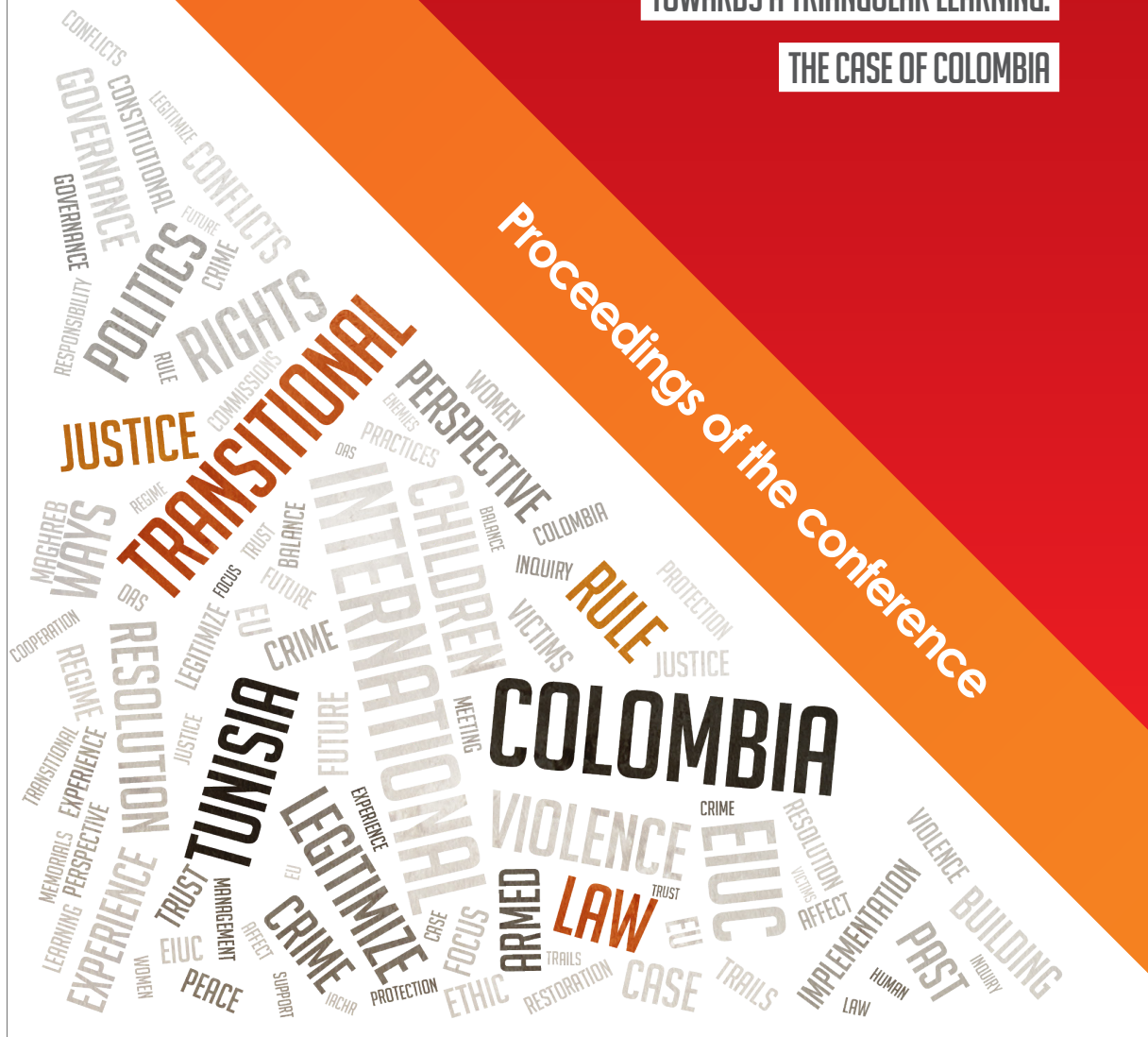


**RULE OF LAW
AND TRANSITIONAL JUSTICE**

**TOWARDS A TRIANGULAR LEARNING.
THE CASE OF COLOMBIA**

Proceedings of the conference



RULE OF LAW AND TRANSITIONAL JUSTICE

TOWARDS A TRIANGULAR LEARNING. THE CASE OF COLOMBIA

Edited by
Anja Mihr
SIM, Utrecht University



European Inter-University Centre
for Human Rights and Democratisation
(EIUC)

Monastery of San Nicolò
Riviera San Nicolò, 26
I - 30126 Venice Lido
Italy

T: +39 041 27 20 911
F: +39 041 27 20 914
info@eiuc.org

www.eiuc.org



Deutsche Gesellschaft für
Internationale Zusammenarbeit
(GIZ) GmbH

Registered offices
Bonn and Eschborn, Germany
Proyecto FortalEsDer
Agencia GIZ-Colombia
Carrera 13 no 97-51 of. 302
Bogotá, Colombia
T: +57 1 636 11 14
F: +57 1 636 15 52
giz-kolumbien@giz.de

GIZ Representation Brussels
Leopold Plaza
Rue du Trône 108
B-1050 Brussels
Belgium
T: +32 2 230 9150
F: +32 2 644 0823
giz-brussels@giz.de

giz.de

© 2013
by EIUC
First edition: September 2013
DOI: 10.7404/EIUC.2012.01

Layout and design
Corinna Greco
EIUC Communications Manager

www.eiuc.org

Table of Contents

Foreword	5
<i>Anja Mihr</i>	
Introduction	7
<i>Helen Ahrens, Christian Grünhagen</i>	
I. Conditions of Transitional Justice Theoretical Concepts and Empirical Research	17
1.1 Access to Justice: Overcoming Amnesty Laws in the Age of Accountability	17
<i>Leigh Payne</i>	
1.2 Challenges for Transitional Justice in Contexts of Non-transition	26
<i>Felipe Gomez Isa</i>	
II. Transitional Justice Policies: Memory and Common Narrative	42
2.1 Beyond Transitional Justice Policies: Memory and Identity and Historical Dialogue	42
<i>Elazar Barkan</i>	
2.2 Sur la mémoire	50
<i>Sameh Krichah</i>	
III. From a practitioner's perspective – Rule of Law through Transitional Justice vs. Impact of Transitional Justice on the Rule of Law in Colombia	56
3.1 Reflexiones sobre el Marco Jurídico para la Paz	56
<i>Iván Orozco</i>	
IV. From a practitioner's perspective – Rule of Law through Transitional Justice vs. Impact of Transitional Justice on the Rule of Law in Tunisia	62
4.1 The evolution of Transitional Justice (TJ) in Tunisia, from the revolution to today	62
<i>Amíne Ghali</i>	
4.2 Le Droit à Réparation: Principes et Dilemmes	66
<i>Fakher Gafsi</i>	
4.3 Justice Transitionnelle et Lutte contre la Corruption en Tunisie	67
<i>Mohamed Ayadi</i>	

V.	Transitional Justice Policies: Reparations and Compensations	73
5.1	Transformative Reparations of Massive Gross Human Rights Violations <i>Rodrigo Uprimny Yepes</i>	73
5.2	Challenges of Collective Reparations: The Experience of the IACtHR <i>Diana Contreras-Garduño</i>	94
VI.	Rule of Law through Transitional Justice vs. Impact of Transitional Justice	103
6.1	The overlapping views of Rule of Law and Transitional Justice <i>Colm Campbell</i>	103
6.2	La présentation du processus d'élaboration du projet de loi sur la justice transitionnelle en Tunisie <i>Mouna Tabei</i>	108
VII.	Governance and Rule of Law: Legal and Political Cultures in Transition Processes	112
7.1	Transitional justice, civic trust and democratic institution building <i>Anja Mihr</i>	112
7.2	La relation entre justice transitionnelle et transition démocratique <i>Omar Weslati</i>	122
VIII.	Domestic Monitoring Mechanism - between International Norms and National Laws	126
8.1	El Proceso de ejercer observancia y control al ejercicio efectivo de los derechos de las víctimas: Lecciones aprendidas <i>Patricia Luna Paredes</i>	126
IX.	International Dimension and Requirements: Organisation of American States (OAS and IACHR), European Union (EU), African Union (AU)	134
9.1	La Corte Constitucional colombiana frente al control de convencionalidad <i>Humberto Sierra Porto</i>	134
9.2	Assessing the impact of the African Union on Transitional Justice <i>Lukas Knott</i>	159
X.	International Context: The Rule of Law and Transitional Justice	165
10.1	Community Reparations in Morocco and the Challenge Facing Outreach Policy <i>Pierre Hazan</i>	165
	Biographies	195
	Annexes	207
	Annex I Declaration of Venice	208
	Annex II Acta de Venecia	211
	Annex III Déclaration de Venise	215
	Conference Programme	219

Foreword

Anja Mihr

This publication is the result of the three days experimental conference endeavor on the Rule of Law and Transitional Justice and the Triangular Learning between three very different actors and cases: Colombia, Tunisia and the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) in November 2012 at the European Inter-University Centre for Human Rights and Democratisation (EIUC) in Venice-Lido. Bringing actors, practitioners and academics together to discuss and assess, past and present, legal and political Transitional Justice processes in Colombia and Tunisia was already a challenge. For decades, Colombia is a conflict torn society aiming to reconcile and to establish the rule of law and more stable democratic structures. Tunisia is a young country in transition that faces similar struggles but yet, a different past and enduring struggle. Learning from each other's past and present experiences how and by what Transitional Justice means and measures to overcome grave injustice, install reparations, compensations or memorial and install at the same time a rule of law regime, is already a challenge for each country. Yet more so, if one tries to find common denominators and ways to learn from each other and bring different actors together. Bringing in a third mediating actor, a development corporation such as the GIZ on a "neutral" ground such as EIUC, is yet another experiment which made this conference a unique and successful experience for all.

Participants across sectors, governmental, non-governmental, lawyers and academics alike manifested over the course of the meetings that there are more commonalities than expected between Colombia and Tunisia. They both face seemingly reluctances, deficits as well as opportunities in the legal and political arena of their countries. Third and more neutral actors like the GIZ as well as international-regional courts like the African Court and the Inter-American Court can contribute and facilitate to this process to overcome past injustice and establish stable democratic regimes. This is where this conference publication aims at testifying the efforts and initiatives taken in the different countries. Participants were highlighting the situation in each of the respective country and compared them with other Transitional Justice processes elsewhere to see what could be best ways to enhance the rule of law in their particular situation. The conference also shows what third and neutral actors and practitioners such as GIZ and EIUC can do and how they can contribute to the rule of law during periods of transition.

The reader finds a number of chapters by conference participants reflecting about the cases of Colombia and Tunisia as well as from a general analysis of Transitional Justice elsewhere. The chapters are kept in the original language of their contributors and thus it is a tri-lingual publication in English, French and Spanish.

By the time of this writing the conference had several follow ups and exchange among experts from Tunisian and Colombian governmental and non-governmental institutions. They were facilitated by the GIZ. Hence, the triangular-learning experiment has entered into its second stage in 2013 and can be taken as an example for other similar cases in the future. The Declaration of Venice (see Annex) highlights the importance of mutual exchange and cooperation in the field of Transitional Justice.

This conference publication would have not been possible without the engagement and support of GIZ-offices in Bogota and their FortalesDer director Dr. Helen Ahrens and the coordinator Christian Grünhagen and the GIZ-office in Brussels and the director Prof. Horst Fischer; the EIUC and its Secretary General, Prof. Florence Benoît-Rohmer and the academic support. The conference coordinator at EIUC, Elena Politi, had been a major support to organize and facilitate this conference as did the support staff at the venue in Venice. Lenna Vromans at Utrecht University contributed to the realization of this publication.

Without the engagement of all participants from different disciplines and sectors this triangular learning would have never happened. They are all mentioned in this documentation.

Thanks to all of them for their contributions and efforts.

Introduction

Helen Ahrens, Christian Grünhagen

Relevance of the conference from the perspective of the program “Strengthening the Rule of Law (FortalEsDer)”, Colombia

The concept of Transitional Justice (TJ) is as much a globally acute as a complex one. It is demanded and discussed primarily in societies that have experienced a series of gross Human Rights violations in their recent past. In order for society to overcome the deep fractions and mistrust caused by these, the concept of TJ came up. The special Rule of Law Unit of the UN establishes that “[t]he notion of transnational justice comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation (UN Security Council 2004, parr. 8).

In Colombia, TJ is one of the most discussed topics in both politics and justice. Because of its ongoing and complex armed conflict it is destined to be one of the most interesting and extensive cases of TJ processes experienced so far. The State itself is working on and implementing measures in every field of TJ and is simultaneously working on the strengthening of the Rule of Law.

In this context a cooperation with Germany takes place through the GIZ-project “FortalEsDer” (Strengthening the Rule of Law). The objective of FortalEsDer is that the judiciary and supervisory authorities (General State Attorney and Office of Ombudsman; Procuraduria General de la Nación y Defensoría del Pueblo) apply law according to their capacity as peace and confidence building guarantors in order to protect citizens against unlawful administrative action. Even though the concept of a social State based on Rule of Law is explicitly enshrined in the Colombian constitution as of 1991, it lacks full implementation in the correspondent institutions. A special emphasis is put on an improved access to justice, particularly for underprivileged groups within society. Improving access to justice in the actual situation in Colombia is of complex nature. It involves issues of post-conflict justice in the context of an ongoing violent conflict as much as the using TJ categories in a context where until now (December 2012) no real transition has taken place. Furthermore, it is also

being asked whether TJ should not address more than just the gravest violations of civil and political rights, as it has until now. Especially concerning its long-term effectiveness many advocates claim that its scope ought to be significantly widened. Aspects related to development, social justice, or economic, social and cultural (ESC) rights are considered essential in this matter. This is, to not only concentrate on some symptomatic phenomena, but rather to address the underlying structure which led to the violations in the first place. Within this context the central issue arises where TJ ends and long term development measures to strengthen the rule of law start.

All these demands necessarily oblige to undertake a systematic reconsideration of the epistemological and conceptual suppositions upon which TJ has so far been based. They need to be regarded in the light of other concepts developed within the context of the Human Rights system as well as under the concept of Rule of Law. Within this context, special attention has to be given to the guarantees of non-repetition, which are measures referring to overcome structural problems as underlying causes for a set of violations. It must be discussed whether they should rather be considered a responsibility of “ordinary justice” and thus be part of long-term development measures within the context of strengthening the Rule of Law instead of being brought up merely as a measure of TJ.

Another GIZ-project containing similar measures is operating within a Good Governance programme in the Maghreb-Region. This includes especially the topic of TJ in Tunisia, where such mechanisms were established to treat with the Human Rights violations committed during the Revolution in 2011.

Both projects found a vivid local discussion within society, academics and public institutions on the possibilities and necessities of TJ and its inter-linkage with Rule of Law concepts in the respective countries. Within this context a transnational conference took place in Venice in November 2012. Its aim was not only to exchange views on concepts and specific measures but also to discover possibilities of initiating a triangular learning concept between Colombia and Tunisia with the support of Germany.

The conceptual and practical difficulties of Rule of Law and TJ in post-conflict societies

A quite controversial discussion about strengthening the Rule of Law, proliferating Human Rights and applying mechanisms of TJ is taking place all over the world. The most conflictive issue lies within the tension between the principles and mechanisms of ordinary law and those of TJ. Ideally – from a TJ perspective - , ordinary justice is one in which all laws are always prospective and individuals can costlessly claim and are granted compensation for all harms to person or property inflicted by others. In such circumstances, where the legal system runs smoothly in settled equilibrium, transitions would not occur – there would be simply no need to.

In reality of course, ordinary lawmaking must routinely cope with policy shifts caused by economic and technological shocks and by changing moral concepts of citizens and legal elites on both national and international levels. These factors also affect the implementation of TJ laws and measures. Their formulating and exercising is generally influenced by a number of actors which all aim at having their particular interests realized in the best way possible. As these interests are naturally contradicting each other and the underlying power-structure of the actors quite asymmetrical, this is often a very delicate matter that additionally is observed closely by the International Community.

This brings us back to the question of how the balancing of interests can be achieved within society as a base of social (and thus political) stability. We have to ask ourselves if measures including the enforcement of ESC rights can be achieved as part of a TJ-progress. If so, this would mean that these measures fall in the field of peace-keeping. ESC rights could also be considered as an essential part of the guarantee of non-repetition, arguing that one has to address and significantly change the underlying structures that had led to the violations. In that case, these measures would fall in the field of peace-building and thus be subject to development policies.

Originally, TJ had often been treated as a self-contained subject within the context of regime transformations, in which the special and unlawful circumstances demand measures that can operate regardless of the existence of a frame of Rule of Law. Anyhow, in most cases the concept of TJ is also taken on by relatively stable states in which TJ laws and measures have then to co-exist with the already operating law system. That being said, it is of great importance that the participating actors of the TJ process always keep asking themselves, what a society and legal culture they want to be transitioning to exactly, especially having in mind the implementation of ESC rights as a key factor to the nation's stability. It seems that the question of how to realize the guarantee of non-repetition plays a key role in the connection of measures taken within TJ or Rule of Law.

The strong need to get a judicial grip on these issues and find applicable terms to deal with it became clear when the United Nations created a special unit to treat with issues concerning the Rule of Law. A first attempt to put together the concepts of Rule of Law with those of TJ can be found in the 2004 report of Secretary General to the Security Council on

the Rule of Law and TJ in conflict and post-conflict societies (UN Security Council 2004). He states that

“concepts such as *justice, the Rule of Law and TJ* are essential to understanding the international community’s efforts to enhance Human Rights, protect persons from fear and want, address property disputes, encourage economic development, promote accountable governance and peacefully resolve conflict” (UN Security Council 2004, parr. 5).

Thus, the report further on defines the three key concepts as follows:

- The *Rule of Law* is a concept... (that) refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international Human Rights norms and standards... (op. cit, parr. 6)
- ... justice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. (op. cit, parr. 7)
- The notion of *TJ*... comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. (op. cit, parr. 8)

With this, the importance of thinking the concepts of Rule of Law and TJ not as parallel ones but rather as complementary ones has been made clearer than ever before. The transitional character of TJ and its aim to be eventually merged into the then established system of Rule of Law is had to be present at all time.

Since then, follow-up reports have been published recently. In October 2011, the Secretary-General published a follow-up report (UN Security Council 2011) and in March 2012, another report called “Delivering justice: program of action to strengthen the Rule of Law at the national and international levels” (UN General Assembly 2012). A high level meeting took place in September 2012, where concrete implementation of the program of action was discussed.

In spite of these progresses, further discussions about interdependencies and the integration of their conclusions into the designing of actual measures are still at their very beginning. The conferences Greentree I and II, “Supporting Complementarity at the National Level: An Integrated Approach to the Rule of Law”, took place at Greentree in Manhasset, New York, in 2010 and 2011 as a collaboration of the International Center for TJ (ICTJ) and the United Nations Development Program, with the support from the governments of Denmark and South Africa. These conferences that brought together more than 70 stakeholders of both the TJ and Rule of Law sectors have given a great impulse in this matter. Together they explored how to implement the concept of complementarity and strengthen domestic systems to investigate and prosecute Rome Statute crimes. With this, they performed a semantical shift from the vision of integrating TJ and Rule of Law into each other to a “complementary vision” that implies the co-existence of both rather than integration.

These initiatives part from the same point as some recent publications understanding TJ as mainly a set of practices that deal systematically with grave Human Rights abuses - thereby ignoring current developments within international and especially regional Human Rights systems concerning reparation measures.

Connecting point is again the issue of the guarantees of non-repetition. One of the pillars of the international Human Rights system is the right to an "effective" remedy for the victims after a rights violation has occurred. But regulations on reparations have taken on different forms depending on the organ that grants them:

- The reparations ordered by the Inter-American Court of Human Rights (IACH) represent three kinds of remedies (access to justice, reparation and access to information) and four basic forms of reparation (restitution, compensation, rehabilitation and satisfaction, guarantees of non-repetition) (UN General Assembly 2005). Non-monetary remedies, such as the guarantees of non-repetition, are remedies directed to society as a whole. Those are measures that identify and attempt to remedy a structural wrong that the Court has recognized in its examination of a case. These measures are often training and educational programs for State officials or legislative reforms.
- The European Court of Human Rights (ECHR) has a more restrictive mandate and refers reparations to national systems. Nonetheless, as ECHR responded the recommendation of the Committee of Ministers "to identify in its judgment finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of its problem, in particular when it is likely to give a rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of the judgment" with the "pilot judgment", there are comparable measures with regard to guarantees of non-repetition as the **case of Turkey** shows. Even though Turkey is not yet a member of the European Union, it has signed the European Convention of Human Rights in 1954 and is thus subject to the jurisdiction of the ECHR. There have been several sentences concerning gross Human Rights violations that took place in Turkey.

As a matter of fact, neither of the Courts has paid attention to the situation the respective State is in. A State passing a transition or transformation has an even more fragmented discussion within the Human Rights system and scholars concerning TJ. At the same time, the strengthening of the Rule of Law becomes the focal point of the efforts of international community, whose arguments are increasingly parting from a Human Rights based approach. How does this translate into reality?

In the Colombian case, transition began with the new progressive Constitution in 1991, which integrates a wide range of Human Rights and codifies the Rule of Law. Nonetheless, armed conflict has not ended yet and has become even more complex and fragmented than before. TJ discourse has been discussed within in Colombia since 2002. From the beginning on especially the application of TJ measures have been subject to multiple criticisms.

These resulted from the point of view that TJ is to be implemented within the frame of the already existing Colombian constitution which explicitly represents the principle of a social State based on the Rule of Law.

Another controversial issue is the balance between the special needs of the peace process and the protection of victim's rights. On the one hand, special conditions concerning the degree of penalty are considered necessary when dealing with armed groups in order to make demobilization a real possibility for armed actors. On the other hand, the underlying asymmetric power structures of the committed Human Rights violations will not disappear overnight and therefore will continue to produce disadvantages to certain groups of victims. Subsequently, many argue that the process, although formally mentioning victims' rights to justice, truth, and reparation, will end up becoming a process that grants impunity to their perpetrators.

The Colombian Constitutional Court (CCC) itself has previously declared several provisions of the Justice and Peace Law unconstitutional in May 2006, especially concerning the absence of regulations on complete confessions, specification of reparations and not to repeat the criminal act. Nevertheless, the same sentence stated that the framework of TJ is perfectly applicable to the Colombian context. The CCC in this case relied on the *Barrios Altos vs. Peru* case of the IACH to make precisions regarding the content of the right to truth, justice and reparation. In that particular case, the IACH stated that Peru violated Human Rights laws by not guaranteeing essential rights in the aftermath of a massacre which took place in Barrios Altos. It is since then the orienting sentence in the field of state responsibilities concerning victims' rights. Thus, these observers point out that the reparations ordered by the IACH have contributed to the progressive development of remedies for victims of violations.

This brief presentation of different visions of how TJ and Human Rights are operating in Colombia reflects the fragmented discussion at international level. It highlights the need for an in-depth discussion about interdependencies and differentiations focusing on the connection of TJ and Rule of Law with the guarantee of non-repetition staging as key factor.

The Planning and Objectives of the Venice Conference

The initiative to a transnational dialogue in form of a conference with Colombia and the Maghreb region emerged from the question: What can be learned from the process by other countries especially Arab ones facing deep transitions and transformations? The Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH on behalf of the Federal Ministry for Economic Cooperation and Development (BMZ) is involved in processes of TJ both in Colombia and Tunisia. Their different points of departure exemplify the variety of contexts in which TJ is discussed and applied.

Besides the program to strengthen the Rule of Law in Colombia the GIZ supports a program fostering Good Governance in the Maghreb region. As well as in the Colombian context, discussions on strengthening the Rule of Law, proliferating Human Rights and applying mechanisms of TJ are taking place in this region. The matter of TJ is especially relevant

in Tunisia. Indeed, under the previous regime in Tunisia fundamental Human Rights were massively violated.

In the aftermath of the revolution, the Ministry of Human Rights and TJ has been founded to deal with the question of how these Human Rights violations can be processed and dealt with. Furthermore, there is an ongoing discourse on the conclusions that arise from the transformation process for the design and future reforms of the judiciary and the administration. The mandate of the "Commission for the processing of violations and violations of Human Rights", set up in January 2011, however, is limited to the unrest immediately preceding the Revolution. Mechanisms for the processing of the previous tyrannical regime do not exist so far. The state judiciary does not have the capacity to process the Human Rights abuses of the former regime under regular procedures. This leaves the justice claims of the victims and society in a normative and institutional vacuum. Thus, learning from international tendencies and comparing with Colombians long struggle for justice might help to come up with new conclusions deriving from lessons already learned.

GIZ addressed the European Inter-University Centre for Human Rights and Democratisation (EIUC) in order to renew and continue to develop suggestions about how to put together the Rule of Law with TJ as is listed in the 2004 report of Secretary General of The United Nations to the Security Council on the Rule of Law and TJ in conflict and post-conflict societies (UN Security Council 2004). To this end, the implementation of a common conference was convened whose objective it was to deepen transnational exchange. Especially the technical and operational aspects of strengthening the interaction of TJ and the Rule of Law should be discussed, as this has been identified as one of the basic matters to be solved. Last but not least, conference participants have been asked to support a triangular learning concept between stakeholders from Colombia and Tunisia with the GIZ and EIUC as mediators and facilitators to strengthen the Rule of Law in both regions.

The conference aimed at establishing and encouraging continued cooperation between agencies, scholars and practitioners from both regions well into the future. The specific goals of the event were:

- to take stock of international developments to the concept of TJ and its relationship or distinctions to recent guarantees developed within international Human Rights system and international humanitarian law and the concept of Rule of Law;
- to look at national legal systems and exploring differences and similarities with the international level. In particular, the comparison between the Colombian and Tunisian cases will allow specialists to learn from each other.
- to study the balance between measures strengthening the concept of Rule of Law, attending the guarantee of an effective remedy or recourse after a rights violation according to international Human Rights system and TJ mechanisms.

Rough Overview of Discussion

The conference finally took place in November 2012 in Venice and brought together scholars, researchers, NGOs and practitioners working in the field of TJ, the Rule of Law and governance. Experts and practitioners from Colombia, the Maghreb region and academics shared their experiences in respect to the long term impact of TJ mechanisms and measures. Specifically, ideas on reparations, trials, commissions of inquiry or memorials, as well as on the impact of international norms and standards on the domestic development of the Rule of Law were discussed and interchanged. The long experiences over the past decade of different stakeholders from the academic and political sphere in Colombia were the main reference point of the meeting.

During the first day, discussion focused on some of the most recent academic research cross countries and regions about the interface between Rule of Law and TJ sharing them with practitioners' views from Colombia and the Maghreb region. As an introduction, theoretical concepts and empirical research concerning the conditions of TJ were examined. In a following presentation it was discussed whether TJ has an essential impact of the Rule of Law and if Rule of Law in Colombia is even being realized through measures of TJ. Changing the focus to the Maghreb Region, the role that justice can play in addressing massive Human Rights violations in an ongoing conflict and in the aftermath of the Arab Spring was explored in the afternoon.

In conclusion, discussions that day centered on the willingness and capacity of both countries to foster an executive power in line with broader Rule of Law initiatives, as well as the types of assistance they might need to this end. The discussion emphasized the point that any technical assistance must be embedded into the local legal context. Although at a first glance, many differences of the countries were striking, it was also emphasized that peer-to-peer exchanges with experts from other countries/regions (especially in Latin America) already proved to be beneficial.

In line with these findings, throughout the course of the conference many similarities could be discovered. Thus, during the second day of the conference, the implementation of TJ mechanisms and measures over an extended period of time was explored. In doing so, the implications of the respective legal and political culture implications of the particular country or region were taken in account, hereby respecting the need for contextualization. Also, monitoring mechanisms in Colombia were presented in order to measure the sustainability of the implemented methods.

Throughout the different sessions it was found that reparations and compensations aim at a political and societal acknowledgement of past violence while memorials aim at achieving a common narrative about past wrongdoings in societies. All of these measures aim at leveraging civic trust and thus political and civic engagement by citizens and therefore enhance good governance and democratic structures. Furthermore, both of these measures influence the political and legal culture in a country: about who is a victim and who was responsible for violence and wrongdoings. These TJ measures help to delegitimize previous policies and enhance to legitimize current political actions and Rule of Law compliance.

Within this context special attention had been given to domestic monitoring mechanisms especially those implemented by the Colombian Ombudsman, combining international norms with domestic ones.

Based on the experience of establishing a stronger Rule of Law in Colombia and the Maghreb region, the third day of the conference was dedicated to the establishment of a triangular learning process between the two regions. Sharing and learning from practice, experience and policies in, how and when to apply TJ measures can be an asset to any transition process in the world. International actors and inter-governmental institutions such as the OAS, EU or AU are key to this process. They shape and facilitate transition processes, set norms and standards, provide monitoring bodies, establish guidelines and make decisions to fill domestic legal and political gaps. The experience with external actors in the transition process towards an enhanced Rule of Law was the starting point in order to plan triangular learning process. Mainstreaming TJ measures into broader Rule of Law initiatives was discussed. It was asserted that such an approach could help to introduce results into long-term strategic planning frameworks and broad national development and peace building strategies. Development actors can be helpful by ensuring that its programs are developed to advance justice, security, and development simultaneously. This could assist not only with ensuring adequate resources and an integrated approach to programming but also ensuring national ownership and facilitating better coordination of all actors involved. Peer-to-peer exchanges with experts from Tunisia and Colombia were estimated to be highly beneficial to all involved actors.

Conclusions and Perspectives

The potential for Colombia and Tunisia to assist each other in strengthening their respective Rule of Law, democracy building and TJ is apparent. In this spirit, Colombian and Tunisian participants, as well as participants from GIZ and EIUC, stated their intention to cooperate towards triangular learning on Rule of Law and TJ. This learning process will cover the following interest areas:

- Rule of Law:
 - Institution building: authorities/ commission of control like Ombudsman, regulation, elections, transition, fight against corruption, etc.
 - Independent judiciary: the functioning and independence of the Constitutional Court
 - Horizontal and vertical accountability
 - Neutrality of administration and public services: capacity to maintain public services in times of crisis, archive quality
 - Land: experience on land registry and property court
- Democracy/ Good Governance:
 - Leverage accountability and responsiveness through elections,
 - Increase level of civic and public participation,

- Enhance governmental and governance accountabilities through guaranties and monitoring
 - Increase level of transparency of decision making processes
 - Leverage citizen mobilization
 - Focus on gender issues
 - Mechanisms of protection of women's rights and gender equality
- Transitional Justice:
 - Combination of mechanisms in a holistic view
 - Victims' advocacy
 - Expertise on reparations
 - Expertise on Commission of Memory
 - Experience on the dynamic of law elaboration
 - Army's role in the transition: neutrality, civil role
 - Management of the refugees' situation

In order to concretize and formalize the triangular cooperation, Colombian and Tunisian participants will consult possibilities of cooperation in the aforementioned areas with relevant institutions in their countries to endorse the concretion of offer and demand and the prioritization of possible activities of cooperation. Subsequently, GIZ and EIUC on their part will concretize their offer as facilitators and contributors to the triangular cooperation. This Conference Report is a result of the views exchanged during the Conference and its striking results. Hopefully this will be the cornerstone of a longstanding and productive triangular learning process which helps to bring justice to the victims of our and other countries.

References

UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General, 2004*. (<http://www.unrol.org/files/2004%20report.pdf>, online report last accessed 06 February 2013).

UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General to the Security Council, 2011*. (<http://www.idlo.int/Documents/UNGA/2011%20UNSC%20-%20RoL%20and%20TJ%20in%20conflict%20and%20post-conflict%20societies.pdf>, online report last accessed 06 February 2013).

UN General Assembly, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels: Report of the Secretary-General, 2012*.

(<http://www.unrol.org/doc.aspx?d=3141>, online report last accessed 06 February 2013).

UN General Assembly, *General Assembly Resolution 60/147, 2005*.

(http://untreaty.un.org/cod/avl/pdf/ha/ga_60-147/ga_60-147_ph_e.pdf, online report last accessed 06 February 2013).

I. **Conditions of Transitional Justice – Theoretical Concepts and Empirical Research**

1.1 **Access to Justice: Overcoming Amnesty Laws in the Age of Accountability**

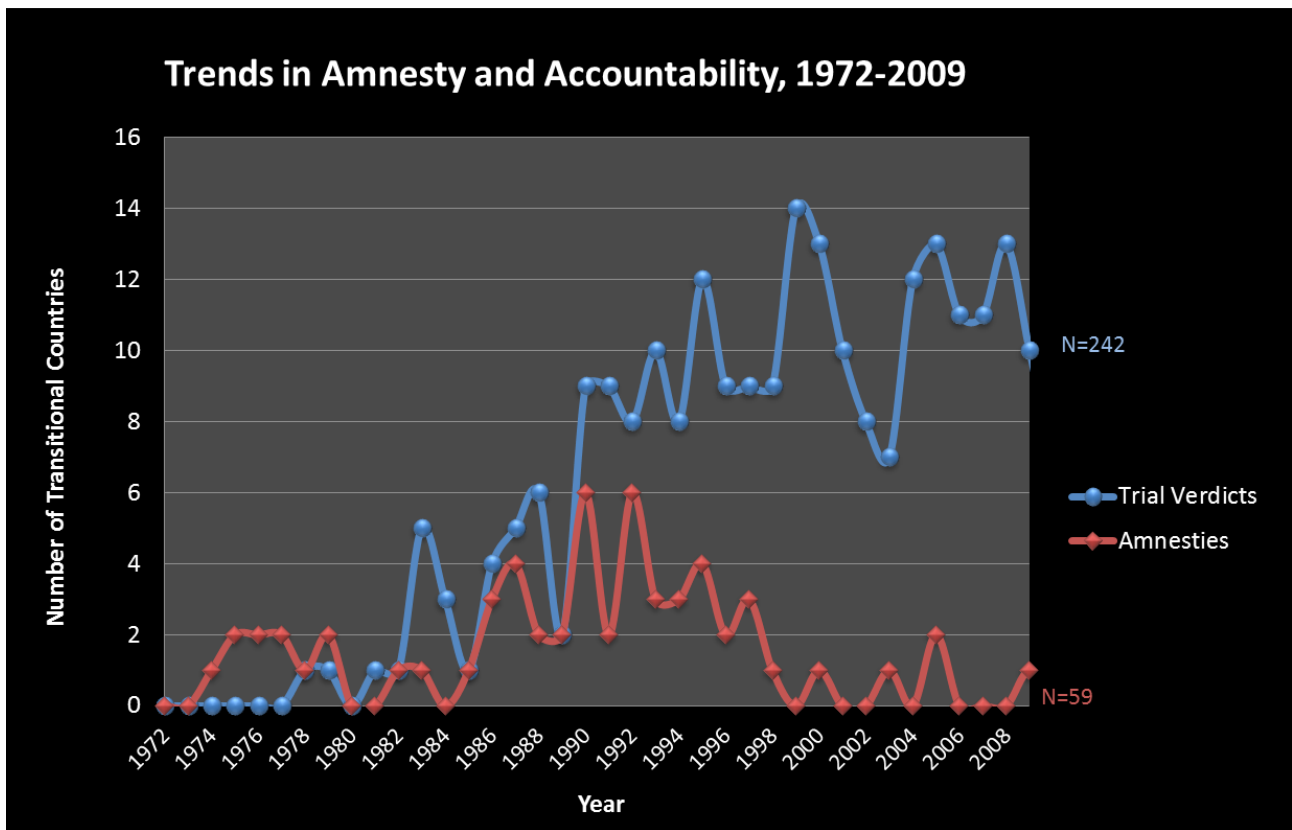
*Leigh Payne**

The use of transitional justice mechanisms has had a positive impact on measures of democracy and human rights. Using cross-national statistical analysis we have found, for example, that doing something – adopting some form of transitional justice – was more likely to bring improvements in those scores than doing nothing. We also found that particular combinations of mechanisms were more likely to improve democracy and human rights scores than single mechanisms. The combination that we found to be statistically significant and positive for democracy and human rights was trials combined with amnesties, with or without truth commissions (Olsen et al. 2010).

In the next phase of our research we have begun to explore those findings. One of the questions we ask is “what makes the combination of trials and amnesties possible?” How is it that countries can keep amnesties from blocking trials? In this paper, we explore that question and draw some tentative conclusions regarding the possibility of overcoming amnesty and allowing for trials. We consider the transitional justice pathways to stronger democracies and improved human rights.

Pathways to Justice

As the graph below shows, amnesty laws have appeared to taper off since their peak in the 1980s and early 1990s. At the same time, trials continue to increase in frequency. This should be a positive sign for access to justice for past human rights violations. It suggests that the combination of trials and amnesties might involve a particular sequence and timing in which amnesties would be supplanted by trials.



(Figure 1. Trends in Amnesty and Accountability, 1972-2009)

We find two pathways in which that timing and sequencing plays out. In one, amnesty laws are “democratically displaced.” The amnesty laws lose legal standing through annulment or derogation. Argentina provides an example. The Supreme Court struck down the amnesty laws in 2005, eliminating legal barriers to holding perpetrators accountable for past human rights violations (Engstrom and Pereira 2012). To date, 273 individuals have been convicted for crimes against humanity and an additional 875 have been charged (Ginzberg and Dandon 2012). Improvements in democracy and human rights have occurred. While propitious for access to justice, democracy and human rights, this pathway faces significant legal and political hurdles, putting it out of reach for most countries in the world. Indeed, of the 76 transitional countries we analyzed, we find only three cases of democratic displacement of amnesty laws: Argentina, Bangladesh, and Uruguay. We further find that other pathways exist to combine trials and amnesties, provide access to justice, and strengthen democracy and improve human rights.

“Creative circumvention” of amnesty laws, or using legal loopholes or other means to bypass the amnesty laws and allow for trials is another pathway. In this scenario, trials do not displace amnesties, but neither do amnesties block trials. They coexist. Chile provides an illustration of this pathway. While the amnesty law continues to have legal standing, 1455 human rights cases have been opened in the country and some perpetrators found guilty of those violations are in jail (Observatorio 2012). Scholars and practitioners debate whether the amnesty law possesses only symbolic power in protecting perpetrators from prosecution or whether the amnesty law continues to have the political power to delay progress toward

justice and render just sentences. There is no doubt, however, that the creative uses of legal loopholes regarding the disappeared allowed domestic courts to respond effectively to the demand from domestic human rights and victims/survivors groups and international courts to circumvent a seemingly “blanket” amnesty law to allow for some justice.

Our qualitative case study research, building on our previous cross-national statistical analysis, suggests that these two pathways to justice – democratic displacement and creative circumvention – result from overcoming a set of domestic political constraints and the emergence of propitious political opportunities. Among the political constraints is the balance of power, or specifically when the supporters of the old authoritarian regime continue to enjoy significant political power in the democratic government and society. Where the authoritarian regime is discredited and leadership in the executive, legislature or courts promote a prosecutorial model, the balance of power shifts, weakening support for the amnesty law, and allowing increased access to justice. International promotion of accountability deepens this process. The role of the Inter-American Commission and Court of Human Rights and the use of universal jurisdiction in foreign courts illustrate the significance of international pressure in the Latin American context. Domestic actors also play a critical role in demanding justice, seeking creative methods for circumventing amnesty laws, pressuring democratic institutional bodies, and prompting legal action in foreign and international courts.

We consider these two pathways effective in gaining access to justice and overcoming impunity. We recognize, however, that they are not always ideal. In addition, the appeal of amnesties, the continued support for authoritarian rule, weak civil society and democratic institutions, and a lack of international pressure may put these two pathways out of reach for most countries of the world. As mentioned above, only three countries have removed the legal standing of their amnesty laws. Our research further suggests that only four countries have creative circumvented their amnesty laws (Cambodia, Chile, Greece, and Peru). To begin to overcome amnesty laws to allow for justice, therefore, we need to also examine less than ideal processes.

Blocked Pathways

Qualitative analysis of country cases and amnesty laws reveals that most of the challenges to amnesty laws are concentrated in Latin America. This could be explained by the region's relatively high number of amnesty laws compared to other regions of the world (28 compared to 14 in Africa, 11 in Europe, and 8 in Asia). In fact, the region experienced a disproportionately high number of challenges to amnesty laws from 1985 to the present (183 in Latin America compared to 16 in Africa, 6 in Europe, and 9 in Asia). We attribute the capacity to challenge amnesty laws to the three factors mentioned above: democratic institutional leadership, international pressure, and civil society demand. In particular, the Inter-American Commission and Court have proved far more active than other regional courts in challenging the legal standing of amnesty laws.

In addition, while amnesty laws have continued to be adopted even in the post-Rome Statute era (after 1998), not one of these emerged in Latin America. All of them were adopted in African countries: Algeria, DRC, Liberia, and Mali. Africa, as noted above, has had the weakest set of challenges to amnesty laws of any region in the world. Thus, while transitional justice pathways to democracy and human rights improvements may be dramatically changing in certain regions of the world (particularly Latin America), similar processes are stunted in other regions.

Great variation, however, also exists within Latin America. The dramatic examples of displacing or circumventing amnesty laws may be the exceptions to the rule of impunity in the region. Our regional study thus allows us to consider blocks to access to justice prevalent in the region and beyond. These include:

1. Prevailing and virtually unchallenged blanket amnesty laws (bad law; bad practice)
2. Amnesty laws that comply with international standards but practices that continue to block prosecution of past human rights abuses, or trial processes that do not promote justice (good law; bad practice)
3. The absence or removal of amnesty laws without progress toward human rights prosecutions (no law; bad practice)

The first of those patterns represent “*obstinate amnesties*” in the sense that these amnesties may not have faced challenges due to a lack of democratic institutional leadership, international pressure, or civil society demand. If they have faced challenges, those challenges have failed to change the amnesty law reflecting the persistence of support for the old authoritarian order. In both Brazil and Spain, for example, efforts to undermine the amnesty laws have failed and those laws remain intact, preventing criminal prosecutions for past human rights abuses. That process appears to be changing in Brazil following the Inter-American Court’s decision on the amnesty law (international pressure) and the leading role taken by prosecutors in finding creative ways to circumvent the amnesty law in lower courts (civil society demand/judicial leadership). It may also be that the decision by President Dilma Roussef to appoint a truth commission will further stimulate civil society demand for justice and creative methods for implementing trials. In Spain, however, efforts by Judge Baltasar Garzón to challenge the amnesty law ended up hurting his own professional career without weakening judicial protection for perpetrators of past human rights abuses. Divided opinion around the Spanish civil war and relatively weak international pressure may explain the obstinate amnesty in that case.

Not all of these cases in the first category constitute “obstinate amnesties.” Sometimes countries reach an “*accountability impasse*”: successful challenges to amnesty laws allow for court cases, but those cases become stalled, dismissed, or reversed, rendering thwarted justice. El Salvador provides an example. While creative circumvention and challenges to the amnesty law has allowed for a high level of judicial activity in the country, this has resulted in only 4 guilty verdicts. Moreover, those found guilty are lower level officers and foot soldiers, rather than the top commanders who ordered past atrocity. The election of President Mauricio Funes and his close connection to several massacres has removed some of the

political barriers to investigate and prosecute past violence. He has complied with Spain and the Inter-American Commission/Court and appointed new judges to the Supreme Court assumed to have an open mind regarding human rights violations. Thus while the balance of power has not completely shifted allowing for political or judicial leadership behind prosecutions, incremental change is evident. Nonetheless, in the category of “bad law, bad practice,” we currently have 20 countries: Albania, Algeria (Law 8198), Brazil, Croatia, El Salvador, Ghana, Honduras, Liberia (1993), Madagascar, Mali, Mexico, Mozambique, Nicaragua, Niger, Portugal, Romania, South Africa, South Korea, Spain, Thailand.

The second category is more complex in that the challenges appear to have worked and a “good” amnesty law emerges. By “good” amnesty law, we mean an amnesty law that complies with international standards, prohibiting amnesty for crimes against humanity, war crimes, or genocide. These types of partial amnesty laws should allow for justice for international human rights crimes. In the illustrative case of Guatemala this has appeared to be the case. Preliminary research shows that Guatemala’s partial (or “good”) amnesty law has allowed for access to justice. A debate has ensued, however, over the quality of that justice. Foot dragging through appeals processes, prosecuting lower ranking officers or foot soldiers rather than the intellectual authors of the crimes, and cases dismissed or reversed by appeals courts have led observers to assume that Guatemala represents a case of circumventing justice rather than circumventing amnesty (Braid and Roht-Arriaza 2012). It appears to be a case of “pragmatic compatibility” between amnesties and trials. A good amnesty law has emerged, but good practice has not. In other words, passing a good law may in some sense shield countries from pressure to adopt good practice. In the case of Guatemala, however, the shield has not held up to weapons for justice. Increasing pressure on Guatemala from the Inter-American Court of Human Rights and from US non-governmental organizations such as the Center for Justice and Accountability, has drawn attention to prevailing impunity. Civil society actors have creatively pursued justice in local and international courts and have begun to have some success in winning judgments. In addition, the appointment of attorney general Claudia Paz y Paz has also had dramatic effect in the last year with efforts to bring the top leaders of the Guatemalan violence to court, including former Guatemalan dictator General Efraín Ríos Montt. In the category of “good law, bad practice,” we are currently investigating six countries: Albania (Law 8202), DRC, Guatemala, Liberia (2005), Panama, and Uganda.

The third category is where no amnesty laws appear to block prosecutions and yet the absence or weakness of civil society demand, political or judicial leadership, or international pressure has failed to advance human rights trials. Some scholars suggest that the absence of an amnesty law may block the process of challenging impunity since no legal barrier exists to combat (Burgess 2012). Ecuador provides an illustration. Despite never having passed an amnesty that legal protects perpetrators of past (or present) human rights abuses, not one perpetrator has faced trial. The Inter-American Court may have more difficulty intervening to promote justice where no legal barriers to justice exist. While international actors and domestic actors have mobilized to draw attention to impunity in Ecuador, they have not succeeded in advancing court cases through the domestic system. Just as the presence of amnesties does not necessarily block trials, the absence of amnesties provides no guarantee of trials.

Dynamics of Change

The discussion of pathways to accountability above hints that countries move along a continuum from impunity to accountability, or from obstinate amnesties to democratic displacement. We are not convinced that countries necessarily progress along this continuum, however. As our illustration below attempts to show, countries may advance, regress, or remain stagnant on the impunity-accountability continuum. The movement (or not) seems to depend on shifts in particular sets of factors that we have identified as: political and judicial leadership, civil society demand, and international pressure. Those three factors tend to shift balance of power away from the supporters of impunity for past human rights violations and toward support for accountability.

We are currently in the process of testing our own hypotheses about access to justice and movement along the impunity-accountability continuum. If we have correctly identified the dynamics of change, certain policy recommendations follow. First, we would suggest international campaigns against impunity. The countries that we would recommend for initial targeting would be those that have laws that are not in compliance with international human rights standards. We have identified 20 cases in this category. Our policy recommendation would be to work with regional courts where they exist, domestic courts, and domestic and international human rights organizations to consider means to creatively circumvent existing amnesty laws that block access to justice. Developing a set of models from existing efforts to circumvent amnesty laws would provide some initial ideas for pathways to overcome impunity.

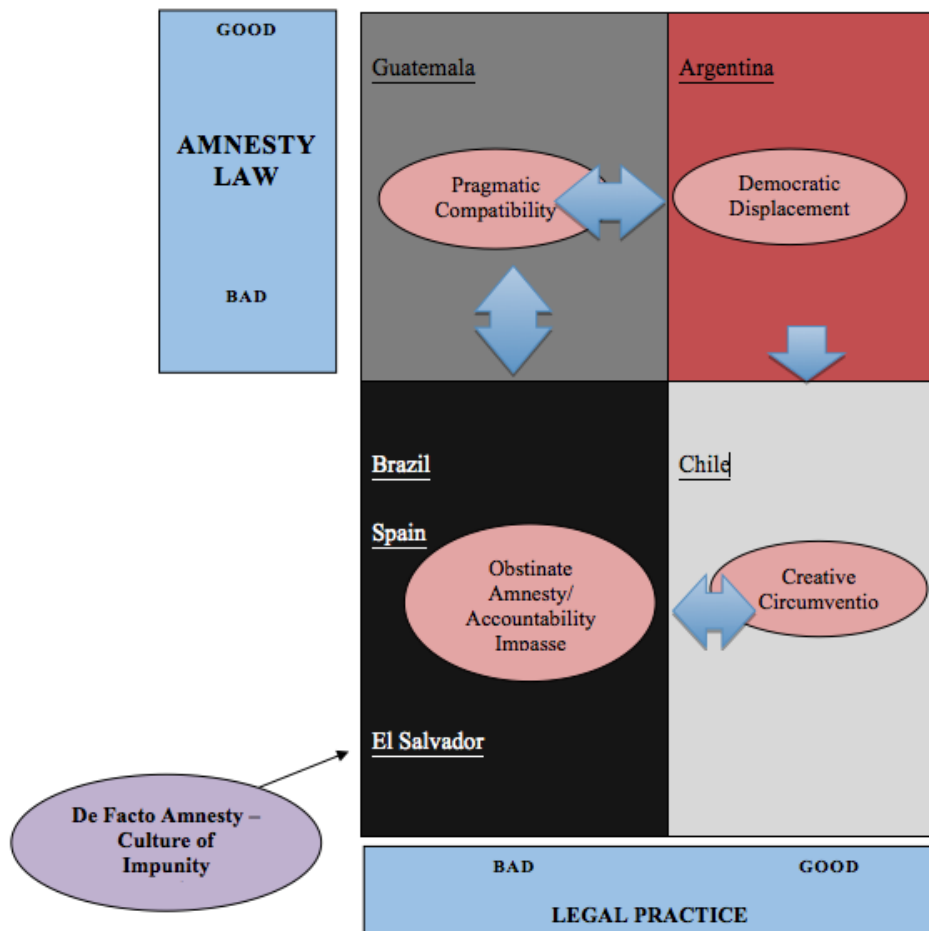


Figure 2. 'Good/Bad practice in Amnesty Laws'

Focusing only on law only, however, ignores practices of impunity. Thus, the second set of countries we would recommend for targeting would be those with no amnesty law or with a “good” amnesty law, but have failed to prosecute human rights crimes. We have an additional 20 countries currently in this category. Considering how to promote justice where legal barriers do not exist would likely involve drawing attention to rampant impunity. Working with domestic and international human rights groups to bring cases to international courts provides one possibility. Training domestic lawyers and judges in human rights is another strategy for overcoming impunity. Condemnation of “bad practice” by regional, international, and foreign governmental and non-governmental agencies could provide some impetus for change. Finally, linking past impunity to current human rights violations and democratic governance weakness could influence executive and legislative decisions regarding the creation of human rights Ombuds offices or secretariats.

Finally, some sort of tracking process will be necessary for those cases that currently fall into the “creative circumvention” and “democratic displacement” categories. We have noticed increasing appeal for amnesty, even if not for amnesty laws. In some cases, such as Uruguay, removing the law has not led to a vibrant prosecutorial process. This case could end up in a “pragmatic compatibility” scenario, with good legal protection against impunity, but a failure to use those protections to actively promote justice. Similarly, successful efforts at “creative circumvention” have not prevented mounting demand for amnesties or pardons in the case of Peru. Even without passing an amnesty law, Peru might end up more in the category of an “accountability impasse” rather than in “creative circumvention.” In these cases, continuing to work with mobilized human rights groups and conscientious judges, as well as promoting the link between human rights trials and improvements in democracy and current human rights at the executive and legislative levels provide some pathways for avoiding movement back toward the impunity end of the continuum.

Tentative Conclusions

The number of trials has grown over time. At the same time the number of amnesties has not increased. Both trends would seem to mark positive steps toward access to justice, strengthening democracy, and improving human rights. This paper has noted, however, that removing amnesties has not always led to trials for human rights abuses. Impunity may exist even without legal barriers to justice. It has further shown that trials have not always brought justice. Trials may also coexist with impunity.

Understanding the factors behind the “democratic displacement” or “creative circumvention” of amnesty laws contributes to thinking about increasing access to justice, strengthening democracy, and improving human rights. Our preliminary analysis suggests that key factors include political and judicial leadership, civil society mobilization, and international pressure.

One of the main differences between the success in overcoming impunity in Latin America stem from the very active role the Inter-American Commission and Court of Human Rights has played in weakening the legitimacy of amnesty laws. Civil society groups and their legal representatives have taken many of those cases to the regional court. They have also taken

these cases to foreign courts and worked with the domestic legal communities to find ways around blanket amnesty laws. Their success can be attributed not only to their high level of organization, but also on resonance at the international level, and within the executive, legislative, and judicial branches of local government. At times this success has depended on electoral shifts that have brought in presidents more favorable to accountability for past human rights activities. At times it has depended on judges, prosecutors, or attorney generals who have been willing to use innovative legal strategies to bypass amnesty laws or to strike them down.

But Latin America is not an example of unmitigated success in undermining impunity and advancing accountability. On the contrary, it also illustrates cases where blanket amnesty laws continue to persist and block trials. It includes countries where laws may prohibit amnesty for international human rights crimes, but legal practice lags behind in bringing justice for those crimes nonetheless. And it shows that even where amnesty laws do not exist to block trials, perpetrators continue to enjoy impunity. Latin America, in other words, represents the processes underway around the world, with only very few cases of access to justice for past human rights violations and widespread impunity. The strategy to overcome legal and political barriers to justice, we suggest, depends on stimulating the three factors that have promoted shifts along the impunity-accountability continuum: political leadership, civil society mobilization, and international pressure.

***Author's note:** *This is a preliminary paper presented for feedback at the conference. Please do not cite without permission from the author; some of the information is subject to updating and revision.*

The research for the paper received support from the National Science Foundation (Grant No. 0961226) and the Arts and Humanities Research Council (Grant No. AH/I500030/1) for the project titled "The Impact of Transitional Justice on Human Rights and Democracy." Any opinions, findings, and conclusions or recommendations expressed in this study are those of the authors and do not necessarily reflect the views of the National Science Foundation/ Arts and Humanities Research Council. The author would like to thank the research team for the work on this paper, particularly Emily Braid, Geoff Dancy, Pierre Louis Le Goff, Francesca Lessa, Tricia D. Olsen, Gabriel Pereira, and Andrew G. Reiter.

References

Braid E., Roht-Arriaza N., "De Facto and De Jure Amnesty Laws: The Central American Case," in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, edited by Francesca Lessa and Leigh Payne (Cambridge: Cambridge University Press, 2012), 182-209.

Burgess P., "De Facto Amnesty? The Example of Post-Soeharto Indonesia," in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, edited by Francesca Lessa and Leigh Payne (Cambridge: Cambridge University Press, 2012), 263-290.

Engstrom P., Pereira G., "From Amnesty to Accountability: The Ebb and Flow in the Search for Justice in Argentina," in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, edited by Francesca Lessa and Leigh Payne (Cambridge: Cambridge University Press, 2012), 97-122.

Ginzberg V., Dandon A., "La acusación." *Página/12* (March 24, 2012), 2.

Lessa F., "Barriers to Justice: The *Ley de Caducidad* and Impunity in Uruguay," in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, edited by Francesca Lessa and Leigh A. Payne (Cambridge and New York: Cambridge University Press, 2012), 123-151.

Observatorio Derechos Humanos website for up-to-date information on trials and sentencing in Chile: <http://www.icso.cl/observatorio-derechos-humanos/cifras-causas-case-statistics/>.

Olsen T.D., Payne L.A., Reiter A.G., *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, D.C.: United States Institute of Peace, 2010).

1.2 Challenges for Transitional Justice in Contexts of Non-transition: The Colombian Case

Felipe Gómez Isa (1)

What is known as transitional justice, or justice of transition, has developed vertiginously over the last three decades, becoming a fertile field for rich and thriving academic reflection, the emergence of NGOs and research and consultancy centers, the growing attention on the part of the international community, and the adoption of increasingly sophisticated legal and institutional standards, both domestic and international (Gómez Isa 2007). The contexts in which the mechanisms of transitional justice operate are often extremely complex situations in which political and opportunistic considerations frequently take priority, and the categorical successes that can be held up are few.

Despite this, what is certain is that in both academic and political circles there is an increasing sense of inevitability in terms of turning to transitional justice mechanisms in order to tackle the process of democratic transition after an authoritarian or dictatorial period or when emerging from a conflict riddled with grave and systematic violations of human rights. In this sense, we can assert that at least to a certain extent transitional justice has had some epistemic success—it is placed at the center of discussions on processes of political transition and conflict resolution and there is a certain recognition of its usefulness in dealing with uncomfortable legacies of the past.

Paradoxically, this relative epistemic success has been accompanied by a "scant advance in the theory" of transitional justice, which means that we still cannot properly speak of a new conceptual paradigm (de Greiff 2009). We are still hostages of an episodic, partial, and very fragmented theoretical construction. This construction began in the 1980s in the heat of the transitions to democracy in the Southern Cone; continued with the cases of conflict-resolution following the extremely prolonged conflicts in Central America; reached its pinnacle in South African post-apartheid; and has recently been extended to other contexts in Africa and Asia. This particular evolution helps to explain why both the basic conceptual tools and the mechanisms of application of transitional justice have continued to evolve as they have been applied in new cases and in new contexts—revealing one of the inherent characteristics of transitional justice, its versatility. The norms and mechanisms of transitional justice cannot be absolutely uniform and monolithic; they must be sufficiently versatile and flexible in order to adapt to the distinct, complex, and varied circumstances in which they must necessarily operate.

Likewise, the experience of transitional justice to date shows that those who have designed and steered the processes of transition have normally been political actors with an agenda and interests that they wish to preserve and protect above all else. Such actors generally count on a power structure that supports their aspirations. Despite the fact that we have legal standards in the field of transitional justice that are increasingly elaborate and bearing a certain degree of coercion, we must recognize that in general it has not been these standards leading the way. Instead, the different actors involved have attempted

to accommodate their interests and objectives strategically within the normative and institutional framework of transitional justice. This political strategic use of transitional justice discourse to legitimize the pursuit of one's own agenda is something that we find, to a greater or lesser degree, inherent in all processes of transition.

On the other hand, the widespread conviction as to the effectiveness of applying transitional justice concepts and mechanisms has meant expanding the instances in which they are applied to contexts that are not, strictly speaking, transitional. There is an increasingly marked pressure to amplify the spectrum of transitional justice's application, which could end up affecting both its basic conceptual character and the very nature of the mechanisms. In this vein, transitional justice discourse is lending itself to situations of open conflict, where there is no credible expectation of peace in the near future and where the peace processes are partial, limited to only one of the actors, such as in the case of Colombia (Uprimny et al. 2006).

This expansion of the discourse is also affecting democratic transitions that took place with a preference for forgetting and not addressing the abuses of the past, such as in the case of Spain. Now, decades later, different actors are turning to transitional justice discourse and practice as a way of definitively closing the book on a transition which they believe to be unfinished (Fernández 2008). At the same time, there is a resort to transitional justice by specific groups demanding recognition of their historic roles and reparations for their suffering over the course of a history of injustice. This includes indigenous populations, afro-descendants, and other subaltern groups (Gómez Isa 2009). Finally, it is also being asked whether transitional justice should address not just the most grave violations of civil and political rights, as it has until now, but whether its scope ought to be widened to include aspects related to development (De Greiff & Duthie, 2009), social justice (Aguilar & Gómez Isa 2011), or economic, social and cultural rights, all of which are essential ingredients for a process of transition to reach a satisfactory conclusion.

We must recognize that these pressures to extend the scope of the application of transitional justice discourse necessarily oblige us to undertake a systematic reconsideration of the epistemological and conceptual suppositions upon which transitional justice has so far been based. They require us to be permanently alert regarding the suitability or not of these theoretical suppositions in each individual case and, above all, of their possible impacts on the concepts and mechanisms of transitional justice.

The objective of this chapter is to analyze the use and application of transitional justice discourse in the case of Colombia. Part I analyzes the context, the discourses employed, and the implementation of the mechanisms of transitional justice in this context. I will then in Part II attempt to extract some conclusions on whether the progressive amplification of the range of transitional justice to non-transitional contexts is an adequate strategy or not, and what the benefits and possible risks are that we run with this strategy. For this, I will look at the victims as political actors; responses to official discourse; the right to truth; the role of normative standards; and possible impact on future peace processes.

I. Transitional Justice Discourse in Colombia

President Álvaro Uribe Vélez assumed the presidency in 2002 and immediately announced his policy of *democratic security*. From the end of that same year a process of dialogue and subsequent demobilization of paramilitaries began, which has led to a reported 31,671 members of these illegal groups promising to demobilize and relinquish their weapons. Uribe, and the political sectors that support him, from the beginning sought to create a way to make this process as easy as possible. Several of the declarations of the government revealed that the real will to seek justice was largely conditional. In the words of the President, the process should try to seek “as much justice as possible, and as much impunity as necessary.” This declaration of the President’s intentions is reflected in the process of negotiating demobilization with the paramilitary groups and continues to be seen today in the implementation of the transitional justice mechanisms designed to accompany this process. In this game of intentions, we cannot forget the forceful pressure exerted by the paramilitaries themselves, with their demands of not being sent to prison, avoiding any possible extradition to the United States to be prosecuted for their crimes, and retaining a significant part of the assets acquired by their illicit activities.

Transitional justice discourse was notably absent in the initial stages of this process of demobilization. The draft bill of alternative sentences (2) that the government presented in 2003 to facilitate the process of demobilization was a bill that, with vague references to restorative justice, in reality sought to guarantee impunity for the demobilized paramilitaries. Due to the avalanche of criticisms from political sectors and human rights organizations, as well as from international organizations that were following the process, the bill had to be withdrawn.

In this complex scenario, the government began to work on a new draft law that suggested a radical change of strategy, as it fully assumed the discourse of transitional justice. This important change in discourse could be seen in both the government and the principal paramilitary leaders. Both went from an absolute rejection of the merest hint of criminal punishment and complete silence on victims’ rights to the admission of the pertinence of finding an equilibrium between the necessities of peace and the demands of justice, which is as we know one of the essential dilemmas faced by all transitional justice processes.

During this process, the Colombian State did not have complete freedom to maneuver, as there was a fairly precise and sophisticated framework established both by international human rights law and by Colombian legislation, and likewise by both domestic and international jurisprudence. This framework suggests fundamentally that in accordance with international law there is no room for impunity for grave crimes, such as those committed by the different actors in the Colombian armed conflict. The international framework, as well as all the international treaties ratified by Colombia, is summarized in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, passed in December 2005 by the United Nations General Assembly (UN 2006). These Principles set out clear guidelines for transitional justice processes, which should always respect an essential nucleus of rights to justice, truth, comprehensive reparations to the

victims of grave violations of human rights, and guarantees of non-repetition.

Through troubled and controversial negotiations, and with intense criticism from diverse sectors who considered that this was another attempt to adopt a legal umbrella of disguised impunity, the Colombian Congress finally passed the Justice and Peace Law in June 2005 (3).

The first point of criticism is that the process of negotiation, demobilization, and reinsertion of the members of the paramilitary groups, like the design of the normative framework to facilitate this process, has been unilaterally directed from the highest posts of the executive power—without any transparency and without effective participation of the victims of the violence. The victims' absence has been criticized as one of the principle weaknesses of the process. As Rodrigo Uprimny has correctly asserted, "it seems ethically and politically questionable that it should be only the armed actors who negotiate the peace and agree on the design of transitional justice, given that these do not represent (in fact, they oppose) the interests of the rest of society." If we really want to advance along the path of peace and reconciliation, it would be appropriate for "all the actors involved in the conflict, and not just the armed actors, to participate actively in overcoming it," thus lending the necessary legitimacy to the project and assuring the support of Colombian society and that of the international community as a whole (Uprimny 2006, intro).

On the other hand, the law at hand fully adopts the discourse of human rights and victims' rights that belong in a scheme of transitional justice, purporting to reach a balance between peace and justice. The law concedes generous sentencing benefits to the paramilitaries who demobilize, with the stated intention that this would facilitate significant advances in terms of the victims' rights to truth and reparation, as well as establish guarantees of non-repetition for horrific crimes attributed to paramilitarism (e.g. massacres, torture, disappearances). A principle criticism made of the law itself is that it fails to specify the mechanisms and instruments necessary to effectively implement these principles—as demonstrated by the enormous difficulties in the application of the Justice and Peace Law and its limited achievements to date.

The Colombian Constitutional Court itself, which declared several provisions of the Justice and Peace Law unconstitutional in May 2006 (4) has accepted that the framework of transitional justice is perfectly applicable to the Colombian context. In its decision, the Court accepted the constitutionality of the measures of alternative sentencing established in the law so long as it is effectively employed as an initiative toward satisfying the rights to truth, reparation, and guarantees of non-repetition. Certainly the Court's judgment very significantly amended key elements of the Justice and Peace Law, converting it into an instrument with more possibilities to ensure that the process of demobilization as a whole leads to the effective materialization of justice, truth, and reparation for the victims. As the Inter-American Commission on Human Rights has pointed out, this decision of the Court should be made the "cornerstone" for managing the demobilization process, as it introduces significant and fundamental changes to the Justice and Peace Law.

In any case, the realization of these objectives does not exclusively depend on the integrity of a discourse and a legislative framework that is more or less in accordance with international

standards on transitional justice. It ultimately and decisively depends on the will and capacity of the Colombian State to modify a situation that has led to the establishment of paramilitarism as an authentic economic, social, military, and political power in vast regions of Colombia, in which the presence of the State has been residual and the enormous wealth generated by drug trafficking its fundamental nutrient.

What underlies the criticisms regarding the application of a transitional justice scheme in Colombia is the danger that the process, under the formal disguise of prosecutions and victim's rights to justice, truth, and reparation, will end up becoming a process that grants impunity and does not effectively dismantle the paramilitary structures of economic power and social control, thus contributing instead to the legalization and institutionalization of paramilitarism and its consolidation as a political project. For some, it is an authentic process of simulation in which, by appropriating the discourses of human rights and transitional justice, at its heart seeks to legitimize the high levels of impunity and the absence of any effective reparation to the victims, which so far have been the costs of the paramilitary demobilization process (Villa 2005).

If this is the case, and there are sufficient indicators to show that it is so, we would find ourselves facing what Rodrigo Uprimny and María Paula Saffon have termed the "mere rhetoric" and "manipulative use" of transitional justice discourse, which could end up greatly harming the integrity and consistency of the basic concepts and mechanisms of transitional justice (Uprimny & Saffon 2006, p. 186-87). If this is deemed to be within the applicable normative and institutional standards, it could contribute to an even greater degradation of processes of transitional justice and to particular instruments becoming unusable or tainted for cases in which there are in fact conditions to apply the mechanisms in a minimally honest way.

In contrast, other sectors have praised the legal framework of Justice and Peace Law as the "most exacting and rigorous of any peace process in recent decades. (5)" Such observers assert that in the transitional justice process in Colombia rather than manipulation, what we are seeing instead are the difficulties of application derived from the enormous complexity of the Colombian conflict. One pervasive opinion of this kind is that defended by the political analyst Plinio Apuleyo, who argues that the establishment has not used manipulative maneuvers to mold transitional justice to respond to its own interests, as some have malevolently claimed, but that rather it is the complexity of Colombian reality that has obliged the mechanisms of transitional justice to adapt (Apuleyo 2009, p. 258). For Apuleyo, the Colombian government has shown more than sufficient proof of its will to carry out the process of demobilization based on the parameters of transitional justice, but dismantling the paramilitary structures is not an easy task.

What these different visions of how transitional justice is operating in Colombia show is that the discourse of transitional justice can be used in different ways and with different motives on the parts of the various actors in a given process, something that tends to be aggravated in situations of conflict. Plinio Apuleyo's accusation about the collusion of certain human rights defense groups with guerrilla groups assumes a qualitative leap, because in this way the debates around transitional justice become part of the very dynamic of the conflict and not something completely removed from it (Apuleyo p. 258). This makes it very difficult

to debate transitional justice with a minimum of rationality, impartiality, and even security, given that, deep down, each actor suspects that the positions of the other actors form part of their strategy in the framework of the conflict.

In line with this, in Colombia we have for some time been witnessing a strategic competition, what Delphine Lecombe calls “epistemic struggles,” (6) between the different actors over the meanings and ultimate objectives of transitional justice, as well as over the use of the various mechanisms it offers to attempt to emerge from the conflict. This delicate situation that transitional justice faces in the context of the Colombian conflict obliges us to employ a “cautious use” of transitional justice language—a use that is devoid of the slightest hint of ingenuity, that is fully conscious of the complex circumstances in which it must operate, and that exposes any intent (from wherever it might come) to manipulate the standards of international justice for any objective other than peace, justice, and the defense of the rights of the victims (Uprimny & Saffon 2006, p. 227).

Below I will analyze this strategic competition on the part of the different actors in the light of one of the measures taken suddenly by President Uribe in the framework of the process of demobilization of the paramilitaries—the extradition to the United States on May 13, 2008 of 14 paramilitary leaders to be tried for drug trafficking. As stated above, one of the paramilitary leaders' conditions to participate in the demobilization process was the guarantee of not being extradited to the United States. This was criticized by some NGOs such as Human Rights Watch, who argued that by accepting this condition the government would lose an important, powerful tool for ensuring effective paramilitary demobilization, strongly limiting the Damocles sword that the genuine application of the principle of universal jurisdiction might represent. The Justice and Peace Law of 2005 makes no explicit references to the figure of extradition. It avoids doing so by using an “astute stratagem”—the inclusion of Article 71, which declared the crime of belonging to an illegal armed group a political crime by qualifying it as sedition (Villa 2005 p, 13). As Article 35 of the political Constitution of Colombia of 1991 establishes that extradition cannot take place for political crimes, this effectively eliminated the possibility of extraditing any paramilitaries admitted under the Justice and Peace Law. Fortunately, the Constitutional Court of Colombia declared this Article 71 of the law to be unconstitutional.

Regardless, the Uribe administration publicly guaranteed that the paramilitaries, if they complied with all the requisites of the Justice and Peace Law, would not be extradited. Despite this compromise, surprisingly in the very early morning of May 13, 2008 fourteen members of the paramilitary leadership were extradited to the United States. This surprising turn of events has provoked conflicting reactions among the different actors with regard to the government's real motives behind these extraditions. According to the administration and supporters, the extradition is a result of the scant collaboration of the paramilitary leaders toward making real advances in demobilization and guaranteeing the victims' rights to justice, truth, and reparation.

According to other sectors, including those that condemned the initial pact of non-extradition, the May 2008 extraditions are part of a political strategic move or “*jugada política*” (Aponte 2009) on the part of the government in order to distance itself from the

paramilitary leaders and avoid the continued revelation of complicities between particular political and economic areas with the crimes committed by paramilitarism in what has been termed the “parapolitics” scandal. These doubts regarding the true motives of the extraditions have led Rodrigo Uprimny to wonder why things were not done the other way around. If, in the government’s judgment, the paramilitary leaders continued to direct criminal paramilitary networks from prison and did not collaborate sufficiently, it should have sought to have them deprived of the generous benefits of the Justice and Peace Law. They could then be prosecuted in accordance with ordinary legislation, which would involve much more severe sentences for their grave crimes. Then, once they had served their sentence in Colombia, they could be extradited to the United States. Uprimny concludes his reflection with an enlightening question: “Why prosecute them first for drug trafficking when it is obvious that killing people is much more serious than exporting cocaine? (Uprimny 2009, p. 29)”

Where there is some consensus is in the fact that extraditions could affect the victims’ rights to truth and reparation because in the United States the extraditees are being tried essentially for crimes relating to drug-trafficking. In this respect, Iván Cepeda, of the Movement of Victims of State Crimes (MOVICE), emphasized in response to the extraditions that “extraditing the accused implies inhibiting the rights of society and of the victims to truth and justice. It should be determined whether these extraditions are the result of a pact of silence and impunity made behind the back of society. (Cepeda 2008, p. 25)”

As we can see, actions are susceptible to different interpretations in the context of the strategic competition over transitional justice discourse, a strategic competition that continues to evolve and adapt as the actors turn to different measures of transitional justice.

Despite all the precautions with which we must approach transitional justice discourse and its application in a non-transitional context such as of Colombia, and despite all the attempts at manipulating and devaluing the standards on the part of the dominant hegemonic rhetoric, as described below, the discourse continues to offer enough positive elements to make it worth confronting the risks that these kinds of processes entail in contexts of conflict.

II. Defense of the Application of Transitional Justice, Conscious of the Risks

A. The Victims as Political Actors

One primary observation that results from analyzing the application of the normative and institutional framework of transitional justice is that for the first time in the history of the Colombian conflict, the victims have come to occupy a relevant place in the public scene. This is despite the initial intentions of the government and the paramilitary leaders who, as mentioned above, resisted taking notice of them. Until very recently, the victims were “the ghosts of the conflict; nobody saw them, and few spoke of them (Jaramillo 2005).” The invisibility of the victims has been something that has characterized the majority of the attempts at conflict-resolution or transition to democracy after periods of dictatorship.

One of the virtues of transitional justice discourse is that it puts the victims themselves, and their rights, into the center of the debate. It focuses on providing the victims with “a sense of recognition, not only as victims, but as holders of rights (de Greiff 2009, p. 47).” We must recognize that in this respect, important steps have been made; we have advanced on a road of no return, in which the victims will be, unavoidably, necessary travel companions, as “exceptional historic witnesses and the subjects of justice. (Cepeda & Girón 2006 p. 375)” From now on it will be totally unthinkable that victims should not be present in debates about peace and justice. The tumultuous debates around the draft Victims' Law is just one example of this. The victims' growing public presence, the consolidation of some of their organizations, the channeling of resources, and the establishment of transnational networks with other international NGOs have been for some victims a hopeful processes of empowerment. This could contribute decisively to encouraging their participation and generating a sense of ownership of the process, which is seen as fundamental from the perspective of many victims themselves. The challenge is to ensure these processes take place without any type of discrimination and that they reach the greatest possible number of victims, without being limited, as often happens, to those victims who have access to supporting organizations and are politically correct at a particular moment.

B. Toward a “From Below” Response to the Official Rhetoric

A second positive aspect, strongly linked to the emergence of the victims as political actors, has to do with how the victims themselves have appropriated the discourses of internationally recognized human rights and of transitional justice to radically question the official rhetoric of the peace process. In the opinion of MOVICE, one of the most representative victims' groups, the official discourse has reduced the peace process with the paramilitaries to a limited process of handing over of weapons and reinsertion into civilian life, without going into basic questions such as real guarantees of the rights to truth, justice and reparation, or the strengthening and deepening of democracy in the country. The discourses of transitional justice have served as catalyzing strategies of resistance(s) from below, which attempt to counteract the powerful official rhetoric. The progressive empowerment of victims has led to the victims themselves devising alternative strategies of truth, justice, and reparation, beyond the official frameworks such as the Justice and Peace Law or the National Reparation and Reconciliation Commission (CNRR) created by that law. This trend can be seen, to a greater or lesser degree, in most transitional justice processes. Initiating these processes can set off certain social forces that begin to take over the reins and approach truth, justice, and memory as processes of social construction, and as “part of a societal democratization process and an opportunity for the social forces that have been excluded, persecuted, and stigmatized to participate in public life. (Cepeda 2006)” In this way, spaces are generated for “resistance to the repression (in both the political and psychic senses) of the past. (Cepeda & Girón Ortiz 2004)” This is one of the objectives of MOVICE's project Colombia Nunca Más. This project is working to create a Center of Memory and Documentation that would serve the double function of a security archive and a public space for truth and memory.

In this context of emerging memory initiatives, interesting interactions arise between the processes coming from above and the processes emerging from below, in the case of the Area of Historical Memory of the CNRR for example. Because of the dynamics since its creation, the personality and enormous intellectual prestige of its Coordinator, historian Gonzalo Sánchez, and the collaboration of a broad group of experts, the Historical Memory Area has obtained a considerable degree of autonomy from the CNRR—which is somewhat discredited in the eyes of the victims—and is contributing to the generation of truth and memory spaces for the victims as a mechanism of empowerment. As the Area of Historical Memory itself emphasizes, its mission is “to develop an integrated, inclusive narrative in tune with the voices of the victims about the origin and the evolution of the internal armed conflict in Colombia.”

The conclusion we can draw here is that in Colombia, even in a context of conflict, which clearly is not the most favorable for the emergence and development of these type of initiatives, interesting processes of recovery and dignification of memories of suffering are being carried out. And such processes have to be part of the reconstruction of the truth about the Colombian conflict and the grave affronts to dignity it has produced—and which, unfortunately, continue today.

C. Some Advances in the Right to Truth

The right to truth is fundamental, for the victims of grave violations of human rights and for Colombian society as a whole. It is crucial both to move toward clarifying the individual cases of human rights violations and to unravel the factors that have contributed to the emergence, development, and consolidation of the phenomenon of paramilitarism. Fulfilling these conditions will permit us to determine if the demobilization process is really progressing, or whether it is a mere mask to cover the de facto legalization of what has been called the “successful paramilitary project (Moncayo 2006, p. 43).”

With respect to the right to truth, we must recognize that the Justice and Peace Law was far from what would have been desirable. This was a major focus of the decision of the Constitutional Court in May 2006, which made amendments based on the increasingly developed international standards on the subject. Once again, despite promising formulations of principle, mechanisms for making this right effective turned out to be completely inappropriate and insufficient.

A first criticism is that the law contemplates exclusively a judicial truth, without explicitly anticipating other forms of truth reconstruction and historical memory—such as a non-judicial truth commission for example, an extreme that was on the table during the process of negotiating the Justice and Peace Law.

One of the most effective ways of being able to guarantee the right to truth, in both individual and collective aspects, would be “to make the *versiones libres* public in such a way that both the direct victims and their relatives, and society as a whole, could hear the declarations of the Justice and Peace participants and know the truth. (Gallón et al.

2007)"(7) It is clear that at this point, with the enormous publicity given to the first *versiones libres* (voluntary depositions) and the parapolitics scandal, Colombian society can no longer deny the enormous atrocities that are coming into the public light, and the complicities of high political officials and allies of the administration.

In my opinion, the media, and particularly the written press, are playing a very important role by bringing the grave events to the wider public through the news, although we must be conscious of the limitations of written press in terms of reaching all corners of a country like Colombia. On the other hand, there are expressions of absolute alarm in light of the "apathy on the part of society in the face of the confessions of the most feared assassins ... which should transcend mere shock and lead to rage, fury, and shame." Likewise, there has also been heavy criticism that some of the demobilized paramilitaries are using their *versiones libres* to justify their crimes as actions of war in the framework of an armed conflict, and even to jeer at the victims—which is making a "mockery of the country" and above all, of the victims of their horrendous crimes.

D. The Role of Normative and Institutional Standards

As I have reiterated, transitional justice relies today on legal instruments and an institutional framework that serve as a limit for actors who are negotiating peace. Although the capacity that they have to orientate peace processes such as those in Colombia should not be overestimated, we must recognize that such standards can operate as "virtuous restrictions," which can impose intractable limits on political negotiations. As Rodrigo Uprimny and María Paula Saffon have correctly emphasized, "if they are clear, and appear very difficult to manipulate or evade, the legal standards can reduce uncertainty and diminish the spectrum of possible results of a peace agreement, making it easier to reach an acceptable compromise between the interests of antagonistic actors (Uprimny & Saffon 2008, p. 209)." Although it is difficult to prove with complete certainty, speculating I have the impression that normative standards have played a relatively important role during the government's process of shaping and adapting its response during the successive stages of the peace process since the initial presentation of the draft law on alternative sentences in 2003.

Regardless, we face a situation of permanent ebb and flow on the part of the government, as demonstrated by its passing of various regulatory degrees. These decrees seek to return, wherever possible, to the content of the Justice and Peace Law as it was before the Constitutional Court's ruling of May 2006. This continuous tactic of the government means that we must be permanently alert and maximize precautions against any intent to distort the standards regarding justice, truth, and reparation. Although we must be conscious that we are moving in very complex and slippery terrain, as the Colombian case makes clear, at such junctures most important is to defend in all cases a minimum nucleus of legal standards not susceptible to negotiation: "One of the main advantages of using the transitional justice paradigm resides in its capacity to introduce objective components into processes of transition, based on legal international norms and principles that channel a particular

conception of justice (Bonet & Alija p, 125)."

In this way, some supranational institutions, such as the Inter-American Court of Human Rights and the International Criminal Court, can and in fact do already function as "virtuous restrictions." The Inter-American Court has issued several judgments condemning the Colombian State for complicity or omission in cases of massacres committed by paramilitary groups (8). This is making an enormous contribution to the guarantee of individual and collective rights to truth regarding the atrocities of paramilitarism and the role played by the State. Likewise, the Court's judgments are very relevant in terms of the victims' rights to justice and reparation, clearly establishing the principle that guaranteeing peace cannot involve boundless impunity. In this sense, the Inter-American Court maintains that the standard of reparation it has established must be the frame of reference for the CNRR, "not only to protect the Colombian process from potential international lawsuits before the Court, but to assure standards that permit the restoration of the dignity of the victims (Cuervo p,17)."

The International Criminal Court (ICC) has also paid attention to the process of demobilization, prosecution, and punishment of the paramilitaries in Colombia. Colombia submitted its ratification of the Statute of Rome on the Permanent International Criminal Tribunal on August 5, 2002, which came into force beginning November 1, 2002. A relevant event relating to the possible competence of the International Criminal Court over crimes committed in Colombia came about on March 2, 2005, when the ICC Prosecutor, Luis Moreno-Ocampo, sent an official communiqué to the Colombian government requesting more information regarding how the State was responding to reports of the commission of numerous, grave crimes against humanity from November 2002 onwards. Similarly, the Prosecutor showed great interest in the different draft laws that were being debated to facilitate the demobilization of the paramilitary groups, asking the Colombian government to keep him "informed of advances made in this respect. (9)"

The ICC Prosecutor intends to follow very closely the crimes committed in the armed conflict in Colombia, and the responses of the State, which was confirmed by his first official visit to Colombia in October 2007. In this visit, the Prosecutor made a very revealing declaration: "I am up to date with the legal processes in Colombia in connection with crimes that could fall under my jurisdiction. I follow the cases and procedures, and I verify that they are fulfilling their function." In principle, a correct application of the Justice and Peace Law would deprive the International Criminal Court of competence over the participating individuals and the crimes covered by the law, given the principle of complementarity that governs international criminal justice.

However, as Hernando Valencia has correctly emphasized, to the extent that the application of the Justice and Peace Law were to be only the "appearance or simulation of justice, (Villa 2005)" the ICC would have jurisdiction over genocide and crimes against humanity (and for crimes of war from November 1, 2009 onwards). Article 17 of the Rome Statute regulates the conditions of admissibility of cases. Specifically, the Court has to determine "determine unwillingness in a particular case . . . having regard to the principles of due process recognized by international law . . ." In order to gauge whether or not there really is the willing to do justice, Article 17 outlines a set of circumstances which must be considered.

That is to say, if the state is unwilling or unable to carry out the investigation or prosecution of those alleged to be responsible, the competence of the International Criminal Court would come, subsidiarily, into play. Fundamentally, the objective is to avoid impunity for crimes abhorrent to the conscience of humanity and that have affected thousands of victims in Colombia. International criminal justice can in this way be a very important tool to complement the efforts of a society to pursue justice and guarantee victims' rights to truth and reparation of the victims.

E. Clear Guidelines for Future Peace Processes

We must begin this consideration by recognizing that in previous peace processes in Colombia, crimes against humanity have never been prosecuted, the victimizers have never been required to confess, even negligibly, to the truth of their crimes, nor have the victims and their right to reparations been taken into consideration. The current process of paramilitary demobilization, launched in 2002, even with all the limitations and abuses on the part of the government and the paramilitary leaders discussed above, is attempting, at least formally, to make the rights to justice, truth, reparation and guarantees non-repetition prevail. The process is by no means over, and we must wait a reasonable period before we are really able to gauge the degree to which the discourse of transitional justice has operated as a mere legitimizing cover for intentions of guaranteeing broad doses of impunity and failing to recognize the victims' rights to an authentic reparation, or whether it really has contributed to opening both official and unofficial spaces for justice, truth, and reparation.

The result from this overall process, and from an international context in which the principles of transitional justice operate increasingly as limits to impunity, is that it is very unlikely that future peace processes in Colombia will be able to shirk the minimum demands of transitional justice discourse. This process can contribute to establishing clear guidelines when approaching future peace negotiations with the illegal armed groups, whether paramilitaries who have not yet been demobilized or guerrilla groups. As Jorge Iván Cuervo has pointed out in this respect “the success of future negotiations with other illegal armed groups, and, in general, a just and dignified pacification of the country” depends on the success and consolidation of this process (Cuervo 2007, p. 56).

Therefore, I assert that, despite all the limitations of seeking to apply a transitional justice scheme in a non-transitional context characterized by the persistence of a bloody conflict, there are well founded reasons to defend the use of transitional justice discourse. Caution will have to be exercised, but the eventual benefits that can be derived with regards to justice, truth, and reparation make it worth the risks; risks that, on the other hand, are indeed inherent to any process of transitional justice.

Conclusion

From the analysis drawn from this *sui generis* model of transitional justice we can extract some conclusions which may be generally helpful for approaching these kinds of transitions that fall outside of the traditional framework of transitions to democracy or transitions to peace.

First, despite all the problems raised by this kind of transition that departs from the orthodoxy of transitional justice discourse, I believe the practice of continuing to apply this discourse to be justified. We must be very cautious, and exercise precautions, but I am convinced that the positive aspects clearly outweigh the risks we may run; risks that accompany any transitional justice process.

One of the most positive aspects of applying the transitional justice scheme is the progressive emergence of the victims as social and political actors, which is undoubtedly a necessary part of any transitional justice process. Their greater visibility, the creation of associations and organizations that legitimately represent their interests and speak in their name, and the channeling of a greater quantity of resources in their favor, have made interesting processes of empowerment possible. On the other hand, when the expectations generated are not fulfilled by the State, or if some victims feel discriminated against, feelings of frustration can arise which can end up undermining civic confidence, one of the objectives of transitional justice.

Likewise, we must recognize that the victims and civil society are the ones that have given a strong push to the process of extending the discourse of transitional justice. In this sense, interesting processes have been triggered from below for the generation of alternative spaces of truth, justice, and reparation, with a protagonist role for the victims themselves.

Another important element associated with these processes is the unstoppable presence of truth and memory. Once the processes begin, the different actors begin initiatives that, in one way or another, contribute to bringing light to the abuses of the past and giving a voice to the victims. The processes of transitional justice are accompanied by artistic, literary, cinematic, and documentary initiatives, whose sole objective is to contribute to the emergence of various truths and memories of a past that resists being forgotten.

Finally, the progress that has been made toward developing normative and institutional standards in the field of transitional justice has meant that the rights to truth, justice, reparation, and guarantees of non-repetition have been very present in the Colombian case. Today it is simply not possible to skirt these rights when a process of transitional justice is being debated, although its practical implementation is largely conditioned by the context in which it is applied.

For all this, and for many other reasons that must remain for another occasion, it seems to me unavoidable that we apply the discourse of transitional justice to these processes which depart from the classic molds, though always trying to remain conscious of the context and the difficulties and barriers that such a context imposes.

Endnotes

1. Although the responsibility for the content of this paper is exclusively mine, I am grateful for the timely comments made on previous versions by Gustavo Salazar (Universidad Javeriana, Bogotá), Carlos Martín Beristain (international consultant, Bilbao), Giulia Tamayo (Amnesty International, Madrid), Pablo de Greiff (ICTJ, New York), Michael Reed (ICTJ, Bogotá), Gabriel Arias (ICTJ, Bogotá), and Javier Chinchón (Universidad Complutense, Madrid).
2. Proyecto de Ley Estatutaria 85 de 2003, Gaceta del Congreso 436 (Aug. 27, 2003).
3. Law 975 of 2005, Diario Oficial n° 45.980 (July 25, 2005). The law, passed on June 22, was approved by the President of the Republic and became law on July 25. For a detailed analysis of the Justice and Peace Law in light of international standards, see Felipe Gómez Isa, *Justicia, verdad y reparación en el proceso de desmovilización paramilitar en Colombia*, in *Colombia en su Laberinto: Una Mirada al Conflicto* 87 (Felipe Gómez Isa ed., 2008).
4. Constitutional Court, ruling C-370 of 2006, No. D-6032, May 18, 2006.
5. Alfredo Rangel, Prólogo, in *Justicia y Paz*, supra note 5, at 12. Obviously, the government defends this positive take on the demobilization process in light of the international standards in the field of transitional justice. This is exemplified by Frank Pearl, High Commissioner for Peace and Reintegration, in the closing speech of the International Congress on DDR in Cartagena de Indias, May 4-6, 2009: "The Justice and Peace Law is one of the most ambitious transitional justice laws in the world. The government could have been less ambitious, but we decided to be visionaries."
6. See her interesting contribution in this book entitled *A Conflicted Peace: Epistemic Struggles around the Definition of Transitional Justice in Colombia*.
7. In this respect, it is important to recognize the enormous publicity that the CNRR is giving to the versiones libres, including the timeline, with the intention of encouraging the victims and society in general to pay attention. For this information, which is constantly updated, see the CNRR homepage, <http://www.cnrr.org.co>. Initially, many of the versiones libres were broadcast by television, to get the most publicity possible. However, this publicity has been limited by a sentence of the Constitutional Court, which has prohibited the direct transmission by mass media of the Law 975 versiones libres. Constitutional Court, ruling T-049/08, No. T-1.705.247, Jan 24, 2008.
8. Case of the 19 Tradesmen vs. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 109 (July 5, 2004); Case of Mapiripán Massacre vs. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005); Case of Pueblo Bello Massacre vs. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006); Case of Ituango Massacre vs. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 149 (July 1, 2006); Case of La Rochela Massacre vs. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 163 (May 11, 2007).
9. Letter from the ICC Prosecutor Luis Moreno Ocampo to the Colombian Ambassador to the ICC, Guillermo Fernandez de Soto (Mar. 2, 2005).

References

Aguilar, G. O. & Gómez Isa, F. eds., *Rethinking Transitions; Equality and Social Justice in Societies emerging from Conflict*, 2011.

Aponte, A. *Colombia: un caso sui generis de la justicia de transición*, in *Justicia Transicional en Iberoamerica*, (Jessica Almqvist & Carlos Espósito eds.) 2009.

Apuleyo, P. *El dilema colombiano: justicia y paz*, in *Justicia y Paz*, Intermedio, Bogotá, pp. 260-7, 2009.

Cepeda, I. & Claudia Girón Ortiz, *Justicia y Crímenes contra la Humanidad*, in *Cursos de Derechos Humanos de Donostia-San Sebastian*, 85 (Juan Soroeta ed.) 2004.

Cepeda, I. *No es el fin del camino*, *Cambio*, No. 776, May 15-21, 2008.

Cepeda, I. & Girón Ortiz, C. *Testigos históricos y sujetos de justicia*, in *Justicia Transicional: Teoría y Praxis*, *supra* note 39, 2006.

Cepeda, I., *Ocho propuestas para la no repetición de los crímenes atroces y el desplazamiento forzado en Colombia*, in *Tierra y Desplazamiento en Colombia: Crisis Humanitaria por el Control del Territorio 147* (Taula Catalana per la pau i els drets humans a Colombia ed.) 2006.

Cuervo, in *Justicia Transicional y Experiencias Internacionales*, , *supra* note 33, 2007.

Fernandes, P.A., *Políticas de la Memoria y Memorias de la Política: El Caso Español en Perspectiva Comparada*, 2008.

Gallón, G. , Reed, M. , Lleras, C., *Anotaciones sobre al Ley de Justicia y Paz: Una Mirada desde los Derechos de las Víctimas 58*, 2007.

Gómez Isa, F. *El derecho de las víctimas a la reparación por violaciones graves y sistemáticas de los derechos humanos*, 37 , *El Otro Derecho* 11, 2007.

Gómez Isa, F. *El derecho de los pueblos indígenas a la reparación por injusticias históricas*, in *La Declaración sobre los Derechos de los Pueblos Indígenas*, 157-91 (Natalia Alvarez, Daniel Oliva & Nieves Zúñiga eds.) 2009.

de Greiff, P. and Duthie, R. in *Transitional Justice and Development: Making Connections*, (Pablo de Greiff & Roger Duthie eds.), 2009.

de Greiff, P. *Una concepción normativa de la justicia transicional*, in *Justicia y Paz: ¿Cuál es el Precio que debemos pagar?* 22 (Alfredo Rangel, ed., 2009) ("escaso avance de la teoría"), 2009.

Jaramillo, S. *Presentación*, in *Cuadernos del Conflicto: Justicia, Verdad y Preparación en Medio del Conflicto 6* (Fundación Ideas para la Paz ed.) 2005.

Moncayo, H.C. *Colombia: los territorios de la guerra. El impacto de la reinserción en la economía mundial*, in *Tierra y desplazamiento en Colombia. Crisis humanitaria por el control del territorio*, Taula Catalana per la Pau i els Drets Humans a Colombia, Barcelona, 2006.

Uprimny, R. & Saffon, M.P. *Usos y abusos de la justicia transicional en Colombia*, in *Justicia y Paz* (<http://www.revistamad.uchile.cl/index.php/ADH/article/viewFile/13511/13777> last accessed 20 February 2013), 2008.

Uprimny, R. et al. Ed., *¿ Justicia Transicional sin Transición ¿ Verdad, Justicia y Preparación para Colombia*, 2006.

Uprimny, R. *¿Y por qué no se hizo al revés?*, *El Espectador*, May 27, 2008.

U.N. Doc. A/RES/60/147, Mar. 21, 2006.

Villa, H.V., *La Ley de Justicia y Paz de Colombia a la Luz del Derecho Internacional de los Derechos Humanos* 9, 2005.

Villa, H.V. *Colombia ante la Corte Penal Internacional, 4 Hechos del Callejón*, 8, 2005.

II. Transitional Justice Policies: Memory and Common Narrative

2.1 Beyond Transitional Justice Policies: Memory and Identity and Historical Dialogue

Elazar Barkan

The program invitation presents Transitional Justice as a coherent enterprise where all of its constituents and components, including legal, historical and political measures, lead to strengthen the Rule of Law. This implies certain conditions, such as vitality of political monitoring bodies and civil society, and an overall assumption that the universal model of trials, truth commissions and independent judiciary will likely lead to a successful transition to democracy and the rule of law. But the invitation also goes on to raise the question of specificity, and comparative perspectives, of Transitional Justice in each society. In particular it underlines the importance of ensuring that victims are allowed to operate without the fear of retribution. While I agree with much of it, I would like to direct attention to the challenges of the intersection of Transitional Justice and conflict resolution and the role that historical dialogue could play in it. In order to describe the role of historical dialogue, we have to differentiate between transitional justice mechanisms that involve conflict among groups from a transition from a dictatorship and to examine the possible role groups – beyond individuals – have in processes of accountability, redress, and conflict resolution.

Let us begin with few observations that generally are accepted in principle, but may encounter hesitations or opposition in practice.

Universal standards are potential guidelines, not prescriptions. Norms of transitional justice have to be mediated through memory which is local, specific, and a critical filter of what constitutes locally the interpretation of global norms or laws. Transitional Justice focuses on individual accountability, as does the concept of the rule of law. Neither have much to say, however, about group responsibility or guilt. Yet transitional justice and rule of law have to respond to crimes of atrocity, gross violations of human rights, war crimes etc., which are often times the result of conflict among groups of crimes committed by one group against another.

Violence in many countries involves ethnicities/religions/national conflicts. Most victims of gross violations of human rights, or atrocity crimes, suffer as a result of their membership in a group and not because of individual factors, beliefs or actions. Similarly perpetrators commit their crimes as representatives of a community, and the crimes are associated with the group. In short the crimes have all the characteristics of targeting members of groups "as such" – the critical part of the definition in the genocide convention. There is a need for distinct mechanisms of transitional justice between countries in which the violence is identity base from those where it is a result of political oppression. In countries like Argentina which emerged from a dictatorship with no division along group identity the hurdles to bring the worst perpetrators to justice faced political constrains but did not present the risk of aggravating communal (along identity) conflict. The acknowledgment did not aggravate inter-communal strife.

In contrast, in countries like the Balkans, Rwanda, or Ireland, where conflicts are between two or more groups fighting against each other, the communal memories are the fuel of future conflagration. In those cases where the memory of the violence represents group identity, it endures beyond the accountability by any individual which is likely to be viewed as unjustified (whitewash), as victors' justice and can undermines the process of peace building and conflict resolution. The memory is anchored in the communal self-justification and identity which simmers and is ready to be awakened as hatred. During the Balkans war in the 1990s, all sides refought the memory of older wars from the battle of Kosovo (1389) to the most violent atrocities of World War Two. In the same vein, but from the polarized end, the memory of good communal relations in the past is repressed, as for example is the case since the 1990s in Bosnia where the memory of its shared multi-ethnic life during Yugoslavia in particular post 1945 is suppressed and is instead replaced by memories of violent Cetniks and Ustasha during the war. This applies not only in to domestic groups' conflict, but is very evident internationally in conflicts grounded in national memory and animosity. Historical conflicts haunt contemporary relations the world over: North East Asia, (Japan, China, Korea); Turkey- Armenia; India – Pakistan; Israel – Palestine; to mention only few. While the rule of law and transitional justice mechanisms certainly animate the demands of the protagonists for redress of crimes of atrocity, including demands for reparations and restitution and acknowledgement, addressing the core and source of the conflicts through dialogue may provide new opportunities which promote redress beyond legal questions.

The legal response is to bring individual perpetrators to justice with the aim at achieving accountability, by making the individual perpetrators stand in for the group. Yet, while accountability of individual perpetrators is important, as is redress for individual victims, these often do not begin to redress the violence inflicted on a community/minority, and do not satisfy the victims. Punishment of individuals is what the law knows how to do, but it does not know how to place responsibility or guilt where they belong, namely the group as a political and cultural unit. Instead it may only obviate a more structural response which is deemed unfeasible. The rule of law in such cases may evade a comprehensive response, repressing rather than addressing group accountability or animosity.

In addition to individual accountability there has to be a mechanism of group accountability and healing. Accountability in this sense may well mean empathy, acknowledgment not

punishment. Empathy does not whitewash criminality and atrocities. Empathy recognizes (does not accept, definitely does not embrace) the multiple positions within a community, including that of bystanders, and the difficulty of resisting atrocities and politically opposing a violent regime. By recognizing such plurality, the specificity of the atrocities is acknowledged, and the demonization of the Other is (potentially) diminished. While it should be clear that group responsibility or guilt does not mean that each individual of the group is criminally guilty, there ought to be a way to respond at the collective level to the crimes and go beyond the individual level exclusively. These responses will focus on acknowledgement and redress, not on punishment.

The primary rationale is that the prerequisite for redress is security and peace. This is true, but an exclusive forward looking road map that does not incorporate a response to the past is often not satisfactory for victims. Hence the frequent demand for accountability too (“no peace without justice”). Yet, because the accountability is in the best of cases very partial, and focuses on few individuals relative to the scope of the crime, the tendency of the peace building community is to encourage the stakeholders to move on. What is left unattended is the accountability to the group responsibility for the crimes; both through participation and enabling the crimes. Foremost, there is no opportunity, let alone an assumption, or a norm, that groups (nations, ethnicities,) will own up for their role in the crimes. The lack of knowledge and experience of how to respond to these issues discourage practitioners from addressing it in the first place. Exceptions exist, and their numbers increase, but more for historical than ongoing conflicts. These exceptions should provide a framework from which to think collective responsibility.

Memory is communal. In most societies memory often emphasizes both the suffering and greatness of the community. Memory intersects with law, but it is much wider. Memory of suffering frequently informs a desire for revenge, whether through legal or other means. The challenge is to imagine a universal standard of transitional justice processes which privilege victims but do not aggravate communal memories. To formulate global norms that pay attention to local conditions. The question is how to overcome formal parity and legality which conflict with long structural memory and animosity that go beyond questions of the rule of law?

In other words, to differentiate between different types of sufferings. Currently the international approach is that suffering, not matter the context or the cause, deserves equal empathy. However, this is conflicts with the experience of inter-identity group conflict. There is a competition over whose suffering should be privileged. Is there similarity between the suffering of those who belong to the victim's group, and those who belong to the group which instigated the violence, and may have been even perpetrators, but were themselves nonetheless victims? In many conflicts the division of victims from perpetrators is not binary and difficult to make; in others it is generally accepted. Yet, there is no language or international standards of how to evaluate complex memories of those who view themselves as victims, but from an impartial perspective may be more complicit or responsible for the crimes. And how to integrate these memories into conflict resolution.

Conflict Resolution

The question is how to engage victims in a conflict resolution process that would both respect their suffering while enable them to view the Other's side not in exclusively negative terms? How to integrate the insights from transitional justice mechanisms and the rule of law, together with peace building? First there has to be a recognition that the two professional communities ("conflict resolution" and "transitional justice") start from opposite assumptions. Although most conflicts are grounded in past violence and memories of victimization, conflict resolution as a mechanism focuses attention on the future and away from the past. When it pays attention to the past, it does so by engaging the present interlocutors, the participants in the process in order to include, share, their perspectives in the process, but avoids any engagement with the structural historical national conflict. It is not about rights or wrongs, but rather of what can be done to overcome the past. Namely, conflict resolution is not engaged in constructing a shared, mutually understandable and usable historical past. Transitional justice places premium on acknowledgement and validation of the victims. The past however is viewed from a relative narrow perspective of the survivors. From within this perspective, the general credo is that there is no peace without justice, and justice is pre condition to deterrence. (Never Again).

Conflict resolution juxtaposes three approaches to resolving or preventing conflicts: power, interest, and rights-based. In general, conflict resolution professionals prioritize reconciling the interests of the parties as the preferred approach. The prevailing view is that only a third party can adjudicate between conflicting rights claims, while conflicting interests can be negotiated among the interlocutors. Subjective perspectives of history or of rights are viewed as better left out of the process. Conflict resolution discourse about rights sees it primarily as analogous to private property rights; that is not as human rights, but as an exclusionary, exclusive competition for resources. This is a narrow perspective of rights, which extend beyond rights to physical property. While interest-based negotiations are critical, the deeper beliefs of rights are necessary to address since these give legitimacy to the process. An agreement that does not address the parties' self-perspective of their violated rights leaves open a space for ongoing simmering conflict, and for political delegitimization of an agreement, even if one can be reached. As human rights play a larger role in public culture, addressing past and historical violations has to become integral to conflict resolution. This is where certain aspects of transitional justice and expansive notion of historical dialogue come to play a role.

Incorporating transitional justice insights into conflict resolutions methodology might mean addressing the source of nationalist hatred by engaging the parties in a dialogue about the atrocities crimes, and perhaps even a contentious past. In addition to existing methodologies, of addressing interests of the protagonists, the question of how the self-identity impacts the conflict might be explicitly addressed. In the 1990s the US did not intervene in the Bosnia war for the longest time because the US administration believed that "the Balkans will be Balkans," meaning nothing can be done to ameliorate the long standing hatred. This obviously did not lead to a solution. The delayed intervention allowed for mass ethnic cleansing and untold suffering. Could prevention have worked?

At a deeper level conflict resolution demands mutual recognition and empathy between groups, this may include a recognition of shared (even if violent) past. There are reasons to believe that when history is not repressed, it could open avenues for better understanding. It could add another tool to peace building. Incorporating acknowledgment and redress into conflict prevention is a long term process, which demands a new understanding on the role of identity in conflict, the malleability of identity and historical memories, and the willingness to address the challenge. Accepting coexistence and reconciliation with the enemy (whether it includes forgiveness or not), necessitates explicit work and has to include acknowledgement of the suffering, that is both sides have to show empathy to the position and perspectives of their enemy.

Historical Dialogue

History is powerful. It represents who we are, the identity of a group, a nation, and it frames our views of our rights, goals, and worldview. Yet, in many societies, not only at the popular level, there is a general recognition of the distinction between history as it happened and the narrative of history. This acknowledgement of a conflict between histories that are written from different perspectives is widely shared, but is at least in principle this presents a predicament that is in conflict with the notion that history represents the reality of the past. For over a century, professional historians not only the public, have accepted that duality. Indeed, even philosophers of history have not moved beyond the internal contradiction, and in some societies, history remains a "science" and historians are seen as scientists. Instead of looking at the predicament as insurmountable, it should be explored for how it has been resolved in practice. The tension between "constructed" and "real" history present both an impediment and an opportunity for conflict resolution and transitional justice. History, in general, continues to be written as non-fiction, despite the awareness of multi-perspectivism. The widespread political recognition that history is constructed, namely that we know history by the way we narrate it, is true primarily as a principle. In practice, however, there are very limited efforts to understand what it means and how to use it in politics.

The malleability of history has to be taken seriously. While definitely not infinitely elastic, it is inelastic enough to invalidate nationalist myths – patent falsehoods – and provides a space to frame shared discursive spaces. Would construction of a different narrative be a possible mechanism to reduce the confrontation represented in nationalists' narratives? After all the nationalists' histories are often pure mythologies that are rejected by professional historians. Can these be confronted systematically from a conflict resolution perspective?

This is where historical dialogue as a methodology may play a role. The goal of historical dialogue is to direct attention to communal memories beyond the question of accountability and to aim and bridge the perspectives of conflicting groups in conflict and post conflict societies. Aspects of historical dialogue have appeared in numerous transitional justice mechanisms, but often these are subsumed by truth commissions and judicial processes, aiming at constructing "truth" (testimonies, judicial verdicts) rather than engaging the sides in dialogues.

Historical dialogue has to be better understood by both academics, for example in political science and history, and as even more importantly, by politicians. First there is a need to recognize and pay greater attention theoretically to the role history plays in conflicts. This may lead to concerted efforts to diminish the historical animosity as prevention mechanism. This stipulation is not merely a wishful thinking, but is based on growing experience of pursuing historical dialogue in various countries, both explicitly and implicitly.

Indeed a growing number of civil society organizations are engaged in knowledge production with the goal of contributing to historical redress. This includes variety of efforts from researching antagonistic histories with a goal of dismantling contentious narratives (such as responding to a frequent source of animosity which is a result of an exaggeration of number of victims, often inflated by nationalist organizations), engaging in memorialization of forgotten violations and atrocities, commemorating victims and losses, to initiating textbooks projects. These types of projects allow for validation and acknowledgment of victims' perspectives, and if done from a conflict resolution perspective engages practitioners from both sides of a conflict. These can be seen in Turkey and Armenia, Israel and Palestine, East Asia. In each case, there is a greater effort to get to the empirical historical truth, while framing the narrative in a manner that allows members of one or more side to acknowledge responsibility which officially is being denied. These civil society organizations are not formal representatives, but introduce a dissonant voice into the antagonist debate. These narratives are not comprehensive, and not even handed, but rather they present a challenge to the nationalist narrative.

The aura of transitional justice is to validate victims, and victims' organizations. This is in most cases, the only right policy. However, greater attention has to be paid to organizations which while giving voice to victims also serve as a base and provide the rationale for politics of revenge. The memory of victimizations is often a double edge sword. The construction of historical narrative as a conflict resolution or prevention mechanism is attempted more often in post conflict cases the dispute remains and creates diplomatic difficulties. It is the rationale for example in the formation of historical commissions which aim to diminish nationalists myths or to resolve specific historical conflict. This has been most frequent attempted in many European states concerning the legacy of the World War II (such as German – French commission, German- Czech commission, internal German commission on the bombing of Dresden), the Holocaust (scores of commissions, certainly those involving Germany, but also domestic commissions in Switzerland, the Vatican, even outside Europe) and commission that investigated the double dictatorships of Nazism and Soviet (as in the Baltic states). Formal and informal, bilateral and domestic commissions are also evident in East Asia and others. The specificity of historical commissions is that unlike Truth and reconciliation commission they investigate violence and conflict more distant in time that remain important to the contemporary society and the legacy of which remains as a memory that can incite new conflict. Sometimes the temporal delineation is not so clear, and TRCs and historical commissions overlap in methodology (testimonies are more prominent in TRCs, documents are paramount in historical commissions) and chronology.

The goal of historical commissions and other mechanisms which aim to construct a non-conflictual history is to tell a shared historical narrative. But the category of “shared history” itself raises various objections which should be addressed. These include the focus of history through nationalist filters, and the division of the narratives into binary according to the national perspective. Instead it is proposed that class, or gender history can overcome the nationalist propaganda. The question of defining the “sides” and the compromises historians are called on to make, all seems to counter the professional ethos. However, this may be misplaced, largely because of the little exposure that historians have in working on joint projects with the aim of conflict resolution. The desired approach is to do the best history we can by taking stock of the best scholarly work to date, evaluating all the empirical evidence we have and being as impartial as possible given our interests and inclinations. Clearly, a “shared” or “negotiated” narrative is not about compromising on the evidence or agreeing to acknowledge more or less violence in the past, but rather to take account of and show empathy for other perspectives that are part of the discussion. In a shared narrative enterprise, the goal of engaging with the past is not to change or distort it, but to recognize the pain experienced by each group and to give it a proper hearing. It is also about creating a space where people who share national, ethnic or other identification markers can see that their perspective has been taken into account, and where they can begin to acknowledge the existence of different perspectives. The shared historical narrative can largely be a synthesis of the best existing historical writing rather than original research, and special attention needs to be paid to its dissemination, whether through textbooks or the media.

Historical redress and advocacy go beyond understanding the historical context of a conflict to analyze the role history as a subject and a narrative, and the memory of the history, has in perpetuating the conflict. Historical dialogue encompasses the efforts in conflict, post-conflict, and post-dictatorial societies to come to terms with their pasts. It is foremost a tool aimed at bridging rival historical memory to promote reconciliation, peacebuilding, and democracy promotion. It includes collecting and describing empirical facts about the history of particular conflicts; expose past violence and human rights abuses; challenge national or ethnic memories of heroism or/and victimhood; question and dispel official historical narratives by establishing empirical evidence of violence and injustice; identify and monitor how history is misused to increase animosity in divided societies and perpetuate conflict. To counter these trends, it aims to enhance public discussion about the past informed by empathy rather than nationalism, to acknowledge the violence and contextualize it.

These narratives of the past are influenced by and in turn shape notions of justice. It is closely impacted by the norm and embrace of transitional justice ethics, but it goes beyond the rule of law, and focuses on group identity. Historical dialogue can never come too early in a conflict. It is possible almost at any stage, because it aims to enhance the civil society elements that would provide the impetus to official and semi-official discussion as part of the peace process. Since every society has a spectrum of political opinions, and there are diverse positions about the historical roots of conflicts, that is the nature of shared history is modular, there is a high likelihood that there are potential protagonists and participants to engage in a historical dialogue even while the conflict is ongoing. It is likely that in most

societies there are individuals who are willing to either engage the other side – or even individually – to challenge nationalist histories. Because civil society and academia is likely to precede official efforts, it is never too early to begin. Civil society projects are an important mechanism to promote historical dialogue, shape public discourse and change public opinion. Historical dialogue is close to transitional justice mechanisms which engage many civil society advocates before the formal process begins. Writing Shared history does not repress differences, but rather strives to delineate distinct perspectives within an agreed framework, debunk national myths, and exposes lies. Stakeholders increasingly recognize that addressing a violent past through historical dialogue can facilitate the construction of shared narratives. These narratives, in turn, can address root causes of conflicts and contribute to a goal of building sustainable peace.

A growing attention globally to gross violations of human rights demands historical as well as contemporary focus. There is a growing number and increased vitality of NGOs who are devoted to commemorating and acknowledging difficult histories in order to bridge over conflict. This is not a trend that can or ought to be ignored. If Transitional Justice focuses on accountability, and conflict resolution focuses on the future, historical dialogue bridges the two by going beyond rule of law to incorporate memory into politics and policies. Historical dialogue should be integrated into mainstream of both transitional justice and conflict resolution mechanism through paying greater attention to advocacy, historical research and education. The international community has declared its commitment to prevention, in particular in the doctrine of Responsibility to Protect (R2P). Unfortunately R2P has proven too weak to counter acute risk, most evident in the ongoing war in Syria, and too short term perspective to commit to long prevention projects. Legitimizing historical dialogue as a methodology that countries, governments, and civil society would be encouraged to engage in can be a real contribution to peace building. Devoting resources to it would encourage advocates to take on projects that would be able over time to diminish nationalists' propaganda, and educate the youth in reconciliatory discourse.

2.2 Sur la mémoire

Sameh Krichah

La mémoire c'est quoi ?

La mémoire collective, de par son nom même, est une mémoire qui rassemble le collectif. Mais à la différence de l'histoire, elle doit attirer et vivre dans l'esprit de la communauté. C'est une notion qui rassemble des événements du passé de façon à enrichir le présent et l'avenir.

La mémoire collective est plus qu'une mémoire fétiche qu'on commémore d'une façon monotone et formelle avec des médailles ou des titres chaque année lors de certaines fêtes nationales. Elle doit plutôt rassembler des événements du passé qui dans leur immédiateté n'ont pas pu être intégrés au passé parce qu'ils dépassaient la capacité du collectif de les comprendre, de les évaluer et de les juger.

Pour ce, on doit « faire le deuil » de ces événements pour pouvoir les dépasser et ne pas rester traumatisés et endoloris. On doit entamer « le deuil » par une recherche de la vérité via des témoignages, des investigations et des recherches scientifiques profondes qui ont pour rôle d'intégrer cette mémoire dans le cours de l'histoire pour servir de remède et de vaccin, un vaccin pour empêcher les tortures, les pratiques malveillantes et la dictature d'un passé révolu de se reproduire. Ibn Khaldoun a résumé la question en disant « L'Histoire en apparence n'est qu'information mais réellement elle est sujet à méditation et analyse ». La méconnaissance ou l'incompréhension – parfois volontaire - de certains événements douloureux a protégé certains d'une vérité qu'ils n'étaient pas en mesure d'affronter. Il s'agit presque d'un mécanisme de résistance contre les chocs éventuels, une sorte de limite à ne pas dépasser pour ne pas être ébranlé et continuer à mener une vie « tranquille ».

Ce sont ces limites qu'une conscience collective doit élargir voir éliminer par des méthodes scientifiques (psychologique, juridiques, historique...), mais également par une approche artistique et créative pour que les générations du présent et celles de l'avenir puissent dépasser les séquelles d'un passé qui nourrit une mémoire collective et la régénère. La mémoire collective est la forme d'altérité la plus accessible et familière.

Elaborer cette mémoire collective est un problème en soi, parce qu'il faut prendre en compte les mémoires tout en évitant la concurrence des mémoires. En effet, en évoquant une mémoire d'un groupe ou d'un individu, d'autres groupes ou individus peuvent sentir que leur propre mémoire est amoindrie, voire même éliminée. Il faut créer de la place pour toutes les mémoires avec une approche explicative d'interprétation et de remédiation pour une mémoire collective fédératrice car en principe il n'y a pas de rivalité entre les mémoires, à moins qu'elles ne deviennent des emblèmes identitaires. Elaborer une mémoire a pour but de créer un référentiel auquel tout le peuple peut s'identifier. « *Quand l'histoire a vécu un cauchemar, le rôle de la mémoire collective est de l'interpréter en termes de vie* ». [Daniel Sibony]

La Tunisie d'aujourd'hui : Quelle Mémoire ?

La Tunisie, comme beaucoup d'autres pays dans le monde, a vécu pendant longtemps sous un régime sécuritocratique, dont l'appareil de la police politique et des services de sécurité étaient perçus comme étant parmi les plus performants et les plus efficaces.

L'Etat semblait tout connaître de tout le monde et beaucoup d'opposants ainsi que ceux qu'on soupçonnait d'être des opposants étaient torturés et parfois même assassinés dans les caves de tortures ou au 7^{ème} étage du Ministère de l'Intérieur. Le Labo' Démocratique a déjà déployé des efforts pour comprendre la mémoire de la Tunisie. Nous avons, pour le moment, focalisé nos efforts sur la recherche et l'analyse de la **« mémoire du temps présent »**. En d'autres termes, la mémoire qui date du règne de Ben Ali, bien que la mémoire remontant à l'époque de Bourguiba ou de la colonisation Française ou encore celle de l'Epoque Ottomane n'est pas moins importante. Il est essentiel d'impliquer les générations présentes dans l'élaboration d'une mémoire de la dictature récente fédératrice et consensuelle, dans la transparence, pour que les mécanismes de justice transitionnelle soient justes, acceptés par la majorité, et réparent les injustices créées par la dictature, tout en posant les bases d'une réforme approfondie du système passé. L'objectif est, d'une part, de minimiser les risques d'un retour à la dictature et à toutes ses pratiques, et, d'autre part, de permettre aux victimes de faire le deuil de leur souffrance, leur évitant ainsi d'infliger – par un réflexe de revanche – la même souffrance à d'autres personnes. Le Labo' Démocratique a dans un premier temps travaillé sur la question des archives de la police politique de la dictature. Cette question est étroitement liée au droit à la vérité :

- Une vérité concernant les victimes et leurs familles qui ont le droit de savoir ce qui s'est réellement passé.
- Une vérité concernant la société dans son entier qui doit comprendre les mécanismes par lesquels l'oppression et la corruption ont pu se répandre et s'incruster dans tout l'appareil de l'Etat, dans tous les domaines et tous les secteurs.

Connaître la vérité passe obligatoirement par l'ouverture des archives, et cette opération n'est pas très simple. Elle pose deux problèmes majeurs : (1) l'atteinte à la vie privée des tiers et (2) l'atteinte à la sécurité de l'Etat. Donc les questions qui se posent aujourd'hui :

- De quelles archives parle-t-on ? archives administratives, archives du Ministère de l'Intérieur, fichiers de police...
- Ces archives sont-elles aujourd'hui protégées ?
- Qui est en mesure d'ouvrir ces archives ? l'Etat, une commission spéciale, la société civile, la justice...
- Comment ouvrir ces archives ? les rendre totalement publiques, faire le tri des informations, ouvrir sur demande des dossiers individuels...

Exemples :

- En Espagne, les archives de la dictature ont été transférées aux archives nationales et soumises aux lois relatives aux archives.

- En Allemagne, tous les dossiers de la Stasi ont été transférés à une institution spécialisée qui peut être sollicitée par les citoyens. Ceux-ci peuvent consulter leurs dossiers individuels sur demande et les noms des tiers contenus dans les dossiers sont noircis.
- En Roumanie, tous les dossiers n'ont pas été transférés à l'institution spécialisée. Une sélection a été opérée par les services de sécurité.

Pour le cas de la Tunisie, on sait déjà que dans la période post-14 Janvier 2011 et avant les élections du 23 Octobre 2011, les archives du Rassemblement Constitutionnel Démocratique (parti dissout de Ben Ali) ont été transférées aux Archives Nationales. Pour le reste, il n'y a encore aucune législation spécifique en vigueur. Cependant un projet de loi sur la justice transitionnelle est en discussion, qui prévoit qu'une commission pourra avoir accès à toutes les archives publiques et privées dans le cadre de ses investigations en vue de l'indemnisation des personnes ayant subi un préjudice du fait des dictatures, et ce depuis le 1^{er} janvier 1955.

Un autre volet tout aussi important est celui de la mémoire des martyrs et blessés de la révolution qui, durant quasiment un mois (du 17 décembre 2010 au 14 janvier 2011), ont été tués ou blessés par les forces de sécurité.

Le sujet des martyrs et blessés de la révolution est un sujet complexe, qui soulève plusieurs questions :

- Est-ce qu'il faut prendre en charge tous les blessés ? Ou faut-il enquêter pour savoir lesquelles de ces personnes ont été tuées ou blessées parce qu'elles ont joué un rôle dans les mouvements de protestation ?
- Est-ce qu'il faut indemniser toutes les familles des martyrs et comment ?
- Est-ce que les tribunaux militaires sont les plus adéquats pour juger de ces affaires ? C'est ce que la loi actuelle prévoit et, de ce fait, les tribunaux civils se sont déclarés incompétents.
- Comment s'assurer que les preuves ne seront pas manipulées à cause de la corruption ?

La mémoire pour une justice de (ré)conciliation

Après la vérité, on en vient à la justice dont le rôle est double : d'une part il s'agit d'indemniser les victimes : les dédommager soit via des procédures de droit civil (victimes expropriées par exemple) soit par la création d'un fond d'indemnisation lorsque le nombre de victimes est assez élevé. L'indemnisation est très importante pour estomper la rage que les gens accumulent face à une injustice et pour dépassionner le sujet. D'autre part, le 2^{ème} volet de la justice est la punition des responsables, qui soulève aussi plusieurs problématiques :

- Quels responsables punir ? Ce qui s'est passé est-il la faute de l'Etat ou des personnes, ou des deux ? De quelles personnes s'agit-il : celles qui ont donné les ordres, celles qui les ont appliqués, ou les deux ?

- Sur quelles lois va-t-on se baser pour punir les coupables : celles du passé (en vigueur à l'époque des crimes en application du principe de légalité des peines) ou celles du futur, que l'assemblée constituante ou le nouveau parlement va promulguer ? Le projet de loi sur la justice transitionnelle prévoit un mécanisme de rétroactivité au 1^{er} janvier 1955 et d'imprescriptibilité.
- Comment instaurer un mécanisme efficace pour garantir l'application des lois nouvelles ? En Tunisie, il y avait des lois interdisant la torture qui était néanmoins pratiquée sans scrupules.
- Comment punir les juges qui s'accommodaient de procès inéquitables, envoyaient des innocents en prison, expropriaient des propriétaires ... ?

Il est essentiel d'insister sur le mécanisme interdépendant qui régit la relation coupable-victime et qui a comme résultat des dommages causés sous l'influence de facteurs externes.

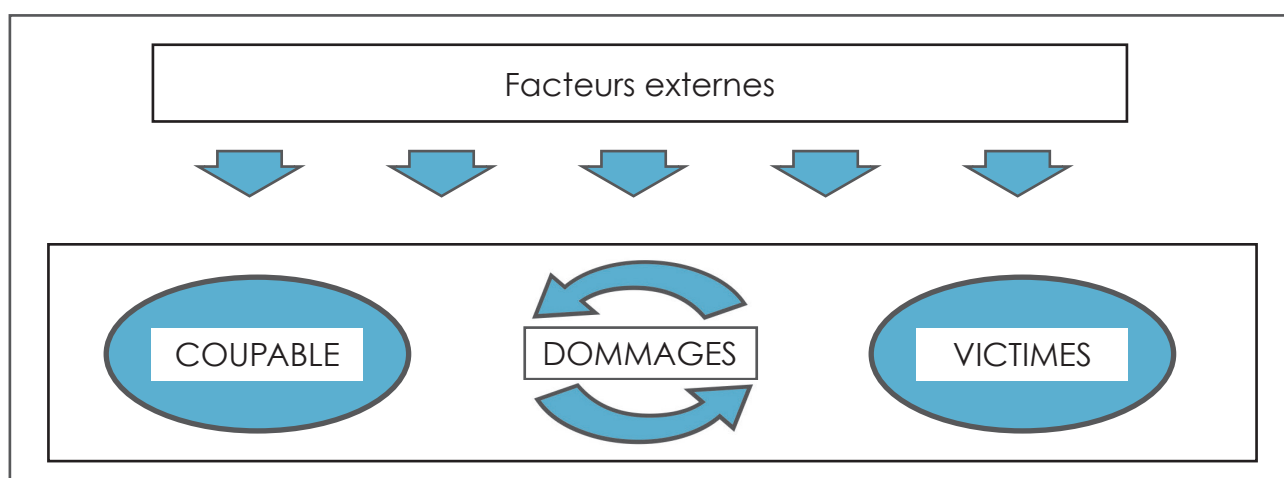


Figure 1. 'La relation coupable/dommages/victimes'

Par exemple, si la victime est un citoyen opposant et le coupable est un agent de police qui l'a torturé sous l'ordre de Ben Ali ou d'un ministre. L'agent de police est-il le coupable ou bien c'est le système qui en est coupable ou encore c'est l'Etat ? Mais, par ailleurs, si tous les agents qui ont servi la dictature à un moment ou un autre avaient démissionné la dictature n'aurait elle pas cessée ? En effet, il faut faire la différence entre le **système** qui est toute une mentalité à comprendre, combattre et démanteler et l'**Etat** qui est une entité à part entière responsable des agissements de ses fonctionnaires contre lesquels elle se retourne après réconciliation avec les victimes. Mais il est aussi important de signaler que cela ne sert à rien d'indemniser les victimes et punir les coupables, d'affirmer qu'on a rompu avec le passé et qu'il y a une justice transitionnelle si le système, avec toutes ses pratiques injustes et déviantes, reste en place. Par exemple, aujourd'hui, en Tunisie, il semble que des citoyens détenus dans les postes de polices à Sidi Bouzid soient encore torturés, brûlés avec des cigarettes et battus comme peuvent en témoigner les certificats médicaux et les témoignages de gens sur le terrain.

L'enjeu est : « **How to turn human wrongs to human rights** »

Après la vérité, qui passe par la reconnaissance, et la justice, qui passe par la réparation, s'ouvre le temps de la réconciliation. Cependant, on parle de réconciliation entre deux camps, deux courants politiques, deux idéologies. En Tunisie on ne peut pas véritablement parler de réconciliation car c'est tout un peuple qui a été victime de la dictature et de la peur. Aujourd'hui, la question qui se pose en Tunisie est plus celle de la conciliation que celle de la réconciliation. L'union des Tunisiens avant le 14 Janvier fait l'unanimité et elle s'est manifestée par la grande solidarité entre Tunisiens de tous bords quelques jours après le départ du dictateur. Ce n'est qu'après que le peuple a commencé à se diviser avec l'apparition des partis de différentes affiliations politiques et la course aux élections.

En effet, sous la dictature de Ben Ali, toute la population était unie par la peur de la dictature et de la torture, tout le monde – même certains des ex membres du RCD – ont été à un moment ou un autre victimes de cette dictature et cet harcèlement psychologique traumatisant.

Le traumatisme se manifeste jusqu'à maintenant dans l'affolement face aux rumeurs qui prétendent que le parti au pouvoir photocopie toutes les archives de tous les ministères. L'existence de ces rumeurs prouve l'existence d'une peur profonde du retour aux pratiques d'antan. Pour désamorcer cette peur et concilier le peuple avec le pouvoir, il est indispensable d'opter pour la transparence et impliquer la société civile dans le processus d'investigation du passé. Le but est d'apprendre et de comprendre la VRAIE vérité, celle qui fait le consensus entre les différentes lectures et versions de tous les groupes qui ont certes subi les mêmes pratiques mais ont interprété les événements différemment. De toute évidence, les islamistes et les communistes perçoivent le passé différemment.

L'exemple le plus palpable en Tunisie est le débat sur la question des indemnisations.

Les islamistes plaident pour l'indemnisation alors qu'une partie de l'opposition refuse toute indemnisation matérielle argumentant que militer est un choix et qu'on ne doit pas être indemnisé alors qu'on a pris ce risque en toute connaissance de cause. D'autres considèrent que beaucoup d'anciens prisonniers étaient des terroristes ou des terroristes en puissance et qu'il n'y a pas lieu de les indemniser. Enfin, d'autres encore considèrent que l'indemnisation est un droit mais que les mécanismes doivent être transparents et justes, surtout dans un contexte de crise économique grave. Ceci ne démontre qu'une chose : l'importance d'une vision commune de la mémoire. Une mémoire saine prépare le terrain pour un peuple uni.

L'enjeu éducatif de la mémoire collective

La mémoire collective de la dictature doit être transmise et partagée dans toute la société, mais l'enjeu le plus important est sa transmission aux jeunes qui demain seront les bâtisseurs de la Tunisie nouvelle. La mémoire doit être décrite aux jeunes générations, avec toute son atrocité, sa violence. Elle doit être expliquée et considérée comme un patrimoine à préserver ; non pas par fierté de ce que la dictature a fait subir au peuple, mais comme une leçon de l'histoire pour ne plus sombrer dans l'obscurité de l'oppression. La Tunisie doit

aujourd'hui prendre soin de sa mémoire, à l'image des nations qui ont déjà su valoriser leur mémoire. En Allemagne par exemple, on trouve des services spécialisés dans le traitement des documents, des prisons transformées en lieu de mémoire qui accueillent chaque année des milliers d'élèves venus faire des visites guidées pour se remémorer ce que leurs grands-parents et leurs aïeux ont connu.

Comprendre les mécanismes de l'injustice et de la dictature, comprendre pourquoi et comment les tyrans ont pu se faire un royaume et s'immiscer dans la vie des gens jusqu'à ses endroits les plus intimes, causer des traumatismes à certaines personnes et à leur enfants, tout cela permet de prévenir les rechutes et d'éveiller les consciences pour que la réaction soit rapide et ferme. La Tunisie d'aujourd'hui a besoin de ses enfants pour élaborer sa mémoire et écrire son livre d'histoire. Au Labo' Démocratique, faisant suite à nos travaux sur les archives de la police politique, nous avons initié le Festival de la Mémoire, la première édition ayant lieu du 6 au 8 Décembre 2012 et au cours duquel il y aura la projection de films cultes traitant du sujet, des témoignages de prisonniers politiques, des séances de lectures de poésies, ainsi que des conférences données par des spécialistes allemands et tunisiens dans le cadre d'un échange d'expertise dans le domaine. Ceci s'inscrit dans la logique d'un apprentissage collectif et une sensibilisation citoyenne au sujet qu'on espère compléter avec des ateliers avec les enfants, des tables rondes, des cercles de discussions etc...

Conclusion

La torture vécue en Allemagne sous le régime communiste et le système de la Stasi était particulièrement importante mais moins que celle infligée par le régime de Ben Ali à ses opposants. Et cette dernière était moins atroce que celle vécue au Guatemala ou encore sous l'Allemagne nazie par exemple. Mais ce n'est jamais un prétexte pour diminuer la dictature car ainsi on ne fait que la renforcer. La Tunisie se situe quelque part sur l'échelle de la torture et de la dictature. Dans un contexte de crise économique, les peuples ont tendance à amoindrir les défauts du passé. La Tunisie passe par une période critique mais elle n'est que passagère. Il faut rester vigilant et réussir la transition démocratique, en osant dire dans les moments de dépression populaire qu'hier n'était pas mieux qu'aujourd'hui. La nostalgie d'un passé revisité ne serait que le produit d'une mauvaise assimilation de notre mémoire et peut ouvrir la porte au retour de la dictature. Toutefois, le gouvernement en place doit témoigner de sa volonté ferme de prendre des décisions claires, précises et concrètes pour installer un vrai processus de justice transitionnelle et rompre avec les pratiques et les mentalités d'antan.

III. From a practitioner's perspective – Rule of Law through Transitional Justice vs. Impact of Transitional Justice on the Rule of Law in Colombia

3.1 Reflexiones sobre el Marco Jurídico para la Paz

Iván Orozco

El llamado marco jurídico para la paz es el marco constitucional que orienta y delimita ex ante las configuraciones posibles de los dispositivos de justicia transicional en Colombia. De conformidad con los recién aprobados artículos 66 y 67 transitorios de la Constitución que la regulan, los dispositivos de la Justicia transicional deberán articularse, como un ejercicio de justicia extraordinaria, en una frontera difícil entre las rutinas de “la política” propias de un Estado constitucional de derecho, y los imperativos de “lo político” en su sentido más ruptuoso y fundacional.

En efecto, el hecho que el artículo 66 transitorio califique de entrada los mecanismos de la justicia transicional como “excepcionales”, es indicativo de la voluntad consciente del Constituyente secundario de producir la diferencia entre lo excepcional y lo normal, lo rutinario y lo emergente, y con ello de generar un doble estándar jurídico para el tratamiento de determinados actores y situaciones en un context transicional. Así por ejemplo, mientras a quienes, para efectos de buscar una paz negociada, sean reconocidos por el Gobierno como “partes en el conflicto” se les podrán aplicar de manera diferenciada según su naturaleza y responsabilidades los distintos mecanismos de la justicia transicional, incluidos criterios fuertes de selección, castigos rebajados y suspendidos, y amnistías condicionadas, y comisiones de verdad; a quienes no sean reconocidos como partes en el conflicto –como seguramente habrá de suceder con las llamadas BACRIM y con las mafias del narcotráfico– se les va a dar, en cambio, el tratamiento que les corresponde en desarrollo de las rutinas del Estado de Derecho de la Constitución de 1991.

Mientras a quienes sean calificados como autores o partícipes en la comisión de “delitos políticos” se les va a otorgar los privilegios tradicionalmente reconocidos por nuestro sistema jurídico para esa categoría de delitos en materia de conexidad, amnistía e indulto, no-

extradición y reintegración política; a aquellos cuyas faltas sean calificadas como “delitos comunes”, se les va a tratar y juzgar, en cambio, siguiendo las rutinas del Estado de Derecho y la justicia ordinaria. En general, mientras a los primeros se les ofrece una salida política y se les juzga con los criterios extraordinarios de la justicia transicional, a los segundos se les somete a los estándares de la justicia ordinaria.

Pero como los dobles estándares son tenidos por contrarios al principio de igualdad y gozan por ello de una legitimidad muy precaria en el mundo de hoy, dominado por la idea de un Super-Estado mundial de Derecho y por el Universalismo humanitario, el Constituyente trató de articular la justicia transicional, hasta donde pudo, en la Constitución vigente, pero sobre todo, trató de controlar su capacidad de producir daño en el funcionamiento de las rutinas del Estado de Derecho.

El hecho mismo de su constitucionalización, más allá de lo que pudo tener de inevitable dada la barrera infranqueable de las jurisprudencias y de las normas que en nombre de los derechos de las víctimas y del deber estatal de luchar contra la impunidad, bloqueaban el camino de la paz negociada, puede ser leído como un ejercicio mimético de camuflaje en la Constitución vigente, orientado a tranquilizar a los jueces y a la sociedad sobre la legitimidad de adoptar fórmulas extraordinarias y que limitan principios importantes del Estado de Derecho como son el de la tri-división de poderes, el de tipicidad, el de proporcionalidad, el de igualdad de todos los delincuentes frente a la ley y el del debido proceso.

Que el establecimiento de los mecanismos de justicia transicional deba proceder mediante la aprobación, por parte de mayorías especiales, de leyes estatutarias sometidas al control automático de la Corte Constitucional, implica un esfuerzo por reforzar su legitimidad precaria, así como por vincular su aprobación a los procedimientos y controles judiciales propios de la rutina de la división de poderes en el seno de nuestro Estado constitucional de Derecho.

De otro lado, la circunstancia que la inserción constitucional de la justicia transicional se haya llevado a cabo mediante dos artículos “transitorios” y aún, el hecho que la autorización para legislar en desarrollo del marco para la paz se haya sometido a un término perentorio de cuatro años a partir de la fecha de presentación del primer proyecto de ley estatutaria por el Gobierno, implica, sin duda, un ejercicio de reducción de daño, determinado por la plena conciencia de que la justicia transicional es una sustancia altamente peligrosa y contagiosa, capaz de penetrar –sobre todo a través del principio de igualdad- en la máquina del Estado de Derecho y de la justicia ordinaria y de destruir su coherencia interna y sus rutinas.

Baste para los efectos de esta presentación llamar la atención sobre el hecho que el mismo día que Humberto de la Calle y alias Iván Márquez dieron, en su calidad de representantes del Gobierno y de las FARC, su rueda de prensa inaugural en Oslo, el Presidente Santos recibió en su escritorio una carta de Salvatore Mancuso, en la cual el hoy extraditado líder de las otrora Autodefensas Unidas de Colombia (AUC), le solicita que en nombre del principio de igualdad, les devuelva a los paramilitares el tratamiento político que el país les quitó, y retome el camino de la negociación política.

En ese sentido, las mayorías especiales y los controles automáticos de constitucionalidad, propios de las leyes estatutarias que deberán desarrollar el marco para la paz, también pueden ser razonablemente interpretados como dispositivos para taponar y amurallar las muy porosas fronteras entre la justicia ordinaria y la justicia extraordinaria.

Contra la idea muy difundida según la cual la paz negociada y la justicia transicional nada tienen que ver la una con la otra, porque mientras la primera pertenece al ámbito de lo político, en su sentido más fuerte y fundacional, la segunda no puede ser entendida, en cambio, sino como una proyección/prolongación de las rutinas continuistas del Estado de Derecho; el marco jurídico para la paz estableció que la finalidad prevalente de la justicia transicional es favorecer la terminación del conflicto armado interno y el logro de una paz estable y duradera.

La fórmula está claramente encaminada a garantizar que haya coherencia entre la justicia transicional y la paz negociada. Entre las múltiples implicaciones de este imperativo de subordinación y coherencia en beneficio de la paz y en detrimento de la justicia, quiero señalar brevemente cuatro que tienen la mayor importancia:

- a. Ratifica la comprensión que tiene el constituyente de la justicia transicional como justicia extraordinaria y de excepción, más cercana con ello a las lógicas fundacionales de lo político que a las rutinas del Estado de derecho.
- b. Fundamenta un balance axiológico ad hoc entre la paz y los derechos de las víctimas –incluido su derecho a la justicia– favorable a la primera, pero altamente respetuoso de los segundos. Dice la norma, en efecto, que los derechos de las víctimas “deberán ser garantizados en el mayor nivel posible”.
- c. Eleva el “pacta sunt servanda” a la condición de principio regulador de los límites de la justicia transicional. Se opone, con ello, a la pretensión de muchos –tanto en la izquierda como en la Derecha– en el sentido de que una vez firmada la paz y superado el paréntesis transicional, la justicia transicional pueda volver por sus fueros para buscar el castigo de quienes siendo responsables de graves delitos, de buena fe negociaron la paz y consintieron en someterse a los dispositivos extraordinarios –seguramente favorables– de la justicia transicional.

Obsérvese que, por lo menos en principio, la exaltación del principio “pacta sunt servanda” favorece por parejo a guerrilleros y militares y no solamente a los primeros. Hay quienes, en el movimiento de derechos humanos, empiezan a preguntarse si una vez firmada la paz van a poder reiniciar la cacería de los militares violadores de los derechos humanos, aún en el evento de que sus delitos hayan sido cubiertos por los dispositivos de la justicia transicional. Similares argumentos se escuchan entre quienes quieren que las guerrillas paguen por sus delitos.

Y por último, el imperativo de que los dispositivos de la justicia transicional se coordinen con las señales enviadas desde la mesa, así como con los compromisos adquiridos en las negociaciones de paz, es una de las razones fundamentales para que en el contexto de los diálogos de Cuba, los proyectos legislativos de la justicia transicional deban ir a la zaga de las decisiones que se tomen Cuba.

Por supuesto que también las limitaciones del tiempo de que habrá de disponerse para legislar, y aún argumentos políticos asociados a la expectativa de que el avance de las negociaciones habrá de concitar y requerir apoyos sociales crecientes para aquellas decisiones legislativas que resulten moralmente más problemáticas, tienen que ver con ello.

Pero no únicamente las lógicas de la justicia transicional interfieren e interrumpen las lógicas del Estado de Derecho. También éstas impactan a las primeras. En este sentido, el marco para la paz es la cristalización de los aprendizajes hechos por la sociedad colombiana, tanto en el ámbito político como en el jurídico, a partir de las experiencias vividas durante el Gobierno Uribe en materia de invasión de lo extraordinario por lo ordinario, en el contexto de las negociaciones con las AUC, así como de la aplicación de la llamada Ley de Justicia y Paz (Ley 975 de 2005) (Fiscalla General 2005).

Acaso el Presidente Uribe sobreestimó la magnitud y solidez de sus apoyos políticos, e hizo, a través de sus negociadores, promesas indebidas en el marco de las negociaciones adelantadas entre el Gobierno y las AUC en Santafé de Ralito a comienzos este milenio, promesas de tratamiento político privilegiado que hizo al calor de las negociaciones y que no pudo cumplir porque no supo anticipar que habrían de resultar contrarias a las corrientes de la opinión doméstica e internacional que finalmente dominaron el debate público y congresional, pero sobre todo porque no tuvo en cuenta que eran contrarias a la contingencia derivada del principio de la independencia de los distintos órganos de soberanía, pero sobre todo del poder judicial, en el seno de la Constitución de 1991.

En respuesta a ello, el marco para la paz empezó a negociarse en el Congreso de la República muy en abstracto y cuando aún no había trascendido a la opinión pública que representantes del Gobierno Santos estaban conversando en secreto sobre la posibilidad de iniciar negociaciones en Cuba con las FARC. La idea era negociar en frío en el seno del Estado y entre los órganos concernidos para evitar que las grandes preguntas dilemáticas y altamente trágicas de la justicia transicional condujeran a rupturas entre los órganos políticos y los judiciales. En honor a la verdad hay que decir, sin embargo, que dicho cometido se pudo cumplir apenas a medias, por cuanto el país, a pesar de que ya las negociaciones oficialmente comenzaron, está todavía a la espera de que la Corte Constitucional se pronuncie sobre la constitucionalidad de las fórmulas adoptadas por el Congreso en su calidad de constituyente secundario. Y lo que es tanto o más importante, aún en el evento que la Corte Constitucional le de su visto bueno a las fórmulas generales de los artículos transitorios 66 y 67 de la Constitución, ello no implica que las corrientes de opinión y el juez constitucional vayan a avalar los proyectos de ley estatutaria que en su momento y siguiendo los dictados de la mesa de Cuba, los desarrollen.

De otro lado, el macro-proceso judicial de "Justicia y Paz" nació como un dispositivo extraordinario de cooperación y de mesa redonda entre las partes procesales, edificado sobre el privilegio agilizador de la confesión, pero que se fue ordinarizando y que en parte colapsó bajo el peso creciente de las lógicas ordinarias que terminaron regulándolo.

Acaso más confundidos que orientados por las directrices que les diera la Sala penal de la Corte Suprema de Justicia, los fiscales de justicia y paz, enfrentados a cientos de miles

de hechos delictuosos, terminaron investigando la macro-criminalidad de los paramilitares delito por delito, siguiendo los dictados del llamado principio de "legalidad", aferrados a un procedimiento cada vez más adversarial y lleno de remisiones al código de procedimiento penal ordinario. Después de casi ocho años, el sistema ordinarizado de Justicia y Paz está desbordado por el tamaño de la empresa y apenas si ha producido una docena de sentencias. Está todavía por verse si la reingeniería a la que fue sometido recientemente consigue sacarlo de la trampa a que lo condujo su excesiva ordinarización. Porque el macro-proceso de justicia y paz está marcado por una enorme desproporción entre la magnitud de la tarea y la de los recursos disponibles, y porque su excesiva ordinarización lo llevó hasta el borde de la parálisis, el marco para la paz autoriza el establecimiento de una selectividad extraordinaria.

De otro lado, el hecho que el marco para la paz haya rescatado de su agonía el tratamiento privilegiado del delito político facilita sin duda que la guerra colombiana, después de diez años de hegemonía de interpretaciones puramente criminalizantes de la guerra como las que son propias del igualitarismo del Estado de Derecho y de los Derechos Humanos, en cuanto refractarias a la distinción entre delitos políticos y comunes, le abre las puertas a una re-significación política de la confrontación armada.

Y lo que es igualmente importante, la rehabilitación extraordinaria y ad hoc del tratamiento privilegiado del delincuente político operada mediante el artículo 67 transitorio, facilita la comprensión de la paz negociada como un "pacto fundacional" si no entre iguales por lo menos sí entre quasi-iguales, orientado a buscar la transformación de los antiguos enemigos militares en simples contrincantes políticos en la arena no violenta de la democracia. Así las cosas, una ley estatutaria deberá determinar los delitos susceptibles de ser declarados conexos con el delito político para efectos de permitir el aterrizaje individual y colectivo de los guerrilleros desmovilizados en la vida política.

En la medida en que el marco jurídico para la paz –acaso sobre todo a través del rescate del delito político- le da forma jurídica a las demandas de justicia en un contexto de paz negociada, refuerza las ventajas que tiene ésta, en un escenario como el colombiano, donde las dimensiones horizontales de la victimización son importantes. Y es que la paz políticamente negociada, a diferencia de la justicia de vencedores, permite la visibilización de las dimensiones horizontales del conflicto y con ello, una mayor verosimilitud y justicia en la representación de lo sucedido. Pero también y por la misma razón, permite un mejor "aportamiento" de las responsabilidades entre las distintas partes en conflicto, así como el florecimiento de una pluralidad de memorias, acaso menos oficializables y menos patrióticas y nacionalistas que la gran memoria oficial y colectiva que resultaría, sin duda, de un modelo de justicia de vencedores, pero sin duda más congruentes con el multiculturalismo y con el pluralismo político propios del siglo XXI.

Bajo premisas de una responsabilidad mejor aportada entre las partes en conflicto y con ello, del reconocimiento de la "responsabilidad parcial histórica del Estado colombiano" en la crisis humanitaria de las últimas décadas, acaso podríamos obtener una mejor subordinación de los militares al Gobierno civil y en general, una mayor lealtad de los mismos hacia la democracia, todo ello en circunstancias en que urge redefinir el papel

de los militares y en general, de nuestras fuerzas de seguridad, de cara a los retos del un mundo crecientemente globalizado y regionalizado.

Mientras un modelo de justicia de vencedores podría exacerbar la polarización entre quienes en el seno de la Izquierda política y del movimiento de derechos humanos ven en el Estado colombiano al gran victimario, y un Estado que se auto-representa como la gran víctima, pero que además se envuelve en la bandera del Estado de derecho, de la democracia y del respeto por los derechos humanos y el derecho humanitario; una salida negociada articulada a un modelo de justicia transicional podría favorecer, en cambio, la despolarización y con ello, una mejor inserción del país en la comunidad internacional.

Por último, de acuerdo con la famosa máxima de Zun Zu, la paz políticamente negociada, articulada a través del marco jurídico para la paz y de su disposición para reconocer al enemigo como parte en una guerra intestina y como un delincuente político, favorece que, en condiciones de clara superioridad militar del Estado sobre las guerrillas, como las que rigen hoy en día en Colombia, represente un "puente de oro" que además de ofrecerle a quienes negocian una salida decorosa, permite acortar la guerra y ahorrarse con ello los costos de su prolongación indefinida y de su degradación.

References

Fiscalia General de la Nacion Relatoria Unidad de Justicia Y Paz, *Ley 975 de 2005* 2005. (http://www.fiscalia.gov.co:8080/justiciapaz/Documentos/LEY_975_concordada.pdf, online report last accessed 06 February 2013).

IV. From a practitioner's perspective – Rule of Law through Transitional Justice vs. Impact of Transitional Justice on the Rule of Law in Tunisia

4.1 The evolution of Transitional Justice (TJ) in Tunisia, from the revolution to today

Amine Ghali

During a short period of 4 weeks extending from mid December 2010 till January 14th, 2011, Tunisia witnessed a revolution, or more accurately an uprising that led to the toppling of the Ben Ali regime, more than 20 liberticidal decades of despotism and nepotism. By all standards, especially when compared to other subsequent revolutions and uprisings of the Arab region, the toppling of the regime was quite swift, caught all actors by surprise, and no strategy for transition was planned ahead. However, the main approach to transition, either intentionally or unintentionally, has been transitional justice. Different actors of the transition process had different understanding and approaches to transitional justice, at different stages of the transition, which could be divided into two phases: phase one, from revolution till election (Jan 2011 till October 2011); and phase two, from election till the preparation of a constitution (this paper has been prepared in November 2012, while the National Constitutional Assembly, elected in October 2011, is preparing the second constitution of Tunisia).

The first premises of TJ in Tunisia have been the creation of two investigation commissions during the first weeks of the new interim government. These commissions are: *The National Commission to Investigate Human Rights Abuses* and *The National Commission to Investigate Corruption and Embezzlement*. It is important to note that these two commissions have been announced by the ousted president at his last speech one day before escaping, but have been established by the presidential decrees 7 and 8. Both commissions were headed by prominent personalities, Mr Taoufik Bouderbala, human rights defender and Mr. Abdelfatah Amor, constitutional law university professor. While these two investigation commissions are

not truth commission, they represent the seeds of such commission, paving the way for a transitional justice process. A conclusion reached by the first conference on TJ organized by civil society in post revolution Tunisia, starting the advocacy on this issue. The Kawakibi Democracy Transition Center, KADEM, organized the first conference, as early as February 2011, entitled 'Investigation Commission the first elements of a truth commission' with the participation of members of the two investigation commissions.

This first conference was the first encounter with the subject of Transitional Justice.

These two commissions, along with other commissions established during this phase, set the stage for the need to establish commissions in order to succeed in the transition period, away from the 'failing' existing state mechanisms and institutions. These two commissions, with minimum means and political support, succeeded to carry incredible investigation work and produce two comprehensive reports attempting to dismantle the violations they were addressing, the human rights abuses during the revolution period for the first Commission and the Corruption abuses during Ben Ali era for the second Commission. Furthermore, the direct link of these commission to the TJ process in Tunisia will be further explained and referred to later in the paper.

Other political decisions related to transitional justice that have been taken with no clear or declared intentions to tie it to a comprehensive TJ process were the ratification of a number of international conventions and protocols that would enhance the protection of human rights and the rule of law in Tunisia. The most important ratification of these is the Rome Statute on the International Criminal Court, a courageous decision taken by the interim government opening the Tunisian justice to international justice, where transitional justice can plan the role of a bridge. A decision praised by most international observers and partners who saw this decision as a sign of a clear vision to reform the justice system in the country. Other international treaties ratified include the International Convention for the Protection of All Persons from Enforced Disappearance, the Optional Protocol to the ICCPR, and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Another decision directly related to TJ is the decree granting amnesty to persons subject to a number of politically motivated court decisions before the revolution, called the General Amnesty Decree of Feb 19th 2011. Directly linked to this amnesty is the granting of reparation to the victims of the human rights abuse, mostly financial compensation. And most of times these compensations were contested by injured victims and families of the victims of the revolution.

In the frame of the political reforms paving the way for a free and fair election, other decisions have been taken that may be assimilated to TJ mechanisms. First, dismantling the ruling party of Ben Ali, the Rassemblement Constitutionnel Démocratique (RCD) by a court decision has been a response to a popular discontent from such a symbol of the old regime. A second important decision has been Article 15 of the election law, which prohibits a number of citizens from presenting their candidacy to the upcoming National Constitutional Assembly (NCA) election based on their affiliation and closeness to the old regime (vetting).

This decision has created a large debate on who should be included in this prohibition list and what criteria should be applied.

The most important feature common to these decisions –and to many others- is that all could be attached to a transitional justice process while none of them have been taken with a clear intention to attach them to such a comprehensive approach to TJ. Most decision makers were not aware or lacked the political vision and will to embark the country on a TJ process. Meanwhile, civil society groups and international organizations, more open to international experiences and to the transfer of best practices, started to advocate and lobby for the need to address democratic transition in Tunisia with a TJ approach. The most active institutions calling for this need were the United Nation Development Program (UNDP), Kawakibi Democracy Transition Center (KADEM), Arab Institute of Human Rights (AIHR), International Center for Transitional Justice (ICTJ), No Peace Without Justice (NPWJ), Freedom House (FH), and Avocats Sans Frontières (ASF). While at the local level established civil society groups such as the Bar Association, Ligue Tunisienne des Droits de l'Homme (LTDH), Association Tunisienne des Femmes Démocrates (ATFD) as well as new groups as Centre de Tunis pour la Justice Transitionnelle (CTJT), Tansikeya, Coordination Nationale Indépendante pour la Justice transitionnelle started to adopt this call and to lobby for TJ.

Following the elections, the new government, headed by the Islamist Nahdha party, was more receptive to this civil society call and demonstrated a political will to go through a transitional justice process. This political will has been visible in two major features. First, Article 24 of the Interim Constitution adopted in mid December 2011, which clearly states that the NCA will take appropriate measures to establish a transitional justice process. The second feature is the creation of a Ministry of Human Rights and Transitional Justice, the first of its kind in the world. While the creation of this Ministry is not accepted and supported by most actors of TJ at the national level, it shows a clear political will to embark the country on a TJ process.

In the months following these two decisions many developments occurred in the country both at the level of civil society and at the governmental level. In fact during late 2011 and 2012, while civil society concern about TJ grew in size and in scope, Tunisia saw the creation of many centers, associations, networks and initiatives on TJ, most of them were on advocacy and on awareness rising while others were on capacity building and technical expertise. In terms of scope, CSOs started to build on the findings of the Investigation commissions mentioned supra, installing the idea that TJ in Tunisia should address the 'regular' abuses of political and civil rights but also, and most innovatively, to address abuses of economic and social rights. The inclusion of these rights in the core of a TJ process is quite new to all previous experiences, making the Tunisian TJ the start of a new third wave of TJ in the world. Meanwhile at the governmental level, the Ministry of Human Rights and TJ started to take the lead in organizing the governmental actions in this matter. On April 14th, the Ministry organized a national consultation with the presence of the top executive power (President of Republic, President of the Assembly and the Head of the Government) sending a strong signal about TJ. This meeting was followed by a second conference to establish a national strategy on TJ, which called for a consultative and participatory approach to TJ.

During the following months, the Ministry of Human Rights and TJ invited the most important 5 local institutions to create the *Technical Commission to Manage the National Debate on Transitional Justice*, supported by some international organizations and partners like the UNDP, ICTJ and OHCHR. The objective of the Commission is to draft a fundamental law on TJ through a participatory approach. To do so, the Commission organized a nationwide debate through regional and professional consultations, TV ads and questionnaires to collect views and opinions of the participants across the regions, aided by a team of more than 100 moderators of debate that they trained and coached. As a result, the Commission drafted a fundamental law to be presented to the Ministry, then to the Ministerial Cabinet, then to the NCA in the current period of mid November 2012. While the approach of law making seems democratic and participatory, the process suffered from different setbacks and shortages. Some of them are related to the short time period granted to the Commission to properly carry its work, especially at the last phase of drafting the text after the collection of opinions, remarks, recommendations and views of the hundreds of participants. A second set back is related to the level and nature of the participation in this consultation, lacking diversity and interest of different ideologies. But the most important set back is the one related to the political decisions taken from the government which directly and indirectly affects the receptiveness of the general public to TJ. In fact, during most of 2012, the government has taken actions related to TJ from a political, sometimes partisan, standpoint that tend to discredit the TJ process and tend to empty it from its content. Just to mention a few, the government has initiated official talks on paying reparation to the victims of the repression (mostly affiliated to the Nahdha party, the ruling party) before the start of the due TJ process and the work of a truth commission. Second, the government took the decision to dismiss 80 judges without any due process, affirming its intention to keep a grip on the judiciary. And in order to justify its actions, the government portrayed them as part of the needed institutional reform of a TJ process. The government started an erroneous reform process, mainly with security forces, opening the door for a new cycle of human rights abuses.

As of today, at the eve of starting the official process of TJ, all of these political decisions, most times partisan, tend to create frustration about TJ and discredit the entire process. Despite the relatively positive draft legislation on JT prepared by the Commission and presented to decision makers, the TJ remains uncertain. And despite the efforts of most non-governmental actors, the political will of the government on TJ needs to remain neutral and non partisan in order to optimize chances of success of such process, essential to the democracy transition in Tunisia.

4.2 Le Droit à Réparation: Principes et Dilemmes

Fakter Gafsi

La notion de justice transitionnelle est construite autour de l'idée de rendre justice aux victimes des violations graves des droits de la personne et des libertés fondamentales dans un contexte de transition politique. Elle sera donc logiquement centrée sur la réparation des dommages subis. Les politiques de réparation sont mises en application pour rétablir les droits inaliénables et sacrés des victimes dans le but de les réhabiliter et restaurer leur dignité dans le respect des principes fondamentaux et directives définis en la matière. (1ère partie). La réparation constitue à la fois une obligation morale de l'Etat et une opportunité de promouvoir les efforts de réconciliation à travers un système de compensation. Mais comme l'ensemble des pratiques de justice en contexte de transition, les politiques de réparation obéissent le plus souvent à des choix difficiles devant concilier plusieurs impératifs à la fois. On parle alors de dilemmes de la réparation. (2ème partie). Les applications tunisiennes en matière de réparation pourraient en constituer une significative illustration. En effet, le gouvernement tunisien n'est pas parvenu à honorer son engagement quant à la prise en charge des victimes sur le plan matériel, médical et psychologique, et ce, malgré une nouvelle législation relative à l'amnistie et à la réparation des dommages subis des victimes de la révolution. Les victimes sont abandonnées à leurs sorts.

Sont à l'origine de cet échec :

- Le processus de JT n'est pas encore en vigueur.
- Les décisions gouvernementales unilatérales de réparation qui répondent souvent à des fins partisans plutôt que recueillir l'assentiment des victimes. (3ème partie).

4.3 Justice Transitionnelle et Lutte contre la Corruption en Tunisie

Mohamed Ayadi

Le printemps arabe est né dans une petite ville tunisienne, suite à un différend entre un marchand ambulant et un agent de la municipalité chargé de contrôler les marchés. Par dépit et par colère, le jeune homme s'est immolé et vous connaissez le reste de l'histoire (Neila Chaabene/ Intervention présentée en Egypte. 12 à 15 mai 2012). La révolution tunisienne a eu le mérite de libérer la parole et de mettre le thème de la corruption au centre des débats publics. Sous le régime de Ben Ali, il n'était pas possible de parler de la corruption, car elle « n'existait pas ». La spécificité de la corruption dans le monde arabe ne réside pas tant dans le phénomène corruptif que dans ce silence généralisé, imposé et même cultivé par le pouvoir en place. Le mouvement populaire en Tunisie a révélé l'état désastreux de la corruption (I) et l'insuffisance des mécanismes de lutte institutionnels et règlementaires. (II).

Un état des lieux désastreux

Les slogans largement repris par les manifestants tunisiens réclamaient la liberté, la dignité et l'emploi d'une part et dénonçaient la corruption et la bande de voleurs du pays, d'autre part. Les manifestants étaient loin de se rendre compte de l'ampleur du phénomène dont les manifestations n'ont pratiquement épargné aucun secteur (A) et dont les causes sont profondément enracinées dans les institutions étatiques (B).

Les manifestations

En une phrase, il est possible de faire l'état des lieux : la corruption et la malversation ont touché tous les domaines. Parmi ces domaines, la commission a pu relever les suivants :

Le domaine foncier :

- Il s'agit du changement de la vocation des terrains de manière à ce qu'ils soient constructibles et, parfois, le changement de la vocation des terrains à usage de construction d'une catégorie à une autre pour que le bénéficiaire puisse en tirer profit.
- L'attribution, sans droit, par les agences foncières de parcelles de terrains constructibles aux proches de l'ex-président, et ce, dans des zones connues pour leur importance sur le plan urbain et le plan économique, telles que la banlieue nord de la capitale, Hammamet et Sousse. Cette attribution, qui constituait une récompense pour les proches, s'écartait des critères objectifs qui devraient guider les prestations des services publics.
- La gestion illégale des domaines de l'Etat, telle que le changement de la nature du domaine public et son déclassement pour l'intégrer au domaine privé, et ce, en vue de le céder ultérieurement à des prix dérisoires ou, parfois, au Dinar symbolique.

Le domaine des marchés publics et des concessions :

- L'attribution des plus importants marchés publics et concessions, dont l'enjeu est énorme, ne se faisait pas dans tous les cas au vu des textes et règlements en vigueur.

En effet, le rôle de la Commission supérieure des marchés se limitait à l'étude des dossiers et à fournir des propositions au président de la République.

Les privatisations :

La privatisation des entreprises n'a pas préservé, dans divers cas, les intérêts du trésor public. La procédure de privatisation a plutôt été déviée, de manière à permettre aux proches de l'ex-président et certains hommes d'affaires privilégiés d'acquérir ces entreprises à des prix inférieurs à la valeur marchande.

Les importations et la douane :

L'importation aléatoire de marchandises du continent asiatique n'obéissait pas aux règlements douaniers stricts, comme c'est le cas pour l'importation de certains fruits, de moteurs et pièces de rechange, d'alcool et diverses autres marchandises sans aucun contrôle de la bonne qualité, telles que les chaussures, les jouets, les vêtements d'occasion, l'électro – ménager et le mobilier. Ces pratiques ont causé la faillite de plusieurs entreprises tunisiennes, lésant ainsi l'économie nationale.

Le domaine financier :

On s'est servi des entreprises publiques et des établissements financiers de même que de la Banque centrale pour sauvegarder les intérêts d'entreprises économiques revenant aux membres de la famille de l'ex-président et de leurs proches. L'abandon de créances et l'octroi de crédits sans aucune garantie suffisante sont les abus les plus frappants au détriment des finances publiques.

La fiscalité :

Le contrôle fiscal a parfois été utilisé pour harceler certaines personnes. En outre, il a été procédé à l'abandon d'énormes créances fiscales par simple décision prise par l'ex-président, la justification de cet abandon étant à charge du Ministère des Finances ainsi que de la Justice. La corruption a ainsi touché de larges pans de l'économie et de l'administration tunisienne. Cette situation s'est installée au fil du temps et s'est surtout accélérée durant les dernières années. Cela s'explique par des raisons diverses.

Les causes

La principale cause est politique : la concentration de tous les pouvoirs entre les mains d'un seul exécutif et législatif, une magistrature aux ordres, un parti ultra-dominant et des médias muselés. Il ne fait aucun doute, aujourd'hui, que la Tunisie était, à l'ère de l'ex-président, victime d'un système de malversation, qui a dépassé le seuil de simples manifestations ou faits divers et isolés. En Tunisie, le système de malversation a été édifié progressivement. Il s'est institué au fil des ans et a fait main basse sur l'Etat et la société. Ses éléments se sont introduits surtout dans des institutions politiques, administratives et judiciaires de l'Etat, mais également dans plusieurs collectivités et entreprises publiques. L'institution d'un tel système a engendré des attitudes et des comportements qui ont fini par donner naissance à une opinion répandue chez de très nombreux citoyens. Ces derniers ont, en effet, intériorisé un schéma qui, en s'approfondissant, a légitimé la prévalence des intérêts privés et la

recherche des privilèges et l'enrichissement facile et illégitime. La loi était instrumentalisée, détournée et violée pour parvenir à ces fins. Il était possible de tout avoir ou de dérober sous couvert de la loi, voire même en dehors de tout cadre juridique. A mon avis plusieurs éléments ont contribué à l'institution d'une telle situation, dont notamment :

- l'exercice unilatéral d'un pouvoir absolu et illimité en dehors de tout pouvoir ou toute norme et éthique, ce qui a engendré une dépendance et une terreur et a fait prévaloir la logique de la paroisse sur celle de la citoyenneté.
- la prévalence de la logique partisane sur l'intérêt général. L'administration a été instrumentalisée pour servir les intérêts d'un groupe au détriment de la communauté nationale.
- la remise en cause progressive du cadre législatif et réglementaire de répartition des compétences et de l'exercice effectif de celles-ci, comme cela a été le cas en matière de marchés publics ou de programme de privatisation.
- parfois on a été plus loin, puisque les lois et règlements ont été utilisés comme un moyen de satisfaire des intérêts privés au détriment de l'intérêt général.
- les mécanismes de contrôle en place n'ont pas pu fonctionner correctement ; en effet les mécanismes de contrôle financier étaient surtout centrés sur la régularité des opérations et non sur leur opportunité. Ils étaient handicapés aussi par le secret entourant leurs travaux et qui ne permettait pas de donner les suites nécessaires au contrôle.

Au vu de ces causes, il apparaît que l'héritage de l'ancien régime en matière de corruption est lourd pour la Tunisie. Il est tout à fait logique qu'une grande partie de la transition démocratique soit consacrée au démantèlement du système de malversation et de corruption et à la fondation d'un cadre d'intégrité et de prévention de la corruption, non pas en faisant table rase du passé mais en donnant toute leur effectivité aux mécanismes existants et en les renforçant par d'autres tirés des leçons du passé.

Mécanismes de lutte insuffisants

Tout de suite après la fuite de l'ancien président, le premier gouvernement provisoire a créé trois commissions indépendantes pour essayer de répondre aux trois grands maux du pays : l'organisation politique, les exactions qui ont été perpétrées depuis le 17 décembre 2010 et une commission d'investigation sur la corruption et la malversation (A), celle-ci ne pouvant constituer une réponse définitive, des réformes s'imposent mais elles tardent encore à venir (B).

La création d'une commission ad-hoc dans l'urgence

Le démantèlement de ce système a commencé à voir le jour depuis le 17 janvier 2011, lorsque le Premier ministre avait annoncé, en même temps que la composition du gouvernement provisoire, la constitution de trois commissions, parmi lesquelles figure la Commission nationale d'investigation sur la corruption et la malversation. Le décret-loi n°7 du 18 février 2011 a institué cette commission, lui attribuant la qualité d'autorité publique indépendante.

La commission a reçu plus de dix mille requêtes. Elle en a étudié environ cinq mille et a transmis quatre cents dossiers à l'autorité judiciaire. Il convient de noter qu'une bonne partie des requêtes ne relève pas de la compétence de la commission, et qu'une autre partie avait pour objet soit des allégations non fondées, soit de simples dénonciations non établies. Il est également important de souligner qu'un grand nombre de requêtes a été réglé grâce à la coopération des administrations concernées, et que certains biens et fonds ont été restitués.

Le démantèlement du système de malversation et de corruption demeure limité s'il n'est pas complété par l'institution d'une autorité permanente et indépendante qui se charge, en sus de la mission d'investigation, de la prévention contre la malversation et la corruption, et ce, conformément à la convention internationale de 2003 ratifiée par la Tunisie en 2008, mais dont la mise en œuvre a tardé.

Le décret-loi du 18 février 2011 prévoit que la commission nationale d'investigation sur la corruption et la malversation est chargée de l'identification des stratégies d'avenir afin de lutter contre la corruption et la malversation. A cet effet, la commission a préconisé la création d'une Instance permanente de lutte contre la corruption. Ce choix s'est imposé compte tenu du contexte tunisien particulier, la période transitoire, post révolutionnaire et l'héritage de l'ère Ben Ali.

Le décret-loi n°2011-120 a été adopté en novembre 2011. Il comprend un Chapitre premier relatif aux dispositions générales envisagées dans le cadre de l'élaboration de toute une stratégie pour faire face et prévenir la corruption et la malversation. Le Chapitre second est relatif à la création d'une instance permanente et indépendante qui comprend un organe ayant pour mission l'investigation sur des faits de malversation et de corruption et formé de plusieurs experts dans divers domaines.

Le choix s'est porté vers la création d'une instance spécialisée, afin de marquer une rupture nette avec le passé, et d'adresser un message fort à toutes les parties concernées et à l'opinion publique.

La corruption est un fléau qui a miné la société tunisienne, aussi bien le secteur public que le secteur privé. Lutter contre la corruption ne peut être réservé aux seules autorités publiques. Il faut impliquer aussi la société civile et le secteur privé.

Dans cet objectif, l'Instance a été conçue pour réunir les représentants des corps de contrôle, d'audit, d'inspection et d'évaluation ; de la société civile et des ordres professionnels ayant des compétences et une expérience en relation avec l'objet de l'instance, ainsi que des magistrats de l'ordre judiciaire, du Tribunal administratif et de la Cour des comptes et des représentants du secteur de l'information et de la communication. Elle réunit les deux missions de prévention et d'investigation sur les affaires de corruption. Elle respecte ainsi le rôle fondamental joué par la justice pour instruire, poursuivre et sanctionner les faits de corruption.

L'Instance sera le cadre dans lequel se dérouleront les discussions sur la politique de lutte contre la corruption et les réformes qui s'imposent sur le cadre législatif et réglementaire ainsi que les mesures d'accompagnement qui devront garantir la réussite de ces réformes. Il ne suffit pas de légiférer, il faut aussi convaincre du bien-fondé des mesures préconisées.

L'Instance offrira un cadre de discussion entre toutes les parties sur les mesures à prendre. La mise en œuvre complète de ce nouveau texte nécessite l'adoption de plusieurs textes complémentaires et d'application ainsi qu'une mise à niveau du système juridique.

Une mise à niveau du système juridique s'impose

La lutte contre la corruption ne peut se résumer à la création d'une instance de lutte contre la corruption, même si cette création est nécessaire dans le contexte tunisien, ou encore d'un ministère de la gouvernance et de la lutte contre la corruption ou une commission spéciale au sein de l'Assemblée Nationale Constituante. Il faut aussi une refonte de larges aspects du système juridique.

C'est ainsi par exemple, que sur le plan des incriminations, la commission d'investigation s'est heurtée à l'absence de l'incrimination de l'enrichissement illicite, l'absence de mise en cause de la responsabilité des personnes morales, l'absence d'incrimination et de moyen de lutte contre la corruption dans le secteur privé, l'absence d'effectivité de la déclaration de patrimoine des responsables politiques et des hauts cadres administratifs. Elle se limite pour l'instant à une déclaration sur l'honneur déposée auprès de la Cour des Comptes qui n'a aucune compétence pour vérifier l'exactitude de la déclaration. La réforme de la magistrature tarde à voir le jour malgré toutes les voix qui se sont élevées depuis le début de la révolution pour la réclamer aussi bien de l'intérieur même du corps ou des responsables politiques ou des citoyens ou de la société civile. Absence de législation qui peut servir de « droit commun » en la matière ; un cadre clair qui établit des mécanismes de prévention et de détection de la corruption. Un an après la révolution, il faudrait marquer le pas à travers certaines actions qui peuvent paraître comme évidentes et qui ont du mal à se concrétiser au vu du contexte politique et économique de la Tunisie. Il convient donc d'agir sur plusieurs fronts :

- Réformer le cadre législatif et réglementaire en le mettant en adéquation avec les engagements internationaux de la Tunisie, notamment à travers de l'incrimination de l'enrichissement illicite (un projet de loi est en cours d'élaboration et de discussion à l'initiative de la Présidence de la République.), de la corruption dans le secteur privé, ou en offrant la protection adéquate aux témoins et aux informateurs, ou encore les modalités adéquates de réparation des préjudices subis par les victimes de la corruption et de la malversation, la généralisation de l'obligation de motivation des actes administratifs.
- Réformer le cadre institutionnel : aussi bien la justice que les corps de contrôle, d'audit ou d'inspection nécessitent un renforcement et une garantie de leur indépendance ainsi qu'une formation plus ciblée pour des professions particulièrement exposées aux tentations/risques de la corruption.
- Consacrer la transparence dans le processus de prise de décision et la communication de l'information au sein de la Constitution.
- Réaffirmer le principe de la légalité et de la répartition des compétences entre les différentes autorités publiques et veiller au respect des principes d'éthique, d'intégrité et de transparence.

- Réformer les programmes éducatifs pour inculquer dès le plus jeune âge une culture de rejet et de stigmatisation de la corruption.
- Faire de l'intégrité et de la probité des valeurs sociales solidement ancrées dans la culture administrative des affaires de l'Etat par l'éducation, la sensibilisation et la motivation des fonctionnaires publics.

Toutes ces actions ne peuvent être réalisées sans une presse indépendante et responsable grâce notamment à la formation du journalisme d'investigation, les medias dont le rôle est essentiel dans ce combat qui ne pourrait pas être mené sans eux.

Conclusion

Pour la Tunisie, l'objectif est de limiter l'ampleur de la corruption, briser définitivement le système corruptif mis en place, afin qu'il ne puisse plus se reconstituer. L'expérience de la commission nationale d'investigation sur la corruption et la malversation n'était qu'un premier pas dans le processus transitionnel ; elle doit être poursuivie avec plus de maturité et d'effectivité dès la parution imminente du cadre juridique officiel de la justice transitionnelle (le projet de la loi relatif à la justice transitionnelle a déjà été déposé à l'assemblée nationale constituante).

Un projet de loi est en cours d'élaboration et de discussion à l'initiative de la Présidence de la République.

Le projet de la loi relatif à la justice transitionnelle a déjà été déposé à l'assemblée nationale constituante.

V. Transitional Justice Policies: Reparations and Compensations

5.1 Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice

Rodrigo Uprimny Yepes

In Colombia, there is an effort of the State to provide reparations for the victims of the armed conflict but in a very difficult context because: i) the armed conflict still goes on, so there are serious security obstacles that threaten the very possibility to achieve success; ii) Colombia has very deep social inequalities and widespread poverty, so there are strong tensions (but also complementarities) between the efforts to compensate victims and the policies to reduce inequality and poverty; iii) Colombia has not had a global truth commission yet, so we are trying to provide reparations while there is not yet a clarification of the universe of victims. My presentation will try to analyze the possibilities, tensions and problems of the policies of reparation and compensation in Colombia in this difficult context in order to develop, from the Colombian case, some more general and comparative conclusions.

Recently, an ethical and legal principle has consolidated, according to which victims of gross human rights violations are entitled to receive full and prompt reparation for the harm they suffered¹. This principle, which is a victory following long years of difficult struggles by human rights movements, represents for victims and their relatives, whose dignity has been critically affected by horrendous crimes, like torture or forced disappearances, a hope that the harm they suffered will be addressed and that their dignity will be restored. I obviously strongly support this principle that has rescued victims, survivors and their families from the oblivion in which they were in the past.

Nevertheless, this principle of integral reparation creates difficult paradoxes and dilemmas for societies that are settling an armed conflict or an authoritarian regime, in which large-scale gross human rights violations were committed². These societies usually also face deep social and economic inequalities with a lot of people living in extreme poverty. The ideal of integral reparations becomes problematic in that context³; it implies, at least in some cases, difficult conflicts between corrective and distributive justice, to use the old but still

very useful distinction proposed by Aristotle in the book V of his *Nichomenian's Ethics*. In philosophical terms, there is a tension between the duty of States to make all efforts to rectify an unjust harm done to victims and its duty to make all efforts also to achieve a fair distribution of benefits and burdens to all members of society⁴. In legal terms, it is a tension between the duty of States to repair victims whose civil rights have been severely injured because of heinous crimes and the duty of States to fulfill economic, social and cultural rights, especially for poor and discriminated persons. In practical terms, these tensions can be illustrated bluntly with this example: should a State that is settling an armed conflict and with very limited resources use the only available funds it has to compensate one middle class victim who was tortured? Or should that State use these funds to build ten houses for ten poor families who were not victims of heinous crimes but desperately need shelter?

This difficult dilemma is not just a nice theoretical problem; it is a poignant issue for all transitional societies that try to take seriously the right of victims to reparation. It is at present time an actual debate in my country, Colombia, because in the last years we have been discussing policies to repair victims⁵. And Colombia has thousands of victims of extrajudicial killings, kidnappings, forced disappearances or sexual violence, and millions of internally displaced persons. But at the same time, Colombia is a very unequal society with widespread poverty. Some people then argue that reparation should be put aside because fighting against poverty should take precedence. I can understand these worries; but the suffering of victims and their relatives cannot be ignored. An obvious question arises: what should we do in face of this difficult dilemma?

My presentation, that is based on reflections made collectively in the last years in our Colombian Center of Studies *DeJusticia*⁶, is an effort to face some of the difficulties that arise when we take seriously, as we obviously should, the ideal of full reparation for victims in transitional contexts, especially in societies with deep inequalities and widespread poverty. My aim is to find some sort of harmonization between the imperatives of corrective and distributive justice in these situations. This purpose explains the structure of my lecture. I will begin in part I by a more detailed explanation of the paradox and dilemma of reparations in these transitional contexts. I will then propose a very simple idea to face this conundrum. I think it is important to preserve and stress the differences between reparation programs and development and poverty reduction programs, if we want to take the ideal of reparation of victims seriously. But I also think that in peace building contexts, after large scale gross human rights violations, it is important to maintain strong links between social services, development programs and reparation efforts, if we want to reduce the tensions between corrective justice, distributive justice and development. Part II of my presentation will then stress the differences between reparation programs and welfare policies in order to preserve the right to reparation of victims, while part III will present the notion of "transformative reparation" as a way to establish the necessary bridges between social services and reparation programs in order to overcome, or at least reduce, the acute tensions between distributive and corrective justice in these very difficult contexts. I will then, in part IV, apply this quite abstract concept to some of the specific and difficult decisions policymakers have to face when they are designing reparation programs in transitional contexts. I hope this step will show the practical potentialities of the concept I propose. Finally, in part V, I will make some last and short comments, especially concerning possible objections to this approach⁷.

The paradox of integral reparation after large-scale human rights violations

The principle of integral reparation states that victims should receive full reparation, or at least one that is proportionate to the gravity of the violation and the harm they suffered. Reparation is then guided by the ideal of full restitution (*restitutio in integrum* in its expression in Latin), that means that States should make an effort to erase all the effects of the crime and undo the harm caused, in order to put the victims in the situation they were before the crime occurred⁸. It is then a classical expression of corrective justice, because the main purpose of reparation, according to the dominant legal doctrines in this area, is to rectify or erase an unjust harm done to a specific victim.

For most serious human rights violations, like extrajudicial killings or forced disappearances, the principle of *restitutio in integrum* cannot be applied, because in all those cases it is impossible to turn back victims to the situation in which they were before the atrocity took place. This impossibility of full restitution in most cases of gross human rights violations is accepted by almost all tribunals and scholars; that is why in view of terrible human rights violations we usually speak of the effort to repair the irreparable⁹. Nevertheless, in spite of this difficulty, the ideal of integral reparation remains an unchallenged principle in human rights discourses, at least in the form of the duty of States to repair the victims or their relatives in different ways (like monetary compensation) that are proportional to the gravity of the violation and the harm suffered. For instance, the “UN 2005 Guidelines” establish that “reparation should be proportional to the gravity of the violations and the harm suffered” (principle 15), that victims should receive “full and effective reparation” (principle 18) and restitution is given priority because the guidelines say: “Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred” (principle 19).

This principle of integral reparation seems to me uncontroversial in cases of isolated gross human rights violations in a “well organized society”, to remind the well known expression of John Rawls¹⁰, because we should endeavor to fully restore the dignity and erase the harm done to victims of heinous crimes. It is true that full restitution might not be achieved in many cases; nevertheless, the duty of States to compensate victims in proportion to the harm suffered and the gravity of the violation remains.

On the contrary, this principle of full restitution becomes puzzling in transitional contexts, after large-scale gross human rights violations were committed. These societies usually also face deep inequalities and widespread poverty. They are in a sense “well disorganized societies”. In that kind of context, the principle of integral reparation enters in acute tension with other duties of the State, especially with its obligation to provide social or welfare services to all poor people, even if they have not been victims of gross human rights violations. The paradox or conundrum of reparations in transitional contexts stems then from the combination of the factual situation these societies face and the ethical and legal norms they are supposed to honour. I proceed then to describe both.

Factual Context

An obvious but essential point is that in these societies large scale gross human rights violations were committed; we then have thousands or even millions of victims and also thousands of perpetrators. It is impossible to attain full or perfect justice in these situations - if there is such a thing as a human full perfect justice, because perfect justice is said to be the privilege of gods; indeed my thesis is that it is even impossible to attain human perfect justice because it is usually unfeasible to punish all perpetrators according to their guilt, or to give reparation to all victims according to the harm they suffered¹¹. Our efforts in these difficult and tragic contexts are then to attain the highest level of "imperfect justice", to use Pablo De Greiff's evoking expression¹².

As mentioned already, a second important point is that these societies usually also face deep social and economic inequalities with a lot of people living in extreme poverty before the armed conflict occurred or the dictatorship took place; usually poverty and inequality tend to be aggravated by the conflict or the authoritarian regime themselves. At this point, I am not going to enter in the vivid and difficult discussion whether or not poverty and inequality are causes of armed conflicts or democratic breakdowns¹³. And it is clear that in some cases large scale human rights violations were committed in societies that had reasonably low levels of inequality and poverty, as Chile, Argentina or Uruguay, when the military regimes took power in the seventies. I just want to stress that many societies that have known massive violations of human rights were, before the humanitarian crises, "well disorganized" societies with also high levels of poverty, inequality and discrimination and that the large scale human rights violations worsened these features.

To get things even more complicated, in that kind of "well disorganized societies", such as Colombia, Peru, Guatemala or El Salvador, many victims were poor or discriminated before they were victimized and in many cases became poorer because of the crimes they suffered. For instance, a recent survey in Colombia has shown that most of the four million of internally displaced persons lived in poverty when they were forced to leave their home but that the displacement led them to a worse situation: now they are in extreme poverty¹⁴. Besides, a recent ruling by Colombian Constitutional Court stressed that women suffered severe discrimination before they were victimized and that the victimization usually has accentuated this discrimination¹⁵. On the same token, the Truth Commission in Peru established that people who spoke quechua, that is indigenous population, were disproportionately represented in the whole universe of victims of the worst atrocities in this country¹⁶. Victims in these unequal societies are then usually the poorest and more vulnerable and discriminated people and they usually get poorer because of victimization. But it is important to stress that not all victims are poor and not all poor people were victimized. It is not unusual that middle class persons or even high income people are also victimized during an armed conflict or a dictatorship¹⁷ and that a large portion of the poorest people might not suffer direct gross human rights violations. In some cases, the main targets of victimization have been members of trade unions or some opposition parties, who were not rich people but neither were they the poorest persons in that country. In transitional contexts, there is then a very complex relation between poverty, discrimination and social inequality and between groups of victims and groups of poor and discriminated people. In

the following table, I try to make a stylized graphic presentation of this situation, inspired by some similar concerns developed by Pablo Kalmanovitz¹⁸:

	Victims	Non victims
Poor people	I	II
Middle class and high income persons	III	IV

Figure 1. 'Victims and poor persons in well disorganized societies.'

As we can see, there are poor people who are also victims (box I) but also poor people who were not victims (box II), the latter group representing usually the larger portion of poor people in these societies. At the same time, you can also have middle class and high income victims (box III).

Finally, States in transitional contexts are usually weak States facing severe economic constraints. This is especially true in post-conflict situations because wars tend to destroy infrastructure and affect deeply the capacity of States to control the whole territory; on the contrary, post-authoritarian regimes can be strong and affluent States.

Normative tensions

Transitional situations, especially from armed conflicts and in unequal societies, are then complex, because there are thousands, not to say millions of victims, and also widespread poverty; besides, States are weak and face economic difficulties. In that difficult context, States should repair victims of gross human rights violations, because it is an ethical and legal obligation to do it, according to principles of corrective justice that are binding in International Law. As this duty does not depend on the economic conditions of victims, States should then repair all persons in boxes I and III of table No I. But at the same time, in the aftermath of an armed conflict, the State has also a duty to provide social services to all poor people, even if they have not been victims of gross human rights violation, according to principles of distributive justice and as a normative consequence of the obligations of States related to economic, social and cultural rights, that are also part of the category of human rights. This latter duty means that States have to provide social services to all people in boxes I and II of table No I. These States, as we have seen, are usually institutionally weak and face severe economic constraints, they have acute difficulties to carry on either integral reparation programs for victims¹⁹ or comprehensive social policies for poor people or discriminated groups; they have of course even more difficulties to develop both kinds of programs at the same time.

Some evident (but at the same time very difficult to answer) questions arise from this complex context: What should be done in that kind of situation? Should States concentrate their efforts to achieve an integral reparation program for victims, according to their duties on corrective justice? This is not at all obvious, because these reparative efforts have in some circumstances negative consequences in terms of distributive justice. For instance,

reparations can use scarce funds to compensate affluent victims (persons in box III), whereas these resources are desperately needed to finance social policies to alleviate poverty for persons that are poor but were not victimized (box II). That is the more common tension. But there are also other difficulties, as we will see.

Reparations efforts can also, some times, affect the coherence of State policies, because the logic of reparation programs can be very different from the logic that supports other State interventions. For instance, according to certain analyses, there have been in South Africa important tensions between the efforts of restitution of land and the efforts to make a deep land reform, because the former stressed rights of individual victims to reparation whereas the latter aimed at collective land redistribution²⁰.

Moreover, in some cases, the very principle of integral reparation can lead to another difficult paradox because, as was set out already, the ideal of integral reparation is the notion of total restitution (*restitutio in integrum*), that means that we should make an effort to erase all the effects of the crime and undo the harm caused in order to put the victims in the situation they were before the crime occurred. But this leads to a perplexity: if the victim was before the crime a very poor person in a very unequal society (box I), then the purpose of restitution seems a too weak ideal of justice, because it means to turn back the victim to a previous situation of deprivation and discrimination. In that case, full restitution "is almost cruel"²¹ because it leads to a violation of the social rights of this person and the consolidation of a social structure that violates principles of distributive justice.

On the contrary, if the victim was a very affluent person in an unequal society (box III), it also seems unjust to try to put him or her in the situation he or she was before the conflict, because it can lead to the use of scarce resources for the reconstitution of fortunes, while these resources are badly needed for social services because many people still live in poverty even if they have not been victimized (box II)²². This result also seems to contradict principles of distributive justice; it also leads to the violation of State's duties in relation to economic, social and cultural rights.

Then, because of these paradoxes and problems of the ideal of total restitution in that kind of situation, one could argue that States which try to supersede massive human rights violations would better concentrate their efforts on distributive justice and implement social services and development programs to alleviate poverty and reduce discrimination for peoples in boxes I and II, even if that means to let aside the reparation of victims²³. But this second alternative does not seem appropriate either, because it is not at all sensitive to the specific needs and suffering of the victims. Besides, this alternative would violate the duties of the State to take measures of corrective justice in relation to victims of gross human rights violations, which is an ethical imperative and a legally binding norm of International Law.

The ideal of integral reparation of victims of gross human rights violations in transitional contexts of unequal societies then leads to a difficult conundrum. Victims are entitled to full restitution or at least to reparation in proportion to the harm they suffered; but this ideal seems impossible to attain in transitional societies, not only because of economic and institutional constraints but also because the strict implementation of this principle can contradict ideals of distributive justice and State duties with poor people, if these societies are unequal and with widespread poverty. To face this dilemma, as was explained in the introduction of

this lecture, I will take a two steps approach: I will stress the differences between social services and reparation programs in order to preserve the specific rights of victims; I will then propose the notion of “transformative reparation” as some kind of link or bridge between these policies and as a way to reduce tensions between corrective and distributive justice in these contexts.

The distinction between social services and reparation programs

In practice, it is sometimes not easy to differentiate reparation programs for victims from social services to alleviate poverty and reduce inequality. Besides, many States have tried to merge both types of programs and blur their differences in order to sell to victims and public opinion as reparation what is really the provision of social services. That is why it is important to distinguish between both kinds of programs, in order to preserve the right of victims to reparation²⁴.

Social services are grounded on the State duty to fulfill economic, social and cultural rights and on the idea of distributive justice and the principle of non-discrimination. It is a general duty of States to ensure minimum material conditions to all their citizens in order for them to live with dignity. Meeting current needs of the population is in a sense the main purpose of social services. States then have to provide social services (as education, health, water, etc) to all people who cannot acquire these goods by their own means. This duty takes a special force in relation to those groups that are very poor and discriminated. This explains the existence in many democratic States of different forms of affirmative action for persons and groups that live in vulnerable conditions and have been discriminated.

On the other hand, the source of the State duty to provide reparations is the harm suffered by victims of gross human rights violations. The final purpose, at least in theory, is to rectify this harm and restore the victims, as long as it is possible, to the conditions they enjoyed before the harm was done. This means that in an extremely rigorous sense, current needs of victims are irrelevant to the orientation and scope of the duty to repair.

Reparations must also have a symbolic dimension because it is necessary to recognize the suffering of the victims and that an injustice was committed. Reparations in a sense must be articulated to truth recovery, because both have to make visible gross human rights violations that in the past were hidden. The necessary recognition of victims and the symbolic dimension of reparations mark an important contrast of reparation programs with social services and development strategies. Reparations are in a certain sense an effort of the State to reconcile with victims that were to some extent deprived of their citizenship and excluded from the political community because of their victimization. On the other hand, social services usually do not have this dimension or purpose because they represent an effort of the State to reduce poverty and discrimination but of persons and groups that were already integrated in the political community as full citizens. I agree then with Pablo De Greiff when he says that “strictly speaking, a development program is not a program of reparation” and that “development programs have a very low reparative capacity, for they do not target victims specifically, and what they normally try to achieve is to satisfy

basic and urgent needs, which make their beneficiaries perceive such programs, correctly as ones that distribute goods to which they have right as citizens, and not necessarily as victims”²⁵.

The previous elements explain a different temporal dimension of reparations and social services; reparations have in principle a focus on the past; they are backward looking at least in legal theory, because the main purpose is to restore victims to the conditions they enjoyed before they were victimized. On the other hand, social services have their focus in the present and in the future; they are present and future looking, because their aim is to satisfy immediately, or in a very short delay, the core content of economic and social rights; they aspire to realize progressively the full content of these rights.

The following table sums up the main differences between social services and reparations:

	Factual origins	Normative grounds	Purpose	Beneficiaries	Temporal dimension
Social services	Poverty and discrimination	Distributive justice, current needs of the population and duties of the State in relation to economic, social and cultural rights	Satisfy current needs of persons and reduce inequality	Poor people and discriminated groups	Present looking for core content of social rights; future looking for progressive full realization of these rights
Reparations	Gross human rights violations	Corrective justice and State duty to give reparations to victims	To recognize and undo harm and restore the persons to their previous situation	Victims	Backward looking because the main purpose is to erase the harm done

Figure 2. ‘Distinctions between reparations and social services’

The importance of stressing these differences comes from the following fact: Governments, sometimes in good faith but in other occasions in a more suspicious manner, present the provision of social services to poor victims as a kind of reparation. One example was a legal norm in Colombia (art. 47 of Law 975) that established that social services provided by the Government to victims should be considered part of the reparation due to those victims. The effect of that norm was to erode the right of poor victims to claim reparation, because the Government could answer that they had already received it, in the form of social services. But, as we have already explained, that is not really a form of reparation because poor people have the right to these social services as citizens, not as victims²⁶.

It is essential to stress the differences between reparations and social services, in order to preserve the specific rights of victims; It is nevertheless equally important to establish links between reparation efforts and social services programs, without dissolving their specificities, in order to face the paradox of reparation of massive gross human rights violations that we have explained before. I propose then the concept of “transformative reparations”, or reparations directed to promote democratic transformation, as an effort to articulate corrective and distributive justice in the design and implementation of reparation programs.

The concept of transformative reparations and the effort to articulate corrective and distributive justice

The concept of “transformative reparation”, that we have proposed in DeJuSticia, rests on a very simple idea. It is an effort to harmonize the duty to repair victims in transitional contexts of “well disorganized societies” with considerations of distributive justice. It is then an effort to articulate the dominant idea of reparations, that in current legal theory is backward looking and grounded in corrective justice, with the concept of distributive justice, that is present and forward looking and takes into consideration current needs of the population. This concept is based on two main ideas, one related with the purpose we should give to reparations in this situation, and secondly with the scope reparation programs should have. I will proceed then to elaborate more on both aspects.

The purpose of transformative reparations

The first tenet of transformative reparations is this: the purpose of reparations of massive human rights violations in unequal societies should not be to restore poor victims to their previous situation of poverty and discrimination, but to change or “transform” these circumstances in which they lived, and that could have been one of the roots of conflict and that anyway are in themselves unjust. In that sense, reparations in a transitional context are an instrument to come to terms with an injustice that took place in the past, but are also a means for a better future; we should see them as a modest but non negligible opportunity to move towards a more just society. That is why we speak about transformative reparations. The reason to defend this transformative purpose of reparations in that context, instead of the aim of restitution, dominant in legal doctrine, is that we are making efforts to correct past harms but in an unjust society, with deep inequalities and widespread poverty.

The purpose of restitution is legitimate when society has in a certain way²⁷ solved the problem of distributive justice and has a fair division of benefits and burdens among all citizens; in that kind of society, if A commits a crime against B, then it is natural to think that A should be forced to repair B, with the aim to restore the position in which B was before the crime occurred. In that sense, in well ordered societies, corrective justice “comes into operation when the scheme created by distributive justice has been infringed”²⁸; reparations or punishment are then a way to restore the enjoyment of the rights; they are “designed to maintain the system which distributive justice has created”²⁹.

The purpose of restitution seems then adequate when there is a society that is reasonably just in distributive terms; but this purpose becomes unacceptable in extremely unequal societies, especially if you are going to repair poor victims, at least for the following two

reasons: first, restitution would preserve some of the conditions of poverty, social exclusion and discrimination that made many of the victims vulnerable to gross human rights violations; vulnerability would persist and that is contrary to the guarantees of non repetition, to which victims are also entitled. Secondly, even if it is not clear that these conditions of poverty and discrimination would become sources of new violations, it is nevertheless a duty of the States to supersede them, because they are contrary to principles of distributive justice and hinder the fulfillment of economic, social and cultural rights of victims.

For all those reasons, reparations in transitional contexts should be seen not only as way to fix a problem of the past; they should be conceived as an instrument to promote a democratic transformation and to attain better conditions of distributive justice for all. This approach of reparations represents a rebuttal of some of the critics made to reparation policies in the sense that they are too much focused in the past; as we have seen, transformative reparations are at the same time backward and forward looking³⁰. They of course look at the past, because the truth about victimization has to be revealed and acknowledged; patterns of victimization and the magnitude of the harm done by perpetrators must be established; memory of this terrible past should be preserved; and the suffering of victims should be redressed; but the aim of all these efforts is not to come back to the past; on the contrary, the idea is, as a title of a well-known movie, to go back to the ... future³¹.

Reparations, in this transformative approach, are then part of an effort of democratic transformation; in this sense, reparation programs should be conceived as an inclusive political project³², especially aimed to include victims in the new social order, by recognizing an alleviating their past suffering and by offering them possibilities of a decent life.

The scope of transformative reparations

The second tenet of our proposal of transformative reparations is the following: the scope of reparation programs must of course be grounded on corrective justice, because they have to address the suffering of victims, but they should also respond to considerations of distributive justice. This means that the duty to give full reparation to a victim should be considered, in line with current developments in legal theory about the structure of norms³³, as a principle or a prima facie obligation, but not as a strict rule or a definitive obligation. In that sense, the right of victims to full reparation exists and States should make all efforts to satisfy it; but this obligation can be outweighed in certain circumstances by considerations of distributive justice. Let me explain this point.

Corrective and distributive justice have different foundations, as we know since Aristotle; it is possible then that they may not be compatible in some cases³⁴. In a stylized form, it is possible to establish three possible relations between corrective and distributive justice in view of a wrongful act made by A against B.³⁵ In case I, full reparation of the harm will have negative consequences in terms of distributive justice; in case II, full reparation will be beneficial for distributive justice, whereas, in case III, the consequences of reparation will be neutral for distributive justice. If we think of the State duty to repair victims as a principle or a prima facie obligation, then cases II and III are clear; the victims should be repaired. On the contrary, case I is controversial; reparations in this case could be limited, or even put aside, if their negative impact on distributive justice is too severe.

Transformative reparations: a reconstructive concept

This presentation of the concept of transformative reparations shows that it is not at all a new idea; in a certain sense, many old and new reparation programs and many old and new theoretical elaborations on the subject, endorse this notion, at least in an implicit form. Let me give three examples: First, reparation programs after World War II in France and Norway excluded from compensation the loss of "sumptuary" elements, as jewelry, because the purpose was to assist survivors in the reconstruction of the countries and not to rebuild past fortunes³⁶. Second, recently, the "Nairobi Declaration on Women's and Girl's Right to a Remedy and Reparation" ³⁷, made during a meeting in March 2007 by women's rights advocates and activists from all over the world, in a very fortunate language, states that "reparations must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women's and girl's lives". Third, it is accepted by many legal scholars, some tribunals like the Inter-American Human Rights Court, and soft law documents, as the "UN 2005 guidelines", that the guarantee of non-repetition is part of the full reparation due to victims. As we can see, the Norwegian and French reparation programs limited the scope of benefits because of concerns of distributive justice, whereas the Nairobi Declaration assumes a transformative purpose for reparations. Finally, the incorporation of the guarantee of non-repetition as a component of reparations clearly goes beyond the notion of restitution; these non-repetition measures usually do not aim to restore victims to the situation to which they were before the crime occurred; on the contrary, they aim to some kind of institutional reforms, that is, some forms of democratic transformation.

Moreover, the previous reference to the "Nairobi Declaration" shows that the concept of transformative reparations fits clearly at least with one important political and academic trend in this area: the differential approaches on reparations and especially the very dynamic development of a gender perspective³⁸. Scholars that have adopted this approach stress the importance to deal with the violence women suffer disproportionately in almost all armed conflicts but they too underline that reparations should also aim to surmount the traditional discrimination of women in societies. In a sense, according to these approaches, the purpose of a gender sensitive reparation policy should be the overcoming of the double exclusion women go through in an armed conflict³⁹: the ordinary discrimination they endure in their normal life and the discrimination and victimization they experience in the conflict and even in the reparation programs, that for a long time have failed to recognize their suffering.

In that context, with the notion of "transformative reparations", we are not proposing a totally novel approach to reparations; we have just wanted to reconstruct concerns and ideas that have already been present in some of the best decisions in the designing of reparation programs and in the best theoretical reflections about these practices. We have tried simply to reconstruct, a little more and in an explicit way, the links between corrective and distributive justice, in order to propose a framework of reparations that is at the same time backward and forward oriented and that might be able to face in a better way the paradoxes of reparation of massive gross human rights violations.

In that sense, the concept of transformative reparations implies, for a State in a transitional

context, legal and ethical duties that are at the same time stronger and weaker than those linked with the usual ideal of integral reparation. State duties are in a sense weaker in the transformative reparation approach; this framework accepts that, because of distributive concerns, not all victims can or should receive integral reparation. At the same time, this concept implies stronger duties to authorities because its aim is to provide a transformative role to reparations.

Let me illustrate this idea with the problem of restitution of land and property to internally displaced persons. A transformative perspective could prioritize as main beneficiaries of restitution or compensation of property small farmers or indigenous communities and exclude from full restitution rich farmers; in that sense, this approach is weaker than an integral reparation program. But at the same time, a transformative perspective of land restitution could see this process as a first step for a deeper land reform if the distribution of property in rural areas is very unequal, as is usually the case in Latin-America. In that sense it is more than an integral restitution effort.

Nevertheless, it is important to stress that we are still talking about a reparation program because the basic entitlement for persons to receive benefits is the fact that they were victims of gross human rights violations, even if this fact does not qualify them immediately to receive compensation in proportion to the harm received; considerations of distributive justice can limit the compensation for a specific person or even exclude some groups as beneficiaries of a program of reparations. Besides, the essential purpose is still to redress or at least alleviate the suffering of victims, survivors and their relatives, recognize the unjust harm they had to endure and make all efforts to restore their dignity. But, because of the concerns of distributive justice, the proposal is that policymakers and civil society should endeavor to “craft reparation programs in a way that provides redress for victims while helping to transform inequalities and create a more just society.”⁴⁰

Last but not least, this transformative approach can be instrumental in establishing linkages between social services, development policies and reparation programs, without confusing them, because it stresses the need of coherence between state policies to alleviate poverty and reduce inequalities and the reparation efforts for victims. The reason is clear: it is obvious that a reparation program cannot have a transformative purpose if its logic is contrary to the global strategies of development of the State or to its poverty reduction policies.

One caveat is necessary. I am not proposing that reparation programs should be substituted by development policies because that, as I explained before in this lecture, would erode, if not totally destroy, the specific right of victims to get reparation. I am just claiming that a transformative approach to reparation would stimulate, or even force, policymakers to find positive articulations between reparation programs, poverty reduction policies and development strategies.

This enhanced coherence of State policy is very important because it makes reparation programs more sustainable and increases their legitimacy. For instance, Rodrig Williams has studied four national efforts of property restitution (Czech Republic, Guatemala, Bosnia and South Africa). He concludes that one of the main lessons of this comparative analysis is that property restitution programs work better if they are designed in a way that they preserve their special features as a reparation program, but at the same time complement and

reinforce the broader development strategies of the State⁴¹. A transformative approach of reparations tackles exactly this issue.

Pablo De Greiff has made a more general analysis of the desirable traits that a reparation program should have in order to achieve satisfactory degrees of legitimacy and justice. He has rightly stressed the importance of integrity or coherence of these policies in two aspects⁴²: reparation programs should be “internally” coherent, in the sense that the different benefits or components of the plan (material reparations and symbolic ones, individual and collective, etc) support one another; and the program should have also “external” coherence, which is the requirement that reparations should be complementary to other transitional mechanisms, as criminal justice or truth telling. For instance, according to this author, material benefits for victims but without truth telling and without serious efforts to hold accountable perpetrators “can be seen by beneficiaries as the attempt on the part of the state to buy silence or acquiescence of victims and their families, turning the benefits into “blood money”.⁴³”

I agree with De Greiff’s analyses about the importance of internal and external coherence to give legitimacy to a reparation program; what a transformative approach can contribute to this analysis is the idea that reparation programs should have also what we can call an “enlarged external coherence”, in this sense: States should make a deliberate effort to harmonize reparation efforts with poverty reduction policies and development strategies.

The concept of transformative reparation in action

Once I have presented the meaning and principal features of the concept of transformative reparation, let me descend from the heaven of pure legal concepts to reality, in order to test the practical potential of this approach. I will try to illustrate how this concept of transformative reparation can be useful for the difficult choices policymakers and human rights activists face when discussing and designing reparation programs.

Without trying to be exhaustive, I think that the idea of transformative reparations is useful at least in the following areas⁴⁴: i) the selection of beneficiaries, ii) the choice of benefits, iii) the design of procedures and the iv) articulation of reparation efforts with the provision of social and welfare services.

One of the most difficult choices a reparation program has to make is the selection of beneficiaries. If we have only a corrective perspective, then the main criteria for selection would be the gravity of the human right violation and the magnitude of the harm done to the victim. These factors are obviously relevant; but a transformative approach would take into account not only past suffering but also present needs of potential beneficiaries. This criterion can justify to prioritize for significant material reparations people that live in the most vulnerable conditions and to minimize this sort of material reparations for affluent victims, even if these persons should receive also recognition for their suffering and significant symbolic reparation. The choice made by Norwegian and French reparation programs to exclude from compensation the loss of “sumptuary” elements is a good development of this idea. But we could also see as an expression of this idea the proposal of the Timor Leste’s Commission for Reception, Truth and Reconciliation to establish a priority for some victims to

receive material reparations, because the choice of the first beneficiaries was not based in the magnitude of the harm suffered by the victims but in a gender perspective, the present needs of the persons and the possibility of empowerment of vulnerable groups. Children, widows, single mothers and survivors of sexual violence were prioritized⁴⁵.

A second aspect in which a transformative approach can make a difference is in the designing and selection of benefits: benefits that empower vulnerable people and reduce inequalities should be preferred. For the same reasons, benefits that reaffirm discriminatory stereotypes and practices, or accentuate inequalities, should be avoided, even if these benefits seem adequate for full restitution. For instance, the decision of some reparation programs to limit compensation benefits of murder or disappearances to a certain amount of money, no matter if the victim was a poor person or a high income individual, could be seen as an expression of this ideal⁴⁶. In some countries, there are still laws that forbid women to own land. In that case, as Murdell points out correctly, a focus on land restitution, without the previous modification of these laws, would be discriminatory against women and would reinforce existing inequalities⁴⁷.

A third facet in which the concept of transformative reparation can play an important role is the procedure. The mechanisms for the adoption of the program and its implementation should be seen as opportunities to reduce discrimination, alleviate property and empower the most vulnerable victims, by adequate participatory decision making.

An interesting experience in this aspect is the collective reparation program set out in Peru⁴⁸. According to the recommendations and findings of the Truth Commission, some 900 peasant villages severely victimized during the armed conflict were chosen to receive a form of collective reparation. The idea is that each village will receive a same amount of money (some 33.000 dollars) and it is up to the member of the peasant community to decide in what kind of project they will use the money. These decisions have been taken in a participatory form and that empowers these communities; this is obviously a positive development. Nevertheless, some evaluations have shown that usually the leaders of these communities are mainly men; women are excluded from this participatory process, with the risk of reinforcing their discrimination within the peasant community. That is why these processes should be more gender balanced⁴⁹.

The analysis developed in the last paragraphs reinforces the centrality that differential approaches, especially a gender perspective, should have in the designing and implementation of reparation programs if we really want to give them a transformative dimension.

Finally, a transformative approach would stress the need to articulate social services with reparations, in a double sense. First, the logic and dynamic of reparation programs should be compatible with the overall development strategy of Government, as mentioned before in this lecture. Second, in some specific circumstances, it would be acceptable to use social or welfare services as reparation. But it is necessary to give to this kind of social services an authentic reparatory meaning. This might be achieved by different procedures: for instance, if you link some social services with profound symbolic gestures of acknowledgement of gross human rights services; or if you justify affirmative action for victims in relation to some social services as a way to give some reparation to these victims.

These few concrete examples show that the adoption of a transformative approach to reparations can have important –and I would argue- positive consequences in the designing and implementation of reparation programs in transitional contexts.

Conclusion

In this lecture, I have proposed the concept of transformative reparations as an approach that could be useful to deal with the paradox that reparation programs face in a transitional context, after large scale human rights violations were committed in an unequal society with widespread poverty. This concept is an effort to harmonize, on one hand, corrective with distributive justice and, on the other hand, the State duty to repair victims of egregious crimes with the State duty to implement economic, social and cultural rights. I have shown also that this concept has a practical utility; it might be helpful in the debate about the tough decisions that have to be taken when designing and implementing a fair reparation program. It can be a useful and productive concept.

Nevertheless, I am aware that this idea of transformative reparations is controversial and might be strongly criticized. In previous discussions of this concept with some colleagues, there were usually five concerns: i) some argue that it is a useless concept, because the transformative purpose is incorporated in the guarantee of non-repetition that is already a component of the right to reparations; on the contrary, ii) other critics argue in the opposite direction: that this idea is contrary to the right of reparations as it has been recognized in current International Law. Other scholars iii) fear that this transformative concept would weaken the specific right of victims to reparations, because it would legitimize limitations of benefits and exclusion of beneficiaries; on the contrary, iv) other critics attack the transformative purpose as a too ambitious one that would condemn reparation programs to failure; they are skeptic of the “effort to turn a program of reparations into the means of solving structural problems of poverty and inequality”⁵⁰ Finally, v) other critics condemn the notion as inconsistent, arguing that you cannot build an institution with two different, and in some was incompatible, principles of justice.

I understand these critics; they are important but they can be answered. Let me do it in a very succinct manner. A transformative approach to reparations is not the same to the guarantees of non-repetition; it aims to overcome some forms of inequality and poverty because they are unjust, even if they are not factors that would generate new cycles of violence. It is true that the concept of transformative reparations is in a certain way contrary to the mainstream legal doctrines about reparations, but it is also a possible and reasonable interpretation of the current international legal standards⁵¹. A transformative concept, far from weakening the right of victims to reparation, makes it more meaningful, because it shows that compensation of victims is compatible with the pursuit of a more just society for all. Besides, this transformative vision does not overload reparation programs with unattainable goals. I do not pretend that reparations are the best way to address structural inequalities in society; the proposal is much more humble: reparation should be seen as a modest but nonetheless important instrument to deepen democracy and improve distributive justice. Finally, the use of different principles of justice (corrective and distributive) is admissible, because they play different and compatible roles; besides, it is not at all unusual that a legal

and political institution is grounded on different principles of justice; for instance, some of the best legal scholars have argued that the structure of the criminal system results from a combination of a utilitarian conception and a retributionist vision of punishment.⁵²

The concept of transformative reparations can be, in spite of its limitations, a useful tool in the difficult battle in favor of human dignity in societies like Colombia, with millions of victims of egregious crimes, but also with millions of persons that face extremely difficult material conditions and strive each day to live with dignity. It is a framework that tries to be sensitive to the needs of those who have been humiliated and offended by terrible crimes, but also of those whose dignity and freedom are critically impaired because of the extreme poverty in which they live. The notion of transformative reparation is in that sense an effort to take seriously in a transitional context the principle of the interdependence of civil and political rights with economical, social and cultural rights, in order to achieve this beautiful aspiration of the Universal Declaration of Human Rights: the “advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want”.

This principle has been incorporated in some treaties, like the American Convention on Human Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the Rome Statute of the International Criminal Court; it has too been recognized by important international tribunals, like the Inter-American Human Rights Court in several decisions and has also been stated explicitly in important documents that are at least soft law in this area, like the “Basic principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and serious violations of International Humanitarian Law” recently approved by the United Nations General Assembly in December 2005 (for now on, the “UN 2005 Guidelines”) . For good summaries of the evolution of International Law related to reparations of gross human rights violations, see Falk, Richard (2006) “Reparations, International Law and Global Justice: A New Frontier” in De Greiff,, Pablo (ed.), *The Handbook of Reparations* , Oxford University Press. pp 428 to 503. See also Buyse, Antoine Christian (2007) *Post-Conflict Housing Restitution. The European Human Rights Perspective with a Case Study on Bosnia Herzegovina* . Leiden: Intersentia, chapter 5, pp 113 to 137. The evolution in the Inter-American Court of Human Rights has been remarkable. See Pasqualucci, Jo M (2003) *The practice and procedure of the Inter-American Court* . Cambridge University Press, chapter 5, pp 230 a 290. See also Arturo Carrillo (2006) “Justice in context: The relevance of Inter –American Human Rights Law and practice to repairing the past” in Pablo De Greiff (ed.), *The Handbook of Reparations* , Oxford University Press. And also Cassel, Douglas (2005). “The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights”, in De Feyter, Koen. Parmentier, Stephan . Bossuyt, Mark and Lemmens, Paul (eds.) *Out of The Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations*, Antwerp/Oxford: Intersentia, pp. 191-223.

References

1. I am aware that there are important legal differences between human rights violations and breaches of international humanitarian law. I have even written a paper to show the implications of these differences in relation to the legal responsibility or liability

of States and non state armed organizations. (See Rodrigo Uprimny (1996) *Algunas reflexiones sobre la responsabilidad por la violación de los derechos humanos en la Constitución* en Hector Pena et al. *La responsabilidad en derechos humanos* . Bogotá: Universidad Nacional). Nevertheless, in this presentation, I will use the expression human rights violations to make reference to both kinds of violations because it simplifies the language and does not have serious implications in my argument.

2. For a very insightful analysis of the same problem, see De Greiff, Pablo (2006) "Justice and Reparations" in Pablo De Greiff (ed.), *The Handbook of Reparations* , Oxford University Press. These analyses have had deep influence in my own approach.
3. In a similar way, Michael Freeman says: "There can be a tension between reparative and distributive justice, because backward-looking policies may weaken society's capacity to build a more just future. Given limited resources the demands of distributive justice may place some constraints on reparation. Yet reparative justice may be right in itself, and might contribute to a more stable and just future" (Freeman, Michael (2006) "Back to the future: the historical dimension of liberal justice" in Du Plessis, Max, Pete, Stephen. *Repairing the Past? International Perspectives on Reparation for Gross Human Rights Abuses* . Antwerpen: Intersentia, p 51). See also from this author: Freeman, Michael (2008) "Historical Injustice and Liberal Political Theory" in Gibney Mark et al (Eds) *The Age of Apology* . Philadelphia: University of Pennsylvania Press, pp 45 to 60. See also Kalmanovitz, Pablo "Corrective Justice vs. Social Justice in the aftermath of war", presentation in the seminar on " Land Reform and Distributive Justice in the Settlement of Internal Armed Conflicts" , Bogotá, June 2009. (Accessed in July 2009): www.prio.no/FICJC/Forumactivities/Land-reform-and-distributive-justice-in-the-settlement-of-internal-armed-conflicts/
4. For a presentation of these debates, see Díaz, Catalina. Sánchez, Camilo and Uprimny Rodrigo (Eds) (2009) *Reparar en Colombia. Los dilemas en contextos de conflicto, pobreza y exclusión* , Bogotá ICTJ, Unión Europea, DeJusticia.
5. See: Uprimny, Rodrigo and Saffon, María Paula " Reparaciones transformadoras, justicia distributiva y profundización democrática" in Catalina Díaz, Nelson Camilo Sánchez, Rodrigo Uprimny (eds.), *Op-cit* ,pp. 31-70. See also Saffon, María Paula and Uprimny, Rodrigo " El potencial transformador de las reparaciones Propuesta de una perspectiva alternativa de reparaciones para la población desplazada en Colombia", en CODHES (ed.), *Desplazamiento Forzado. ¿Hasta cuándo un Estado de Cosas Inconstitucional?*, Antropos-CODHES, 2009, Tomo I. For a gender perspective of the idea of transformative reparation, see Guzman, Diana (2009) "Reparaciones con enfoque de género: el potencial para transformar la discriminación y la exclusion" in Mantilla, Julissa et al. *Justicia desigual? Género y derechos de las víctimas en Colombia* . Bogotá: Unifem. For a transformative approach to the problema of land restitution in Colombia, see Sanchez, Camilo, Uprimny, Rodrigo (2009) *Propuestas para una restitución de tierras transformadora*. Bogotá: mimeo ICTJ, DeJusticia (unpublished work)
6. One clarification about the scope of my purpose is important. My lecture will focus "only" on the conundrum of reparation of large-scale gross human rights violations that are "recent". I am speaking about crimes that took place no more than some decades ago.

Victims, survivors, perpetrators and their relatives are still alive. I exclude the discussion of "historical injustices", like Slave Trade. The importance of this debate is obvious and I support some of the claims for reparation of these historical injustices, but this discussion has some clear differences with the one I am dealing with in this lecture, at least because direct perpetrators and victims of this historical injustices, like Slave Trade, have died long time ago. I am dealing with a problem of "transitional justice"; reparations for slavery are a problem of "intergenerational justice". For the distinction of these concepts, see Steinberg, Jonathan (2002), "Reflections on Intergenerational Justice," in *The Legacy of Abuse: Confronting the Past, Facing the Future*. The Aspen Institute. For a discussion of reparation for slavery, see: Brooks, Roy (2006) "Redress for Slavery, the African-American Struggle" in Du Plessis, Max, Pete, Stephen. *Repairing the Past? International Perspectives on Reparation for Gross Human Rights Abuses*. Antwerpen: Intersentia, pp 297 to 313. For this discussion in Colombia, see Mosquera Rosero-Labbé, Claudia (2007) "Reparaciones para negros, afrocolombianos y raizales como rescatados de la Trata Negra Transatlántica y desterrados de la guerra en Colombia" in *Afro-Reparaciones: Memorias de la esclavitud y justicia reparativa para negros, afrocolombianos y raizales*. Bogotá : Universidad Nacional de Colombia.

7. We can find several presentations of this idea. For instance, according to the Inter-American Human Rights Court, "reparation of the harm caused by the infringement of an international obligation requires, whenever it is possible, full restitution (*restitutio in integrum*), which consists in the reestablishment of the situation previous to the violation" (Case *Bulacio vs Argentina*, Judgment of September 18, 2003, par 72). Legal scholars agree with this idea: see for instance Hector Faúndez Ledesma. (2008) *The Interamerican System for the Protection of Human Rights. Institutions and procedural aspects* (3 Ed), San José, p 759. See also Pasqualucci, Jo. *Op-cit*, p 239.
8. See for instance Hamber, Brandon: "Repairing the Irreparable: Dealing with double-binds of making reparations for crimes of the past", Paper presented to the African Studies Association of the UK, London, 14-16 September 1998, in <http://www.incore.ulst.ac.uk/publications/conference/thepast/repair.html>.
9. See Rawls, John. (1973) *A Theory of Justice*. Oxford, Oxford University Press, 1973, párr. 69.
10. This point has been stressed by Richard Goldstone. See his prologue to Minow, Martha (1998). *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*. Beacon Press.
11. See De Greiff, Pablo. (2004) "Reparations Efforts in International Perspectives: What Compensation Contributes to the Achievement of Imperfect Justice" in Erix Doxtader, Charles Villa-Vicencio (Ed) *To repair the irreparable: Reparations and Reconstruction in South Africa*, Claremont: Dave Philip,
12. I think nevertheless that there are compelling arguments in favor of the thesis that at least inequality has strong links with violence. See for instance Gutiérrez Sanín, Francisco (2001) " Democracia. inequidad y violencia política: una precisión sobre las cuentas y los cuentos" in *Análisis Político*, Nro.43, Bogotá: IEPRI, UN.
13. See *Proceso Nacional de Verificación de los Derechos de la Población Desplazada*,

Décimo Primer Informe a la Corte Constitucional, Cuantificación y valoración de las tierras y los bienes abandonados o despojados a la población desplazada en Colombia. Bases para el desarrollo de procesos de reparación . Bogotá, January 2009.

14. See Corte Constitucional Colombiana. Auto 092 of 2008.
15. See Comisión de la Verdad y Reconciliación. 2003. Informe final . Conclusiones Generales. (Accessed in August 2009 in www.derechos.org/nizkor/peru/libros/cv/con.html#N_5_). According to their findings, 75% of victims have quechua or other indigenous languages as their mother tongue; in general population, this percentage is only 16%. This means that the if you were an indigenous person during the armed conflict, you would have a possibility about 16 times higher to be a victim than the rest of the population.
16. An example is Colombia because of the large-scale practice of kidnappings by leftist guerrillas; the main targets of this cruel strategy have been middle class and high income persons.
17. See Kalmanovitz, Pablo. Op-cit .
18. This shows that my presentation focuses on the dilemmas of massive reparation programs, that have usually an administrative nature, even if they can have some judicial oversight. I will not deal in this.
19. See Williams, Rodri (2008) "El derecho contemporáneo de restitución de propiedades dentro del contexto de la justicia transicional" in Díaz, Catalina (Ed). Reparaciones para las víctimas de la violencia política . Bogotá: ICTJ, pp 441 to 459
20. Carranza Ruben (2009) The Right to Reparations in Situation of Poverty. ICTJ briefing, presented to the Conference in the Hague in September 2009 "Fighting Impunity in Peace Building Contexts"
21. This has been one of the critics to the restitution program in the Czech Republic. According to some analyses, this policy favored mainly the economic elite that existed before the communist regime; its results in terms of distributive justice are then problematic. See Williams, Rodri (2008) Op-cit , p 426.
22. This is the proposal developed by Kalmanovitz. See Kalmanovitz, Pablo. Op-cit .
23. See Uprimny, Rodrigo and Saffon, Maria Paula. (2007) "Reparación integral, atención humanitaria y política social", Caja de Herramientas No. 124 (2007).
24. See De Greiff, Pablo. Justice... Loc-cit , p 470
25. In order to avoid this unacceptable degradation of the right of victims to reparation, DeJuSticia, in collaboration with other organizations and scholars, questioned the validity of this regulation before the Constitutional Court. We were successful because the Court ruled that this regulation was null and void (Ruling C-1199 de 2008). The Court rightly stressed that Government should avoid confusing social services that are due to all citizens with reparations that are due only to victims.
26. I use deliberately the expression "in a certain way" because no society will solve completely the problems of distributive justice; there will always be a distance between the ideal of distributive and the actual structure of society; besides, controversies about

the principles of distributive justice will remain. In this lecture, I will not discuss the different principles and theories of distributive justice; I assume, without further elaboration, that human rights law, as long as it accepts economic, social and cultural rights, has an implicit idea of distributive justice. So, whenever I make a reference to distributive justice, I am evoking this implicit conception of justice associated with the recognition of economic, social and cultural rights.

27. Lamont, W.D. "Justice: distributive or corrective" in *Philosophy. The Journal of the British Institute of Philosophy*. Vol. 16, No. 61 (Jan., 1941), p 3.
28. *Ibidem*, p 18.
29. See for instance, Torpey, J (2005). "Victims and Citizens: The Discourse of Reparation(s) at the Dawn of the New Millennium", in De Feyter, K.; Parmentier, S.; Bossuyt, M., y Lemmens, P. (eds.), *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations*. Antwerpen-Oxford:Intersentia,.
30. In a similar sense, see Freeman, Michael. *Back to the future... op-cit* . I have borrowed in this part of the lecture the suggestive title of his article. See also Mani, R. "Reparation as a Component of Transitional Justice: Pursuing 'Reparative Justice' in the Aftermath of Violent Conflict", en De Feyter, Parmentier, Bossuyt y Lemmens. *Out of the Ashes* , op. cit .
31. On the importance of conceiving reparation programs as a political project, even if not a partisan one, see De Greiff, Pablo. *Justice and reparations... Op-cit* . An also from this author: " Enfrentar el pasado: reparaciones por abusos graves a los derechos humanos", in De Gamboa, C. (ed.), *Justicia transicional: Teoría y praxis* . Bogotá, Universidad del Rosario, 2006; See also Mani, "Reparation as a Component...", op. cit.
32. For further development of this perspective, see Robert Alexy, "Sistema jurídico, principios y razón práctica", in *Derecho y razón práctica* , Fontanamara, 1993, pp. 9-22.
33. For a similar analysis, see Freeman, Michael, *Op-cit* , pp 41-42.
34. See Walt, Steven. "Eliminating Corrective Justice" , *Virginia Law Review* 92 No. 7 (2006), pp. 1311-1323.
35. See Jon Elster, *Closing the Books. Transitional Justice in Historical Perspective* . Cambridge University Press, 2004, p. 170.
36. For a presentation of this declaration, see the homepage of the "Coalition for Women's Human Rights in Conflict Situation" (www.womensrightscoalition.org)
37. See Mantilla Falcón, Julissa (2005) "Reparaciones con perspectiva de género: haciendo visible lo invisible" in *Coyuntura* , Lima, CISP, No 3; Rubio-Marin, Ruth (ed) (2006) *What Happened to the Women? Gender and Reparations for Human Rights Violations* . New York, Social Science Research Council; Guzmán, Diana (2009) "Reparación par a las mujeres víctimas de la violencia en Colombia" in Díaz, Catalina. Sánchez, Camilo and Uprimny Rodrigo (Eds) (2009) *Reparar en Colombia...* Op. cit, Other important differential approach to reparations has been the ethnic one, that usually adopts also some kind of transformative perspective. In the Colombian debate, see Salinas, Yamile (2007). "Criterios de reparación de víctimas individuales y grupos étnicos" in *Primero las víctimas*

- . Bogotá: Procuraduría General de la Nación y Agencia Canadiense para el Desarrollo Internacional.
38. See Guzmán, Diana. Op-cit, p 220.
 39. Mudell, Kelli (2009) Limitations and Opportunities of Reparations for Women's Empowerment. ICTJ briefing, presented to the Conference in the Hague in September 2009 "Fighting Impunity in Peace Building Contexts"
 40. Williams, Rodrig. Op-cit , pp 492 to 496
 41. De Greiff, Pablo. Justice and reparations... Op-cit , p 467
 42. Ibidem, p 461
 43. For similar proposals from a gender perspective, see Murdell, Kelli. Op-cit
 44. See Bolivar, Aura Patricia. (2009) "Mecanismos de reparación en perspectiva comparada" in Díaz, Catalina. Sánchez, Camilo and Uprimny Rodrigo (Eds) (2009) Reparar en Colombia... Op-cit, p 86, 92 and 110 to 112. See also Murdell, Helli. Op-cit .
 45. For instance, the Chilean compensation program adopted the method of one fixed sum, no matter the income of the victim: all families of the victims of murder or forced disappearance identified by the National Truth and Reconciliation Commission received a monthly pension of about 500 dollars. See Lira, Elizabeth (2006) "The Reparations Policy for Human Rights Violations in Chile" in De Gre iff, Pablo (Ed) The Handbook... Op-cit , p 59. On the contrary, if resources are very limited, it could be contrary to distributive justice, even if totally coherent with the corrective justice ideal of restitutio in integrum, to estimate this monetary compensations according to the income of the deceased person.
 46. Murdell, Kelli. Op-cit , p 3.
 47. Díaz, Catalina. Op-cit , p 187; Mudell, Kelli. Op-cit , p 2.
 48. De Greiff, Justice and reparations Op-cit. p 470
 49. For an analysis of this case, see Díaz, Catalina (2009) "La reparación colectiva: problemas conceptuales en perspectiva comparada" in Díaz, Catalina. Sánchez, Camilo and Uprimny Rodrigo (Eds) (2009) Reparar en Colombia... Op-cit, pp 171 to 192
 50. We have shown this compatibility in Uprimny, Rodrigo and Saffon, Maria Paula " Reparaciones transformadoras, justicia distributiva y profundización democrática" in Catalina Díaz, Nelson Camilo Sánchez, Rodrigo Uprimny (eds.), Op-cit , pp. 31-70
 51. See. Hart, Herbert L.A (1990) "Introducción a los principios de la pena" in Jerónimo Betegón y Juan Ramón De Páramo, Derecho y moral. Ensayos analíticos , Madrid: Ariel, pp. 163 y ss..

5.2 Challenges of Collective Reparations: The experience of the Inter-American Court of Human Rights *Diana Contreras-Garduño*

Collective reparations have been the most common kind of reparation awarded to victims of gross violations of human rights. Since this kind of violations implies large number of victims, it is believed that collective reparations, whose twofold goal is the restoration of the victims' dignity and the redress of communities as a whole, are the most appropriate and feasible reparations to take place. This has been supported by the adoption of several collective reparations programmes as part of transitional justice mechanisms and the reparations ordered by diverse international judicial organs when dealing gross and systematic violations of human rights law. While this kind of reparations have been welcomed globally by victims' groups and scholars due to their progressive approach, there is little clarity as to which should be the guidelines underlining their effective implementation.

This presentation examines the experience of the Inter-American Court of Human Rights (IACtHR), first international judicial body in awarding collective reparations, in two of the main challenges faced by them: the concept of these reparations and the identification of beneficiaries.

To begin with, it is important to recall that the obligation to provide reparations for wrongdoings has a long recognition under international law, but it was until early 1990's that international attention was given to reparations for gross human rights violations. By means of Van Boven's study on the basic principles and guidelines on the right to remedy for victims of gross violations of human rights and fundamental freedoms, it was established that although, "gross violations of human rights and fundamental freedoms, particularly when they have been committed on a massive scale, are by their nature irreparable" reparations are an imperative of bringing justice to victims of those crimes. In the same study, Van Boven recommended five types of reparations for victims of gross human rights violations: restitution, compensation, measures of satisfaction, rehabilitation and guarantees of non-repetition. These forms of reparations can be granted on an individual or a collective basis.

Bearing in mind Van Boven's basic principles, non-judicial and judicial bodies have opted for granting these five types of reparations for victims of gross violations of human rights in a collective basis. Some examples of it are: the Peruvian Reconciliation and Truth Commission whose final reported recommended an Integral Reparation Plan, which included collective reparations; and the Sierra Leone truth Commission's report was also recommended collective reparations.

Similarly, the Inter-American Court of Human Rights (IACtHR) has granted collective reparations in cases involving gross violations of human rights (massacres) and violations to indigenous communities. For instance, in the *Plan de Sánchez* case, the Court determined that the State of Guatemala was responsible for a massacre against a Mayan community which involved the murder of more than 250 persons. The Court granted collective reparations to the survivors of the massacre.

Under international criminal law, decisions on collective reparations for large number of victims have also precedents. The Extraordinary Chambers of the Courts of Cambodia's decision on reparations in the Case 001 against *Kaing Guek Eav alias Duch*, set up the first precedent. Most recently, the International Criminal Court's decision on reparations in the *Lubanga* case seems to follow the trend of granting collective reparations when dealing with gross human rights violations. In this decision, the Trial Chamber of the International Criminal Court (ICC) granted collective reparations to direct and indirect victims of the crimes from which *Lubanga* was found guilty. Unfortunately, questions such as how and when the identification of those victims would be conducted still remain unanswered.

Significantly, the IACtHR usually indicates a period of time and procedures to underline the identification of victims. Since the identification of victims is at the core of the implementation of any reparation programme, the experience of the IACtHR is of extreme relevance.

The IACtHR's reparations approach

But the importance and relevance of this Court regarding reparations not only lies in the guidelines for identification of victims in the context of collective reparations. This Court is well known for its progressive approach toward reparations, specifically regarding cases gross violations of human rights, which sadly, have been the common violations adjudicated by the Court since its first judgment. This is because during the 1970s and 1980s, Latin America was a home of authoritarian regimes whose repressive measures led to numberless gross violations of human rights.

But before analysing the IACtHR's approach, let me briefly introduce you with the Inter-American System for the protection of human rights. The Inter-American System is composed of a number of international human rights instruments and two principal bodies: the Inter-American Commission of Human Rights (IACmHR) and the Inter-American Court of Human Rights as established in the American Convention on Human Rights (AC). The former is an autonomous organ of the Organisation of American States (OAS), whose principal functions are the promotion of the observance of human rights in the region. The Court, on the other hand, is an autonomous judicial institution also of the OAS whose principal function is the interpretation and application of the AC through its adjudicatory and advisory function. .

Under the Inter-American System, not only the victim of a violation of a right enshrined in the AC may file a petition before the IACmHR, but a group of people or a non-governmental organisation (NGO) can do so as well. Upon receiving an individual complaint, the Commission decides on the admissibility of the complaint. If there is a decision on admissibility, the Commission would seek a friendly settlement among the parties by issuing recommendation to the state, some of which can be regarded as "reparations". If the state fails to fulfil the recommendations, the Commission may lodge a case before the IACtHR. It is worth mentioning that whenever the Court finds state responsibility, it order reparations to be made to the victims.

Based on article 63(1) of the AC: "If the Court finds that there has been a violation of a right or freedoms protected by its Convention, the Court shall rule that the injured party be ensured

the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.” The Court has developed the most progressive and victim-friendly reparations approach under international law by aiming to provide *restitutio in integrum*. This aim mirrors the first’s decision regarding reparations before the Permanent Court of Justice: Reparation for damage caused by a breach of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of re-establishing the previous situation. According to the Permanent Court of Justice when that were “not possible, the international court must order that steps be taken to guarantee the rights infringed, redress the consequences of the infringements and determine payment of indemnification as compensation for damage caused.”

The Inter-American Court of Human Rights ‘adapted’ the international obligation that States have to provide *restitutio in integrum* for any damaged done by the breach to an international obligation to that of the obligation of States to provide ‘integral reparations’ when found responsible for gross violations of human rights. Yet, the Court has not expressly defined what an ‘integral reparation’ is.

Nevertheless, the Court has been very unique and creative in giving meaning to integral reparations for victims of gross violations of human rights. For instance, the in the *Serrano Cruz’s* case. This is a case that deals with the forced disappearances of two children during the Salvadorian civil war. In one of the many militaries operations which took place at the time, two sisters were abducted by soldiers and given up for adoption to a family in exchange of money, common military practice tolerated by the State during that time. The sister’s relatives never heard about their whereabouts after the abduction but they never gave up in the search for some information about them. After many years, this case reached the IACtHR and the Court ordered El Salvador to create a “system of genetic information that allows genetic data that can contribute to determining and clarifying the relationships and identification of the disappeared children and their next of kin to be obtained and conserved.” In addition, in the *Alboeboetoe v. Suriname* case, in which the IACtHR dealt with the extrajudicial killing of seven members of the Saramaccan Maroon boatmen by military forces, the IACtHR ordered the State to reopen a school and establish a medical dispensary. This particular measure had the purpose not only to benefit the relatives of the direct victims but rather to benefit the community as a whole, in other words, this is collective reparation.

Collective reparations have become an important development in the jurisprudence of the IACtHR, especially because the Court has granted them even when victims do not ask for them but they demonstrated the precarious conditions in which they live.

Collective Reparations

It is of the utmost importance to note that under international law, there is no single definition of collective reparations. Nor the IACtHR has attempted to give a definition through its

jurisprudence. Interestingly enough, there is little research on collective reparations and therefore, there are few scholars who have tried to provide a definition on it.

Friedrich Rosenfeld for example, defines collective reparations in this way: "collective reparations [are] the benefits conferred on collectives in order to undo the collective harm that has been caused as a consequence of a violation of international law."

Rosenfeld, further identifies four elements of collective reparations:

- 1) Benefits which can take place in a variety of different forms. These benefits encompass symbolic (public apologies, memorials) or material reparations (development programmes).
- 2) The beneficiaries are collectives or groups.
- 3) They aim at redressing a 'collective harm' which victims who 'share certain bonds, such as common cultural, religious, tribal, or ethnic roots' suffered.
- 4) The harm resulted from a violation of international law.

But this definition is not more than one scholar's understanding on this term. While collective reparations are granted more often than individual ones by international courts, the need for a single definition becomes more necessary.

The same uncertainty as to what a collective reparation is or is not can be seen in the recommendations of several TRC's. It is important to point out that despite of its conceptual uncertainty; the implementation of collective reparations in transitional justice processes has become a key element in moving forward in re-building relationships among individuals and communities.

However, most of the collective reparations recommended in those processes amount to people being granted certain social services, and those services should be granted because every human being is entitled to social, economic and cultural rights to secure a dignified and decent existence, and not because they are victims of gross human rights violations. It seems that the only difference between social or development programmes and collective reparations as understood by TRCs is their label. Without the label, it is difficult to think that victims would see those programmes as a measure of reparations. This has been one of the main pitfalls of the reparations programmes carried out in Peru as recommended by the Peruvian TRC's. Uprimny has stated that the beneficiaries of those reparations often see the reparations as 'development aid' or better protection of their economic and social rights instead of reparations as such. Along with the label, collective reparations should be accompanied by symbolic measures such as a monument or a genuine apology. Combining symbolic and collective social reparations, beneficiaries could find it easier to see the reparations as part of a justice process for past abuses.

Collective reparations, however, face more challenges than distinguishing between social programmes and the collective reparations programmes. For instance, the mere objective of reparation seems to be challenged by collective reparations as it is difficult to argue that those kinds of reparations will wipe out the harm of the victims. As explained in the second

section of this paper, reparations aim at wiping out the consequences of the human rights abuses. Unfortunately, it is clear that the harm cannot be erased. Instead, “reparations for human rights violations only provide the victims the means to attenuate their suffering, making it less unbearable, perhaps bearable.”

A crucial question arises from this complicated situation: would collective reparations such as health programmes or the improvement of infrastructure attenuate the suffering of victims of gross human rights violations? Ezequiel-Malarino has answered this question negatively. He has expressed that: “Only when putting a lot of effort, one could argue that the construction of a sewage system, a water system or improving roads, to cite a few examples, ‘repair’ the victims of a massacres.”

Nevertheless, it is fairly clear that there is no single form of reparation that would be guaranteed to reduce suffering. Would providing a sum of money directly to victims be a better measure to make their suffering more bearable?

Collective Reparations under the IACtHR

Similarly, the IACtHR has granted social programmes as part of collective reparations. For example, in the Plan de Sánchez case the Court ordered the State to develop the following programmes:

- a) study and dissemination of the Maya-Achí culture in the affected communities through the Guatemalan Academy of Mayan Languages or a similar organization;
- b) maintenance and improvement of the road systems between the said communities and the municipal capital of Rabinal;
- c) sewage system and potable water supply;
- d) supply of teaching personnel trained in intercultural and bilingual teaching for primary, secondary and comprehensive schooling in these communities, and
- e) the establishment of a health center in the village of Plan de Sánchez with adequate personnel and conditions, as well as training for the personnel of the Rabinal Municipal Health Center so that they can provide medical and psychological care to those who have been affected and who require this kind of treatment.

Likewise, in the Ituango Massacres case, the IACtHR ordered the State, among other reparations, to “implement a housing program to provide appropriate housing to the surviving victims who lost their homes and who need this.”

Similar reparations were also granted in cases dealing with indigenous communities, with the only but significant difference that in these cases, the IACtHR ordered the state to establish a fund to implement those reparations. The Court has also ordered the state to delimit, demarcate, and grant collective title over the indigenous community territory.

From the jurisprudential development in this matter, it seems clear that:

- 1) The IACtHR usually grants collective reparations to victims of gross human rights violations.

- 2) Those reparations seem to meet the four elements of the definition of collective reparations given by Rosenfeld

From the IACtHR jurisprudence, one can observe that collective reparations: i) take place in different forms; ii) victims of gross human rights violations are implicitly seen as a group; iii) aim to 'repair' a collective harm. Moreover, iv) there is causal link between the collective harm and the State's responsibility.

Yet, the IACtHR has neither explicitly recognised victims of mass crimes as a group (unless they are indigenous communities), nor in all cases acknowledged the existence of 'collective harm' when awarding collective reparations. This seems to suggest that it is not necessary to suffer 'collective harm' to be accorded collective reparations; therefore, one can well wonder how the IACtHR defines who the beneficiaries of collective reparations are and whether there is any difference between the concept of victim and beneficiary.

The Definition of Victim under the IACtHR

Firstly, it should be mentioned that under international law there is no a uniform definition of the concept of victim, however, victim's entitlements have been recognized as fundamental rights through jurisprudential developments from regional human rights and UN human rights bodies.

The American Convention on Human Rights does not enshrine a concept of victim nevertheless; the IACtHR has defined the term 'victim' throughout its jurisprudence. In this light, it is possible to affirm that for the IACtHR, 'victim' is any natural person or group (when proved a cultural identity link among their members) whose rights were violated, and it includes both direct and indirect victims.

It is nevertheless important to note that article 63 of the American Convention entitled the 'injured party' to obtain reparations when their rights or freedoms were violated. Since it is universally recognised that victims are entitled to obtain reparations and under the AC all 'injured parties' are entitled to obtain reparations, we could assume that an 'injured party' is a synonym of 'victim'. This is supported by the jurisprudence of the Court as well as diverse Judge's separate opinions.

That let us to conclude that all victims or injured parties are to be the beneficiaries of reparations. At first glance, this seems clear and easy approach to apply to all cases. However, when it comes the issue of identification of collective reparations this can be anything but a clear guideline.

Defining Beneficiaries of Collective Reparations: IACtHR

The founding document of the IACtHR does not provide any guidelines as to how the identification of 'beneficiaries' should be conducted. Yet, the IACtHR 'created' a rule that established that the Commission is obliged to identify the 'alleged victims' of a given case; in

other words, the potential beneficiaries of reparations. It further established that victims “must be properly identified and named in the application that the Inter-American Commission files with this Court”. Thus, if the Commission does not succeed in identifying all victims at that very early stage, they cannot include more victims in later stages. This approach has also been applied to cases related to gross violations of human rights. Unfortunately, there is not legal foundation which justifies the Court’s position to delegate the Commission the duty to identify victims. But one could understand the practical benefits for the Court to pass this responsibility to another body.

Significantly, the Court has not applied its jurisprudential creation regarding the duty to identify victims equally to all cases. The Court has also accepted some exceptions. It has agreed to include victims in a later stage when dealing with cases involving large numbers of victims because of the complexity of the nature of the cases. In addition, the Court has also ‘sometimes’ been flexible in including victims in later stages in ‘some cases’ that do not deal with gross violations of human rights. Yet, the Court has not been so coherent as to elaborate criteria in which it can accept the inclusion of victims during the proceedings before it, when those victims or individuals were not mentioned in the application and report of the Commission.

Although it has established that in order to become a beneficiary of reparations someone has to be identified as a victim, the IACtHR has also established, when dealing with large numbers of victims amounting to collectives or groups, that it is not possible to identify all members of those collectives or groups. Nevertheless, the IACtHR considers the collective or group as beneficiary and awards it collective reparations. Does this imply that the group was a victim? This was unclear until the Court delivered its judgment in the *Sarayaku* case, in which the Court asserted a group can be regarded as victim.

Likewise, 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” but that such identification should be done after the judgment is delivered within a fixed period of time. The Court also has stated that States need to publish an announcement in the media which communicates the State’s intention to identify the victims of a given massacre of gross violations of human rights. Those publications ‘must be made for at least three non-consecutive days and within six months of notification of [the] Judgment.’ Finally, victims could be nominated as beneficiaries for a period of two years after the notification of the judgment.

Conclusion

Pursuant to article 63 of the American Convention, the Inter-American Court of Human Rights has awarded collective reparations to victims of cases related to gross violations of human rights on a large scale. Jurisprudence of this Court shows little coherence as to the elements of a definition of collective reparations and the great challenge of how to identify beneficiaries of those reparations. Furthermore, the IACtHR has seemed to suggest that collective reparations are preferred when it is difficult to identify all victims during proceedings

before it. In this light, the Court has ordered states to identify victims of cases concerning large number of victims after the judgment has been delivered and has established a fixed period of time for such identification. This allows us to conclude that in the light of IACtHR jurisprudence, procedures for identification of beneficiaries of collective reparations, as a necessary stage for the effective implementation of collective reparations, should be flexible and that the only guideline that can be provided to states is a fixed period of time.

References

Buti A., *International Law Obligations to Provide Reparations for Human Rights Abuses*, in *Murdoch University Electronic Journal of Law* 1999 (<http://www.murdoch.edu.au/elaw/issues/v6n4/buti64.txt> online journal last accessed 1 August 2012).

Medina-Quiroga C., *The battle of human rights: gross, systematic violations and the Inter-American System*, Leiden: Martinus Nijhoff Publishers 1998.

Malarino E., '*Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de la Corte Interamericana de Derechos Humanos*', in: Grupo Latinoamericano de Estudios sobre Derecho Penal Internacional, Sistema Interamericano de Protección de los Derechos Humanos y Derecho Penal Internacional 2010-1.

Rosenfeld F., *Collective Reparations for victims of armed conflicts*, International Review of the Red Cross 2010.

International Centre for Transitional Justice, *The Rabat Report: The Concept and Challenges of Collective Reparations*, 2009.

Margarell L., *Reparations in Theory and Practice*, New York: ICTJ Reparative Justice Series, International Center for Transitional Justice 2007.

Bassiouni M.C., '*The Protection of Collective Victims in International Law*', New York Law School: Human Rights Annual 1985-2.

Roth-Arriaza, *Combating impunity: some thoughts on the way forward*, Law and Contemporary Problems, Vol. 59, No4, 1996.

Antkowiak T.M. '*Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*', Columbia Journal of Transnational Law 2008-315.

International Documents

Final Report, Theo Van Boven, UN Doc. E/CN.4/Sub.2/1993/, para. 131.

International Center for Transitional Justice (ICTJ) Sierra Leone Submission to the Universal Periodic Review of the UN Human Rights Council 11th Session: May 2011. 2011.

Organization of American States, *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 1969. (<http://www.unhcr.org/refworld/docid/3ae6b36510.html> online journal last accessed 06 February 2013).

Rules of Procedure of the Inter-American Commission on Human Rights (Available at: <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp> last accessed 20 February 2013).

UN Sub-Commission on the Promotion and Protection of Human Rights, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms : final report / submitted by Theo van Boven, Special Rapporteur*. 1993. E/CN.4/Sub.2/1993/8 (<http://www.unhcr.org/refworld/docid/3b00f4400.html> online journal last accessed 06 February 2013).

Cases

ECtHR., Kurt v. Turkey, Judgment of 25 May 1998, Reports of Judgments and Decisions 1998.

IACtHR, Aloeboetoe et al. v. Suriname, Reparations and Costs, Judgment of 10 September 1993, Series C No. 15.

IACtHR, Bulacio v. Argentina, Merits, Reparations and Costs, Judgment of 18 September 2003, Series C No. 100, Judge Cançado Trindade's separate opinion.

IACtHR, Juvenile Reeducation Institute v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment of 2 September 2004, Series C No. 112.

IACtHR, Ituango Massacres v. Colombia, Preliminary Objection, Merits, Reparations and Costs, Judgment of 1 July 2006, Series C No. 148.

IACtHR, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment of 31 August 2001, Series C No. 79.

IACtHR, Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment of 15 June 2005, Series C No. 124.

IACtHR, Plan de Sánchez Massacre v. Guatemala, Reparations and Costs, Judgment of November 19, 2004, Series C No.

IACtHR, Reverón-Trujillo v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment of 30 June 2009, Series C No. 197.

IACtHR, Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment of 29 March 2006, Series C No.

IACtHR, Saramaka People. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 28 November 2007 Series C No. 172.

IACtHR, Serrano-Cruz Sisters v. El Salvador, Merits, Reparations and Costs, Judgment of 1 March 2005, Series C No. 120.

IACtHR, Velásquez-Rodríguez v. Honduras, Reparations and Costs, Judgment of 21 July 1989, Series C No. 7, § 26.

IACtHR, Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment of 17 June 2005, Series C No. 125.

ICC, Lubanga Case, ICC-01/04-01/06-2842, 14 March, 2012.

VI. Rule of Law through Transitional Justice vs. Impact of Transitional Justice on the Rule of Law

6.1 The overlapping views of Rule of Law and Transitional Justice

Colm Campbell

The topic of this panel suggests two possible ways of looking at the interaction of transitional justice and the rule of law in post-conflict or post-authoritarian environments: (1) in one the operation of transitional justice itself serves to create or to recreate the rule of law. (2) In the other, the rule of law is constructed by the employment of a variety of techniques and strategies. One of these is transitional justice, which may on occasion have perhaps an ambivalent relationship with the rule of law – hence the 'impact of transitional justice on the rule of law'.

This paper examines which of these provides the better account of the relationship between transitional justice and the rule of law in post-authoritarian or post-conflict situations. Reflecting the practical focus of this conference, particular attention will be paid to UN material germane to the topic, especially to two reports (2004 and 2011) of the UN Secretary General on transitional justice and the rule of law (UN Security Council 2004, UN Security Council 2011). These provide some key reference points guiding international human rights policy. Some areas of the report are aimed at situations of direct UN intervention, others with the more general interaction of the rule of law and transitional justice. As the term is used in the Reports, transitional justice 'comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large scale past abuses, or in order to achieve accountability, serve justice and achieve reconciliation' (UN Security Council 2004, para. 8). These include judicial mechanisms, reparations, truth seeking, institutional reform, and vetting and dismissals.

As regards the 'rule of law', the Reports describe how this requires that all entities (including the state) are to be accountable to laws. These laws are to be publicly promulgated, and equally enforced. Alleged breaches of the law are to be independently adjudicated in accordance with the separation of powers (executive, legislative and judicial). There is to

be equality before the law and accountability to it. Arbitrariness in the operation of the law is to be avoided - rather there is to be legal certainty with the result that people can plan their affairs in accordance with the law. There is to be procedural and legal transparency, and the laws are to be in accordance with international human rights norms and standards. The challenges of post-conflict legal construction may, as the Reports note, be immense, include devastated institutions, lack of institutional independence in the justice sector, lack of domestic technical legal capacity, and lack of political will. While some of these impediments to construction may be overcome relatively quickly, others clearly require some considerable time

Transitional Justice Delivering the Rule of Law?

In terms of building the rule of law, it is obvious that holding transitional justice trials in accordance with international standards will build the rule of law in the treatment of those defendants. However where trial is by an international tribunal, there is little evidence to suggest that such trials help to build domestic competence in the sphere of trials. Indeed in some cases (for instance that of reception of the operation of the International Criminal Tribunal for the Former Yugoslavia in Serbia), there may be a negative reaction. The dynamics may be different where domestic transitional justice trials are in question. Here it has been suggested that there can be knock-on effects, with trials resulting in a 'justice cascade' at home and in other states. However two points should be noted about such claims. The first is that domestically the trials in question (in Latin America) occurred some time after the original transition. Because of the passage of time in such 'late' justice initiatives, the democratic environment could be expected to have led to improvements in the rule of law. Hence it may be that these rule of law improvements contribute to the late justice rather than the other way around. A further (minor) point is that the hypothesized justice cascade describes a dynamic where late transitional justice trials spur further such trials at home and abroad. No claims are made about trials outside of the cascade. As regards other transitional justice mechanisms, some of the literature suggests a lack of clarity as to the effects of truth-finding initiatives, particular of truth commissions. Mendelhoff's survey of the rationale advanced for truth commissions demonstrated that the benefits claimed included the promotion of justice and the rule of law (Mendelhoff 2004).

But he also made a good case that the evidence in support of these claims (and of others for the efficacy of truth commissions) is frequently thin and contested.

Amnesties that do not cover torture, crimes against humanity, genocide and war crimes may not breach international law, but they may nevertheless be difficult to reconcile with the rule of law at the domestic level. A crime has been committed but is to go unpunished because of the former context (political violence and repression) and the status of the possible defendant (a state- or non-state participant in the violence). This could be viewed as either a special case of rule of law application (the crime was committed at a time when the rule of law did not apply) or as a deviation from it. Complicating matters further is the fact that in practice, many amnesties are not clearly limited to exclude international crimes (Mallinder 2008).

Even the highly juridified formula for 'trading amnesty for truth' at the South African Truth and Reconciliation Commission (SATRC) did not necessarily exclude the most serious crimes (such as torture) The SATRC literature is vast. Key contributions include Audrey R. Chapman and Hugo van der Merwe, 'Truth and Reconciliation in South Africa Did the TRC Deliver' (2008) and Antje Du Bois-Pedain, 'Transitional Amnesty in South Africa' (2007).

Intermeshing Transitional Justice and the Rule of Law

However, to say that there is limited evidence in support of a link between transitional justice and general rule of law improvements is quite different from proving that there is no link. Mendeloff's point was that claims are sometimes overblown with respect to the available evidence—leaving open the possibility that lesser order claims could be valid. Furthermore, the problem may be partly the dearth of empirical research (and limited deployment of research techniques), an issue reflected in a recent trend towards greater study of the impact of transitional justice initiatives. There may be good grounds for suggesting that reparations can help repair a wrong caused by a rule of law failure. Vetting processes, rather than purges, can be in accordance with the rule of law (i), and may be important elements in institutional transformation (UN Officer of the High Commissioner for Human Rights 2006). Truth processes may play a key role in acknowledging and uncovering truths about periods of conflict and authoritarianism (ii), and this knowledge can be regarded as a good in its own right, irrespective of the societal effects of the exercise. Likewise transitional justice trials held in accordance with international standards may mark an important symbolic break with past rule of law failures, and furthermore may make a real contribution to addressing the needs of victims. What this tends to suggest is that there are certain goals that transitional justice may be relatively successful in achieving, but to expect that of itself, it can deliver widespread rule of law reform is surely to overload the concept, setting it up for failure. This argument chimes with the Secretary General's Reports, the central theme of which is the need to integrate transitional justice and rule of law initiatives (implicitly they are viewed as distinguishable).

The Reports are careful both to sketch how rule of law concerns can be incorporated alongside those of transitional justice, and to insist that change cannot simply be imposed from the outside – there must be support for domestic reform constituencies. As the 2004 Report acknowledges 'Too often, the emphasis has been on foreign experts, foreign models and foreign-conceived solutions to the detriment of durable improvements and sustainable capacity' (UN Security Council 2004, para. 15). By contrast the recommended approach is to ensure the participation of legal professionals, Government, women, minorities and civil society.

As regards integrating elements of an overall strategy, the 2004 Report is clear that '...a piecemeal approach to the rule of law and transitional justice will not bring satisfactory results in a war-torn or atrocity-scarred nation'. Instead it suggests widespread local involvement in the generation of a single strategic plan, which is to be nationally owned and led. As regards addressing rule of law lacunae the Report suggests that establishing a national human rights commission can make a useful contribution, pointing to successes in Afghanistan, Rwanda, Colombia, Indonesia, Nepal, Sri Lanka and Uganda. Disarmament,

demobilization and reintegration processes must likewise be integrated with an overall rule of law and transitional justice plan. A further crucial issue is to ensure that the very measures designed to address the needs of vulnerable and victimized groups, do not result in their further victimization.

As regards how truth commissions are to be incorporated in the plan, the 2004 Report stressed that to be successful, the commission must have meaningful independence, and have credible criteria for commissioner selection. The report also shows an awareness of the dangers of too high expectations of such transitional justice mechanisms as truth commissions: Strong public information and communication strategies are necessary, amongst other things '*to manage public and victim expectation*' (the implicit warning being that results may be lower than expected)

On the question of vetting, the Reports draw a direct link between weeding out office-holders implicated in violations under the previous regime (specifically mentioned are the police, army, prison services and judiciary), and building the rule of law. But this is only where appropriate vetting mechanisms are put in place. These must be sensitive both to victims and to the human rights needs of those suspected of abuses. The public should be kept informed of the process, and there should be adequate procedural protection for those being vetted (the Report mentions administrative and quasi-judicial bodies and a right to appeal).

Conclusion

Overall, the Reports displays some willingness to learn from past mistakes, evident for instance in what was said above about managing victim expectations, and about the need to avoid retraumatization. There is little support for simplistic assumptions that transitional justice of itself will deliver a functioning rule of law. Rather the picture painted, is a much more complex but credible one, where transitional justice and rule of law initiatives interact, where 'one-size-fits-all' solutions are rejected, and where pitfalls abound (UN Security Council 2004, Summary).

End notes

- 1 UN Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Vetting: An Operational Framework*, 2006, HR/PUB/06/5, available at: <http://www.unhcr.org/refworld/docid/46cebcd62.html> (accessed on 12 December 2012)
- 2 Key contributions to the literature on truth commissions include Hayner, Priscilla B., *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2003), Freeman, M. *Truth Commission and Procedural Fairness* (CAMBRIDGE Cambridge University Press 2006) 400 7.

References

Chapman A.R., van der Merwe H. *Truth and Reconciliation in South Africa Did the TRC Deliver?* Philadelphia: University of Pennsylvania Press, 2008.

Du Bois-Pedan A, *Transitional Amnesty in South Africa*. Cambridge: *Cambridge University Press*, 2007.

Mallinder L., *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*. Oxford and Portland, Oregon; Hart Publishing, 2008.

Mendelhoff D., 'Truth-Seeking, Truth Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?', in *International Studies Review*, 6, 2004.

UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General*, UN Doc. S/2004/616 2004. (<http://www.unrol.org/files/2004%20report.pdf>, online report last accessed 06 February 2013).

Un Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General*, UN Doc S/2011/634, 2011. (<http://www.unrol.org/doc.aspx?d=3096> online report last accessed 13 February 2013).

UN Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Vetting: An Operational Framework*, HR/PUB/06/5, 2006. (<http://www.unhcr.org/refworld/docid/46cebcd62.html> online report last accessed 12 December 2012).

6.2 La présentation du processus d'élaboration du projet de loi sur la justice transitionnelle en Tunisie

Mouna Tabei

L'établissement et la « légalisation » de la justice transitionnelle en Tunisie semblent être de plus en plus une nécessité après les événements qui ont eu lieu ces dernières années. Une nécessité vu le flou qui entoure la situation sociopolitique du pays. En effet, l'échec des commissions d'enquête à dévoiler toutes les vérités relatives aux événements du 14 janvier 2011 et l'absence d'une réelle volonté politique pour instaurer les réformes institutionnelles ont mené à la dispersion du processus. C'est une nécessité aussi pour assurer la transition entre despotisme et démocratie en paix, ainsi que pour réaliser et mettre en place les mécanismes d'un Etat de Droit basé sur le respect des institutions et des droits humains. En réalité, la justice transitionnelle dans ce sens est un élément qui s'ajoute à d'autres pour renforcer la mise en œuvre de l'Etat de Droit dans la mesure où elle vise d'une part la garantie du non-retour aux violations des droits humains et d'autre part elle incite la reconstruction des institutions étatiques d'une manière imposant leur soumission aux lois.

En Tunisie, les débats sur la justice transitionnelle ont commencé depuis les élections de l'assemblée nationale constituante. Pour certains partis politiques, l'idée même figurait lors de la campagne électorale. Mais le processus a vu ses réelles prémises naître officiellement après la création d'un nouveau ministère chargé de la mission, à savoir le ministère des droits de l'homme et de la justice transitionnelle. C'est ainsi que l'organisation d'une journée de débat le 28 avril 2012 au sein du ministère des droits de l'homme et de la justice transitionnelle a donné lieu à la proposition de créer une commission technique pour superviser un débat national sur la justice transitionnelle. Un débat qui permettra de:

- faire une proposition et une stratégie claire du processus de la mise en œuvre de la justice transitionnelle en Tunisie.
- garantir la participation de la société civile auprès du gouvernement dans l'élaboration du processus.
- présenter un projet de loi qui traduise une régulation par le bas et permet aux citoyens et victimes d'exprimer leurs avis et leurs attentes de la justice transitionnelle.

Le processus d'élaboration du projet de la loi organique sur la justice transitionnelle en Tunisie :

Le processus d'élaboration du projet de la loi peut être considéré comme étant un processus consensuel et participatif vu la composition et les rôles qui ont été octroyés à la commission technique et au comité de rédaction.

La composition de la commission technique pour la supervision du dialogue national sur la justice transitionnelle

La commission technique a une composition hétérogène : elle regroupe des représentants de la société civile et des représentants du ministère. Elle est composée de deux représentants

du ministère des droits de l'homme et de la justice transitionnelle et de dix représentants de la société civile (2 membres du Centre EL KAWAKIBI pour les transitions démocratiques, 2 membres la Coordination nationale indépendante de la justice transitionnelle, 2 membres du Centre de Tunis pour la justice transitionnelle, 2 membres du Centre de Tunis pour les droits de l'homme et la justice transitionnelle, 2 membres du réseau tunisien de la justice transitionnelle) et un rapporteur chargé de codifier toutes les réunions de la commission.

Les rôles de la commission

Suite à sa création - qui a eu lieu le 28 mai 2012- la commission a été dotée de plusieurs missions. Ces missions doivent être accomplies dans un délai de 3 mois à partir de la date de sa constitution avec la possibilité de prolongation de 2 mois seulement. Ces missions concernent : la supervision du débat national relatif à la justice transitionnelle, l'organisation de débats sectoriels, la préparation d'un questionnaire relatif aux fondements de la justice transitionnelle, le choix des membres des commissions régionales, la programmation des formations nécessaires en matière de justice transitionnelle pour les membres des comités régionaux, la collecte de toutes les données et la préparation d'un rapport sur ses missions. La mission principale de la commission concerne, en réalité, la préparation d'un projet de loi sur la justice transitionnelle pour la Tunisie. La commission a respecté les échéances réparties à cette fin et le 28 octobre 2012 avait terminé la préparation d'un brouillon de projet de loi pour la justice transitionnelle. Pour ce faire, la commission technique a prévu des journées de débats avec les composantes de la société civile, des journées de débat dans les régions et la création d'un comité de rédaction du brouillon du projet de loi. Concernant les journées des débats ouverts avec les composantes de la société civile, la commission technique a organisé une journée de débat avec les partis politiques le 09/08/2012, une journée de débat avec les syndicats et les organisations nationales le 16/08/2012, une journée de débat avec les associations humanitaires et les associations de victimes le 25/08/2012 et une journée de débat avec les institutions chargées de l'archive le 20/09/2012. Concernant les débats régionaux, ces derniers ont eu lieu du 16 septembre 2012 au 07 octobre 2012. En effet, la commission technique a organisé 24 débats, une journée de débat par Gouvernorat. Les débats ont été effectués en collaboration avec les comités régionaux (6 comités régionaux, chaque comité est composé de 15 membres). Le comité de rédaction du brouillon du projet de la loi a été créé au sein de la commission technique et composé de 6 juristes parmi ses membres. Il s'est basé lors de son travail sur les données des travaux effectués par la commission technique et les comités régionaux et essentiellement sur les recommandations tirées des journées des débats et des débats régionaux, ainsi que les résultats de l'enquête distribuée auprès des citoyens lors des débats régionaux. De même le comité de rédaction du projet de loi a eu recours à l'examen des projets de lois proposés par certains acteurs de la société civile comme l'ordre national des avocats, l'association nationale des huissiers notaires, le parti républicain. Il a effectué aussi des rencontres avec les experts nationaux et internationaux pour discuter de la structure et de certains choix relatifs à l'institutionnalisation des mécanismes de la justice transitionnelle.

Le contenu du projet de la loi organique sur la justice transitionnelle

Le comité de rédaction du projet de la loi sur la justice transitionnelle, après l'examen des données collectées, a choisi de présenter un projet de loi organique c-à-d une loi cadre telle que prévue par l'article 24 de la loi relative à l'organisation des pouvoirs publics. Ce projet de loi contient 76 articles répartis en 2 titres, un premier titre relatif aux fondements de la justice transitionnelle et un second titre relatif à la création de la haute instance.

1. Titre premier : Aux fondements de la justice transitionnelle

Il s'agit dans ce titre d'une présentation des principes généraux de la justice transitionnelle. Le projet de la loi donne la définition des différentes étapes et mécanismes prévus pour l'établissement de cette justice. Le premier article présente une définition de la justice transitionnelle, une définition générique qui trace les buts et les mécanismes relatifs à la notion. Dans une seconde étape, le projet de la loi consacre certains articles à la recherche de la vérité et de la conservation de la mémoire nationale. Ensuite, les articles 6, 7, 8 et 9 sont consacrés à la question des poursuites. A cette fin, le projet prévoit la création de chambres judiciaires spécialisées en matière des violations graves des droits humains au sein des tribunaux. La réparation et la restitution font l'objet des articles 11, 12, 13 et 14. Le projet de la loi propose dans ce cadre une définition large des victimes dans laquelle figurent les individus, les groupes, les personnes morales et les régions qui ont été marginalisés sous l'ancien régime. Enfin, un article est consacré aux réformes institutionnelles et un article à la réconciliation.

2. Titre deux : De l'Instance de la vérité et la dignité

Ce titre englobe toutes les questions relatives à la création de « l'instance de la vérité » et la dignité. Une haute instance indépendante qui veillera à l'établissement des mécanismes de justice transitionnelle en Tunisie. Cette instance, selon le projet de loi, va travailler durant la période du 1^{er} janvier 1955 jusqu'à la date de la publication de la loi au J.O.R.T. Son mandat est limité à 4 ans renouvelable une seule fois et pour une seule année. Concernant la composition de la haute instance, le projet prévoit qu'elle contient 15 membres de différentes spécialités et il détermine les méthodes et les conditions d'éligibilité, les devoirs et obligations de ses membres. De même, il donne la possibilité à la haute instance de créer un organe exécutif composé de bureaux régionaux et de comités spécialisés. Concernant les attributions et les prérogatives de l'instance, ces dernières sont :

- prise de connaissance des dossiers de l'archive
- investigations sur les violations des droits humains
- détermination des responsabilités
- écoute des victimes
- collecte et codification des données
- création d'une base des données pour les victimes

- détermination des procédures urgentes de réparation
- proposition de réformes institutionnelles
- création d'un comité d'arbitrage et de réconciliation
- élaboration de son règlement intérieur

Le projet de loi consacre aussi certains articles relatifs au budget de cette instance, à la fin de ses travaux et à son rapport final. Après la rédaction de ce projet et avant son dépôt à l'assemblée nationale constituante pour approbation, ce projet est présenté au Conseil ministériel d'une part pour avis et aux experts des différents centres et réseaux concernés par la justice transitionnelle d'autre part pour juger des différentes modifications possibles.

VII. Governance and Rule of Law: Legal and Political Cultures in Transition Processes

7.1 Transitional Justice, civic trust and democratic institution building

Anja Mihr

Transitional justice (TJ) measures can be linked to the development of strong democratic institutions, their performance and in consequence, their quality. TJ measures are used in all types of democracies, weak and strong, demonstrating that TJ measures are seen across the board as a catalyst to enhance democratic performance with the aim of strengthening and legitimizing political institutions. In order to attain peace and societal stability through means of justice and truth within a conflict-torn society, a country's political (democratic) institutions must have a basic level of accountability, transparency and free participation of citizens. The impact of the applied TJ measures on democratization can be assessed on the level of peace, reconciliation and stability achieved in society. Ultimately, TJ measures aim to support efforts to de-legitimize the previous regime and political elite and legitimize and strengthen the new regime (Priban et al, 2003). Consequently, I focus on the parallel processes of de-legitimization and the legitimization of political institutions.

To assess the quality of democracy with respect to TJ, it is necessary to consider the main institutions and actors involved both in the process of democracy and that of TJ. The three main democratic institutions, governments (executive), the parliaments (legislative) and the courts (judiciary), are the primary units of analysis. Quality democracy is a regime that satisfies citizens' needs and that has the full backing of civil society (Morlino 2010: 213). While TJ measures can be misused, resulting in the weakened performance of democratic institutions, I will argue the possible positive impact that TJ measures can have if applied in a holistic, diverse way and over an extended period of time.

Timing and Participation

While there is no set guide on when to start the process, executive and legislative powers that are responsive to claims leverage institutional legitimacy and stability. It is also important to note that politics are often at odds with TJ measures, particularly in periods of transition.

Old elites, authoritarian traditions and bigotry dominate the political spectrum and many of the liberators have themselves committed war crimes or are responsible for human rights violations. Both “winners” and losers ought to be brought to justice in the transition period, but reality shows that “winners” are often exempt from trials and instead hold great political power (Peskin, 2005; Biddiss, 1995). Furthermore, they often use TJ measures to cleanse the country from personal opponents and political enemies, with little or no interest in setting up a holistic TJ process. We find a number of TJ mechanisms being applied in autocracies, oligarchies and full-fledged democracies with the main purpose to delegitimize the previous regime and to manifest ones own autocratic power, but not with the aim to increase the quality of democracy. Thus, we have to look closer at the specific inter-action between state institutions and citizens along with the simultaneous application of TJ tools or measures, as well as the sequencing and timing of their application, in order to compare and see the difference in outcomes. Furthermore, the quality of democracy also depends on how inclusive the process is. In this respect, Hazan points out that in conflict-driven societies, governments ought to first develop symbolic bonding systems between institutions and citizens without denying the past (Hazan 2006: 46-47).

After long periods of conflict, a traumatized and fearful society is often the driving force behind the success or the failure of TJ processes. The process can fail if the country has little experience with democracy, if the TJ measures are not carefully applied and/or the new political elite is not fully committed to perform according to the good governance principles (Kiss 2006). Additionally, one can argue that unless there is a national and popular catharsis that leads to the popular and substantial majority (approximately 70% of the population) driven desire to deal with the past, TJ measures may not lead to the desired outcome and it may be useless to even begin the process (Linz and Stepan 1996: 5; and Diamond, 1999: 68). Most post-conflict societies share this national catharsis but often, this catharsis exists for only a short period of time up to one year or less. Often, after a year, this “window of opportunity” closes long before commissions of inquiry have ended their reports or trials have started, let alone democratic institutions are in place. New violent outbreaks are, instead, often the result (Quinn 2009). The window usually opens up again when the first post-conflict generation, approximately 20 years after the end of the conflict, gains political powers, as they are the commonly the first generation free enough to set up a holistic and thorough TJ process using democratic institutions.

Potential for Transitional Justice Measures to Serve as a Catalyst

In 2006 the OHCHR in its guiding principles for TJ concluded that TJ measures are a substantial factor aiding democratization processes (UN Doc GA Resolution 60/147, 21 March 2006). The guidelines emphasize that TJ policies need to be enforced through democratic institutions, with public participation and should not be applied against the willpower of citizens. Other international guidelines and policies of the international donor community, inter-governmental organizations can add to the process, through recommendations and monitoring (Davis 2010). These organizations and institutions do promote TJ measures if there is yet no direct impact on democracy expected and it is evident that whatever mechanisms lead to delegitimizing the previous regime by bringing justice to perpetrators

and victims alike justify the measures. For example, victims who do receive reparations or compensation will invariably link up with the democratic institutions of the new regime and thus fuel the democratic process. As a result, TJ measures function as a catalyst to take up claims, concerns, and grievance wishes for vengeance. They can help to turn false allegations myths, conspiracy, silence and mistrust into facts, figures, truth, transparency and trust which adds invaluable to the process of achieving justice and democracy. They can prevent society at large from undertaking arbitrary acts of vengeance or violence and channel these desires towards peaceful conflict resolution and transition period. Parallel efforts between citizens and victims can help to slowly re-build trust in public (democratic) institutions. When citizens and victims see their claims materialize, they are more likely to refrain from once again taking justice into their own hands through violent means. In this same context, Olson, Payne and Reiter have argued that applying only some TJ measures while leaving others out may have diminished effect on the sustainable democratic development of a country (Olson, Payne, and Reiter 2010: 141-145). Nevertheless, as Baxter highlights in her observations, different TJ measures impact different sectors of society and institutions and are not perceived equally by all (Baxter 2009: 325-326). Views on the issues range from desiring to leave the past behind to those who cannot wait to see their victimizers punished. The variety and disparity of interests must be carefully assessed and balanced, a challenge for democratic leadership and institutions, when deciding if and what kind of TJ measures to apply.

Political and legal traditions and international and regional surveillance and monitoring mechanisms also play an important role in this process. The less a country in transition can count on the support (and pressure) from the international community, the less likely its political elites start the process, let alone in a holistic manner. Instead, it carries the risk of being misused by new political elites to cleanse themselves of unpleasant opponents. Hence, liberal democracies maintain that regardless of what measure a government applies, TJ mechanisms must comply with constitutional and legal norms. In some countries, due to constitutional constraints, this can lead to a delay of the retributive justice or restorative claims (Encarnación 2008). Consensual democracies may contest that when claims arise they have to be dealt with immediately. In this respect, I argue that the pace and the extent to which governments and parliaments respond to claims indicate the level of responsiveness and thus accountability. Governmental response to claims can take place at any stage of democratic development. There is no 'punto final', no 'final debate', as some politicians demanded for in Latin American in the 1980s or in post WWII Germany (Roht-Arriaza 1998). As the United Church of Canada's apology to the First Nation People in recent years has shown, crimes and injustice can be addressed decades or even centuries after they occur. The value for all democratic institutions is always increased legitimacy. The moment one group brings an issue of the past to the attention of the political agenda; the executive and legislative powers ought to respond in an open way. In return, that kind of responsiveness will impact the quality and effectiveness of executive and legislative power institutions.

Transitional Justice Measures in Consolidated vs. Unconsolidated Democracies

Unsurprisingly, we see that TJ measures are more likely to be successfully applied in better established or consolidated democracies than in less established ones. For all the constraints and political odds new democracies face, they may focus on one or two TJ measures and leave out others because they fear negative consequences for their new and fragile regime. The elites who avoid trials may also fear being subject to trials themselves one day, and so on. This calls for a closer look at the real reasons behind some country's restrictive TJ policies (Spinner-Halev 2012: 164).

The frequency of employment of TJ measures often has little to do with the quality or functionality of democratic institutions. Rather it depends on whether international organizations or governments impose these measures, and whether there is also a bottom up citizens' movement that exists to proceed with TJ. In post WWII West-Germany, for example, after an initial top-down approach in the early years; one generation later, most TJ measures shifted to a more bottom up approach, and this has done much to increase the quality of democratic institutions (Herf 1997). In Spain, immediately after the death of Franco in 1975, very few amnesty and compensation measures would have qualified as being part of the TJ process. As of today, institutional flaws and "unconsolidated" pockets in democracies such as Spain, Greece or Chile are often connected with the lack of dealing with past wrongdoings. Although, the absence of TJ measures alone is not automatically linked to the complete failure of democratic institutions, it is linked to the level of effective performance and thus the legitimacy democratic institutions receive. The relatively slow progress of democracy in places such as Turkey has, by and large, benefited from the few TJ measures so far (Mihir 2013). Henceforward, if international organizations, the government, and the civil society cooperate and apply a mix of TJ measures over a period of time, the impact on the level or performance of democratic institutions will be discernible.

Responsiveness

Responsiveness occupies a central position when analyzing the impact of TJ measures on the quality of democracy. Here, the assumption is that if there is responsiveness by institutions, there is also legitimacy and satisfaction among citizens and vice a versa. The level of responsiveness through executive and legislative powers in liberal, consensual or representative democracies depends on how they balance public versus institutional interests and react accordingly. The balance among legal imperatives, public safety and pragmatic considerations is nevertheless crucial in any TJ process (Olson, Payne, and Reiter 2010: 154-155). Of course this always depends on the capacity and leadership of governmental institutions to understand and respond to the needs of their citizens and the general population. It is important to follow up some of the above-mentioned dimensions and links when assessing responsiveness. For example, (1) it is helpful to examine when and how political institutions and leaders formally acknowledge past wrongdoings, with options ranging from compensation funds to introducing memorial days (Kritz 2009: 17). Governments and parliaments can (2) respond to citizens' claims when issuing restitutions or reparation funds, initiate rehabilitation or compensation for expropriations, imprisonment and loss of

family members. They can also (3) set up quotas for working relationships among former enemies or combatants in public institutions or (4) issue amnesties to political prisoners of the former regime that often go hand in hand with issuing amnesties to old elites. Another way to respond is (5) in providing public funding to restore buildings or to convert them into memorials and maintaining historical or religious sites. Many of these measures are already stated as part of humanitarian obligation of states, according to the Geneva Conventions of 1949 and are manifested again in the 2006 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations (Geneva Convention 1949; UN Doc GA Resolution 60/147, 2006). Following active participation and lobbying of a civil society, institutional representatives decide (6) on a framework for criminal justice by supporting tribunals and court procedures against perpetrators and victimizers through legal reforms. International human rights and humanitarian law should be applied to the cases concerned in order to attain a high level of quality of institutional performance. Any legal reform of a penal code should go in accordance with international human rights norms and thus be based on freedom and equity rights. This is also true for (7) official vetting and lustration processes of civil servants. These measures can leverage accountability. By doing so, institutional powers combat impunity and launch reform of the security system.

Thus, all these varying dimension of institutional responsiveness, whilst using TJ measures, are also dimensions of accountability. If TJ measures are noticed by citizens and the larger population they can enhance the civic trust and hence, individual engagement and interaction between citizens and democratic institutions. Coming to terms with the past through TJ measures serves here as a catalyst to enhance the accountability of the regime. Nevertheless, some of these procedures can perpetuate division within societies. They can result in unfair vetting and lustration processes (Thoms, Ron, and Paris, 2010: 329-342). Similarly, other studies compiled by Van der Merwe, Baxter and Chapman came to the conclusion that dealing with past injustices can provide a rationale and momentum for the new government to reform institutions and ideologies and may help society to move forward, but it can also impede it (Olson, Payne, and Reiter, 2010; Van der Merwe, Baxter, and Chapman 2009: 19). If TJ measures are applied in a single or isolated manner separate from other measures, without the consent of victim groups and with the aim to install victors' justice instead of a broader social justice, it can nurture functional failures of its institution or trigger corruption, resulting in a decline in quality of democracy.

Therefore, the impact or inter-linkage between institutions and measures depends on political expectations. Is it an increase of electoral turnout or more civil society participation? Both can have different reasoning and causes. But to see a direct causal linkage is difficult. Thus it is recommended that one look at the general performance and trust of citizens by and in institutions in general.

Transparency through Justice

Independent and representative legislative and judicial institutions enhance transparency through the rule of law. Justice instruments and institutions will have greater impact on societal change and the well functioning of democratic institutions the more independently they

operate. Public trials and truth commission proceedings in the context of TJ are vital to this process. The independence of the judiciary and the rule of law is perhaps the most difficult mechanism for young democracies to establish, and for consolidated ones to uphold. Yet, retrospective justice is urgent in order to delegitimize the previous unjust, violent, or terror regime as it highlights that the new order is established on the rule of law and peaceful problem solving mechanisms. Sooner or later, most governments will confront the dilemma of whether to undertake the prosecution of the leaders of the exiting regime, or whether they leave the past behind with blanket amnesties. If they opt for a middle path – which most countries do – they have to carefully examine the kind of sanctions and penalties they apply. If the rule of law is taken seriously, the principle of *nulla poena sine lege*, meaning that barring the prosecution of anyone for an act which was not criminal at the time it was committed, is crucial (Kritz 1995, Vol II: xxxi-xxxii). One way to overcome this principle without violating it is to apply international (customary) human rights law since this body of law applies regardless of how abusive the regime was or whether the country was party to any of the international human rights treaties. International human rights laws, norms and standards are transparent and accessible to everyone and can be applied in any legal system. Its vagueness is its strength, giving countries a large margin of appreciation and thus adaption into its own legal system.

In order to score higher in quality performance, states need to transfer and adapt international human rights norms and standards into their constitutions and domestic legislations as well as local and traditional judiciary regimes. But governing bodies will only do so if they see a direct benefit, acknowledging that these reforms will help them delegitimize former opponents and increase their own legitimacy. Hence, Schmitter, Bühlmann, Merkel and others add to the observation that beyond the formal adherence to these norms, the guarantee of human rights political leadership has always to be transparent, accountable and responsive to citizens needs, otherwise it will be useless and ineffective (Schmitter et al 2003; Bühlmann, Merkel and Wessels 2008). Civil society, victims, bystanders and victimizers must enjoy security and freedom rights. Where these human rights are restricted, the likelihood of fair trials, reconciliation workshops, memorial initiatives, negotiation of property rights and compensations, to give some examples, are all at risk and will mostly fail and cause major flaws in institutional performance.

It is essential to highlight the importance of basic freedom rights, constitutional and political guarantees of equality and equity before the law, and citizen participation in relation to the proper functioning of the rule of law. The state and (new) political system or order, however, has to have de facto control and effective power to implement these measures. It has to guarantee both human rights as well as the safety of those who make claims (Bühlmann, Merkel and Wessels 2008). This is far from reality and therefore many governments in transition refrain from following a TJ process. However, most of the observations of the past decade offer the possibility to construct and evaluate what has been called “evidence based transitional justice”, through which it can be understood to what extent TJ measures reach their anticipated outcome, for example, when guaranteeing basic human rights (Pham and Vinck 2007: 232).

Participation, civic trust and engagement

In their assessment of the quality of democracy in Latin American countries, Altman and Perez-Linan used Dahl's basic dimensions of quality of democracy, which focuses on citizen's participation. First, in order for citizens to participate and engage with democratic institutions, their civil human rights have to be guaranteed constitutionally. A "free exercise of political contestation" ought to be allowed to attain high level of accountability and transparency (Altman and Perez Linan, 2010: 89). Democratic institutions that do not guarantee these rights will face mistrust and a lack of legitimacy over time. Consequently, governments may even face violent resistance by old elites, military or separatist movements. Vertical accountability, (participation) becomes a central dimension as it grants individual citizens and organized civil society actors the means of control over politicians and political institutions (Diamond/ Morlino, 2005: xiii). If citizens feel free to participate in decision-making processes they are more likely to claim TJ measures as one way to attain their goals of acknowledgement, truth and compensations. At the same time political and legal frameworks need to be established in order for citizens to act freely. Balanced and prudent governmental responsiveness increases the civic trust and the confidence of citizens in public institutions. Citizens' concerns are taken seriously and are dealt with by state bureaucracy. Putnam and Tilly also highlight the variable of 'trust' in this context. Putnam summarizes that 'the greater the participation, the higher the trust in a democratic system' (Putnam 1993). That premise goes along with Tilly's analysis, which concludes that, in order to establish trust in democratic processes, insulation of categorical inequalities in public politics as well as transformation of non-state powers to establish a protective relation between citizens and state are needed (Tilly 2007: 96). Although, none of these statements are surprising, the main argument in this chapter is that if perpetrators, victims and bystanders gain confidence, they will make increased use of state institutions. For the TJ process, it will mean that citizens' who perceive that there is a response to their claims for truth and justice will more likely engage with democratic institution and increase the quality of such. Due to the nature of democracies, it will more likely happen in democratic bureaucracies than in authoritarian regimes or oligarchies.

This again, goes along with the metaphor that if democracy is successful it will be the only game in town (Linz and Stepan 1996:5). This widespread 'game' allegory helps to explain and underline that loyalty of the large majority to the democratic regime is the motor to consolidation. The higher the level of participation of citizens and engagement with institutions the higher the level of civic trust in a democratic system will be. Schmitter summarizes this when saying that in order to measure the quality of democracy, we have to look at levels, frequencies and timelines of participation or abstentions of society and also the extent to which public institutions respond to demands and needs or rather impose decisions (Schmitter 2005; 28-29). As a result, it is not only if but also how governments respond to the claims and needs of citizens, victims, perpetrators or to their former opponents and enemies.

Conclusion

The inter-linkage and multi-causality between TJ and democracy and its quality depends largely on the level of responsiveness by political elites, the transparency and adherence to international human rights norms and participation and engagement (civic trust) by the public sphere, citizens, and by victims and organized perpetrator groups. Higher quality is achieved if governmental responsiveness and civic engagement and thus trust are merged with different TJ measures at different stages in the process of democracy. It can take over a generation to see measurable results. Top-down initiatives, that is to say by international or governmental actors, or bottom up, that is to say citizens and victims groups, driven initiatives alone, at only one moment in time, will not lead to any positive impact of TJ measures on the societal development neither to democratic institution building or its quality. Nor will there be any impact on the quality of democracy if only trials or truth commissions are applied and, even less, if they only take place outside the country. Follow up procedures and a commitment to long term TJ and reconciliation is required in order to see the multi-causalities and the intertwining among TJ measures, democratic institutions, local, domestic and international level. Moreover, TJ measures and tools can serve as a catalyst to strengthen democratic institutions on all levels. They support the new regime's efforts to delegitimize and demystify the previous regime and opponents to the democracy. Furthermore, the measures contribute to healing and reconciliation in a divided society that is fundamental for active citizen engagement in democratic institutions. Consequently, the intertwining effect that TJ and democratic institutions enjoy will leverage civic trust in institutions and enhance legitimacy and quality of the new regime.

Last, but not least, the core idea of democracy is that of popular rule or popular control and catharsis over collective decision making (Beetham 1999: 90). That can be achieved by TJ measures but yet, not alone. The more influence citizens or pressure groups have over the TJ process, the more it impacts the quality of democracy. In post-conflict or post-authoritarian societies, it is important to establish civic trust in newly established democratic institutions, but it is equally essential to strengthen democratic regimes over a longer period. Thus, the crucial premise is that the more responsive and sensitive executive and legislative powers are to their citizens' claims at any stage of transition, the more legitimized they will be -- and the higher the quality of their democratic system.

References

- Altman, D., Pérez-Linán, A. Assessing the Quality of Democracy: Freedom, Competitiveness and Participation in Eighteen Latin American Countries, in *Democratization*, Vol. 9, No 2, Routledge, 85-100, 2010.
- Baxter, V. Critical Challenges for the Development of the Transitional Justice Research Field. In: Van der Merwe, Hugo., Baxter, Vitoria. and Chapman, Audrey R. (eds.). *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*. Washington DC: USIP Press, 2009.

- Beetham, D. *Democracy and Human Rights*. Oxford: Polity Press Blackwell Publisher, 1999.
- Beetham, D., Carvalho, E., Landman, T. and Weir, S. 2008. *Assessing the Quality of Democracy: A practical guide*. Stockholm: International IDEA.
- Biddiss, M. Victors' justice? The Nuremberg Tribunal. *History Today*, Vol. 45, Number 5, May 1995, 40-46, 1995.
- Bühlmann, M., Merkel, W. and Wessels, B. *The Quality of Democracy, Democratic Barometer for Established Democracies*. Working Paper No. 10a. Zürich: NCCR Democracy and University of Zürich, 2008.
- Dahl, R. A. *On Democracy*. New Haven, Connecticut: Yale University Press, 1998.
- Davis, L.. *The European Union and Transitional Justice. Initiative for Peacebuilding*. 2010.
- Diamond, L., Morlino, L. (eds.) *Assessing the Quality of Democracy*. Baltimore: The Johns Hopkins University Press, 2005.
- Diamond, L. *Developing Democracy, Towards Consolidation*. Baltimore: John Hopkins University Press, 1999.
- Encarnación, O.G. Reconciliation after Democratization: Coping with the Past in Spain. *Political Science Quarterly*, Vol. 123, Number 3, Sept. 2008, 435-460, 2008.
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 287.
- Hazan, P. Measuring the impact of punishment and forgiveness: a framework for evaluating transitional justice. *International Review of the Red Cross*, 88 36:19-47, 2006.
- Herf, J. *Divided Memory, The Nazi Past in the Two Germanys*, Cambridge et al: Harvard University Press, 1997.
- Kiss, C. The misuses of manipulation: The failure of transitional justice in post-communist Hungary. *Europe-Asia studies*, Vol. 58, Number 6, 925-941, 2006.
- Kritz, N. J. (ed.) *Transitional Justice, How emerging Democracies Reckon with former Regimes*, Washington DC: United States Institute for Peace, 2004.
- Kritz, N. Policy Implications of Empirical Research on Transitional Justice. In Van der Merwe, Hugo, Baxter, Vitoria and Chapman, Audrey R. (eds.). 2009. *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*. Washington DC: USIP Press, 13-22, 2009.
- Linz, J. J., Stepan, A. (eds.) *Problems of Democratic Transition and Consolidation. Southern Europe, South America, and Post-Communist Europe*. Baltimore and London: John Hopkins University Press, 1996.
- Mihr, A. Turkey, Transitional Justice and Reconciliation. In Stan Lavinia/ Nedelsky, Nadya (eds.) *Encyclopedia of Transitional Justice*, Volume 1, Cambridge University Press, 2013.
- Morlino, L. Legitimacy and the quality of democracy, in *International Social Science Journal*, Blackwell Publishing, Oxford, No. 196, 211-222, 2010.
- O' Donnell, G. and Cullell, J.V. and Iazzetta, O.M. *The Quality of Democracy, Theory and Applications*, London: University of Notre Dame Press, 2004.

- Olson, T.D., Payne, L.A. and Reiter, A.G. *Transitional justice in Balance, Comparing Processes, Weighing Efficacy*. Washington DC: US Institute of Peace, 2010.
- Peskin, V. *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*. *Journal of Human Rights*, Vol. 4, Number 2, April 2005, 213-231.
- Pham, P. and Vinck, P. *Empirical Research and the Development and Assessment of Transitional Justice Mechanisms*. *The International Journal of Transitional Justice*, Vol. 1, 2007, 231-248, 2007.
- Priban, J., Roberts, P. and Young, J. (eds) *System of Justice in Transition, Central European Experience since 1989*, Ashgate Publishing, 2003.
- Putnam, R.D. *Making Democracy Work, Civic Traditions in Modern Italy*. Princeton: Princeton University Press, 1993.
- Quinn J. R. Haiti's Failed Truth Commission: Lessons in Transitional Justice *Journal of Human Rights* Vol. 8, Number 3, 2009, 265-281, 2009.
- Roht-Arriaza, N. *Truth Commissions and Amnesties in Latin America: The Second Generation* *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 92, April, 1998, 313-316, 1998.
- Schmitter, P. *The Ambiguous virtues of accountability*. In Diamond, Larry. and Morlino, Leonardo (eds.) 2005. *Assessing the Quality of Democracy*. Baltimore: The Johns Hopkins University Press, 2005.
- Schmitter, P.C. and Guillhot, N. *From Transition to Consolidation, Extending the concept of democratization and practice of democracy'* *The Geojournal Library: Democratic and capitalist transition in Eastern Europe* 55: 131-146, 2000.
- Spinner-Halev, J. *From Historical to Enduring Injustice*. *Political Theory* 35: 574-597, 2007.
- Spinner Halev, J. Enduring Injustice , Cambridge University Press, 2012.
- Thoms, Oskar N.T. and Ron, J. and Paris, R. *State-Level Effects of Transitional Justice: What do We Know? The International Journal of Transitional Justice, Special Issue: Transitional Justice on Trial –Evaluating Its Impact* Vol. 4, 2010: 329-354, 2010.
- Tilly, C. *Democracy*, Cambridge: Cambridge University Press, 2007.
- UN Doc GA Resolution 60/147. *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* indicates that TJ measures are a factor aiding democratization processes and democracy, GA Resolution 60/147, 21 March 2006.
- Van der Merwe, H., Baxter, V., and Chapman, A. R. (eds.). *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*. Washington DC: USIP Press, 2009.

7.2 La relation entre justice transitionnelle et transition démocratique

Omar Weslati

Si le peuple avait, un jour, décidé de vivre, le destin ne peut qu'obéir. « abou el kassem chebi » : c'est le célèbre slogan de la révolution tunisienne qui a été utilisé dans toutes les manifestations et dans toutes les régions du pays. Durant ces dernières années, avec de surcroît un cumul de problèmes économiques et sociaux devant l'« asphyxie politique », l'absence de consensus régissant le débat social et la persistance de la censure et de la désinformation médiatique (absence des libertés essentielles de la presse et de l'informations) à propos de tout ce qui se passe dans le pays, notamment en 2008 les incidents du bassin minier qui étaient accompagnés d'infractions flagrantes aux droits de l'homme, de la primauté de la loi et la prolifération de la culture d'impunité pour le cercle de la famille au pouvoir et les influents. La majeure partie de la population tunisienne vit aujourd'hui dans la pauvreté, d'où la nécessité de réformes qui doivent aller dans le sens d'une mobilisation de tous les acteurs économiques et sociaux. De telles réformes passeront inévitablement par une meilleure répartition des ressources et une redistribution plus adéquate des richesses créées. Le concept de « développement humain » est un mode du développement qui ne se contente pas de susciter une croissance économique, mais veut aussi sa répartition équitable. En Tunisie, comme dans d'autres pays du printemps arabe, promouvoir le respect de l'Etat de Droit devrait constituer un défi majeur aidant à créer un environnement stable dans lequel les citoyens sont informés de leurs droits. De même, il faut tenir compte de l'indépendance de la justice, l'amélioration des systèmes judiciaires en général pour arriver à promouvoir l'Etat de Droit. Afin d'émerger de cette étape fragile et litigieuse, nous devons travailler pour changer les législations et les rendre conformes aux dispositions institutionnelles et aux standards internationaux conçus pour protéger la liberté et les droits des individus. Peut-on considérer les événements politiques qu'a vécus la Tunisie après la révolution la pierre angulaire pour renforcer l'Etat de Droit ? Pour répondre à cette question nous allons faire une lecture de cette période de transition, nous allons montrer les caractéristiques de la transition politique en Tunisie (I) qui amènent par la suite la mise en œuvre de mécanisme de la justice transitionnelle (II).

Caractéristiques de la transition politique en Tunisie

Après le 14 janvier 2011, la Tunisie a connu un dynamisme politique important (A) et ce changement va avoir un impact sur la mise en œuvre de mécanismes de justice transitionnelle (B)

A) La scène politique en Tunisie après la révolution

La Tunisie a connu un dynamisme politique important se résumant en l'effondrement de l'ancien régime et la chute de son parti – le Rassemblement constitutionnel démocratique –RCD. « Le Rassemblement Constitutionnel Démocratique (RCD) est officiellement dissous le 9.03.2011, après l'annonce du jugement en référé prononcé mercredi matin par le tribunal

de première instance de Tunis qui a décidé de dissoudre le Rassemblement Constitutionnel Démocratique et de liquider ses biens et fonds par le biais de la direction du domaine de l'Etat ».

La dissolution de ce parti était l'une des revendications brandies par le peuple entre le 17/12/2010 et le 14/01/2011. Les partis qui ont fait preuve d'allégeance à l'ancien régime avaient connu une mouvance interne dirigée par les courants réformateurs, les Tunisiens se sont engagés d'une façon volontaire et spontanée dans l'action politique et associative.

L'accroissement de la pression populaire « kassabah2 » a révélé l'urgence de l'élection d'une assemblée constituante chargée de rédiger une nouvelle constitution pour le pays et cette pression a mené à la multiplication des cas de schisme et de fusion au sein des partis, qui ont fusionné ou intégré d'autres partis sans déclarer leur dissolution comme le stipule la loi.

La détermination de l'orientation des courants politiques après ces transmutations est devenue ardue mais on peut constater qu'il ya 4 importants courants : le courant social, le courant nationaliste arabe, le Courant islamique et le courant libéral. Le courant social englobe les orientations léninistes, maoïstes et autres marxistes générales pour arriver aux tendances communistes démocratiques ; focalise sa politique sur le phénomène d'inégalité sociale et d'injustice et œuvre pour l'accomplissement de la justice sociale. Le courant nationaliste arabe : des orientations unificatrices générales, nassériennes et autres Baath ayant pour dessein la concrétisation de l'union arabe et l'affranchissement de la nation du colonialisme ancien et nouveau. Le courant libéral : des orientations d'affranchissement intellectuel, de la diffusion de la culture des droits de l'homme et de la consolidation des libertés ; prône la liberté de pensée, du choix et de la participation. Le courant islamique comprend les orientations salafistes, djihadistes, émancipatrices, prédicatrices, soufies et les frères musulmans arrivant aux mouvements islamiques réformateurs (modernes) ; sa doctrine se base sur le déphasage entre la réalité vécue et les préceptes du coran ainsi que de l'enseignement du prophète « Mohamed » (sunna).

Aujourd'hui 150 partis politiques tunisiens peuvent exercer leurs activités au sein du système politique tunisien. Leur représentativité est limitée au sein de la Haute instance pour la réalisation des objectifs de la révolution, de la réforme politique et de la transition démocratique avant de se refléter au sein de l'assemblée constituante élue le 23 octobre 2011.

La quasi-totalité d'entre eux ont été créés après la révolution, mais plusieurs ont fusionné ou intégré d'autres partis sans déclarer leur dissolution comme le stipule la loi. D'autres sont mort-nés et n'ont accompli aucune activité depuis leur autorisation. On dénombre donc à peine une cinquantaine de partis actifs.

B) Relation entre justice transitionnelle et transition démocratique.

Le déclenchement du processus avant les élections de 23/10/2011 s'est concrétisé à travers la création d'un comité national pour enquêter sur les affaires de corruption et la création d'un comité national d'investigation concernant les abus enregistrés durant la période du 17 décembre 2010 jusqu'à la cessation de sa raison d'être.

Et malgré les controverses soulevées à leur propos et les suspicions sur leur destinée et le réel rapport de force engagé avec le pouvoir juridique, ces comités étaient considérés par les observateurs et les experts mondiaux comme le premier noyau pour l'ancrage du régime de la justice transitionnelle en Tunisie.

L'engagement du pouvoir constituant, suite aux élections du conseil national constituante (ANC) .L'article 24 de la loi constituante se rattachant à l'organisation provisoire des pouvoirs publique du 16 Décembre 2011 stipule que l'assemblée constituante va promulguer une loi organique régissant la justice transitionnelle et fixant ses fondements et son secteur d'action. Le ministère des droits de l'homme et de la justice transitionnelle, créé le 19 janvier 2012, a selon l'article 26 de l'ordre de sa création le mandat d'organiser des référendums et des colloques sur le secteur de la justice transitionnelle. Il s'occupe par ailleurs de l'élaboration et de la suggestion des projets de lois dans ce domaine. La promulgation de la loi constituante de la commission de la justice transitionnelle, selon le verdict de l'article 24 de la loi ordonnant les pouvoirs publics, représente la dernière phase de l'étape des tractations nationales à propos des conceptions suggérées ; dont le déclenchement était au mois d'avril 2012 sous la tutelle du ministère des droits de l'homme.

Il a lieu ici d'insister sur la nécessité d'accélérer l'installation de ce cadre juridique sans précipitation et d'autoriser la commission à entamer son activité sur le terrain d'une façon effective. Malgré les efforts du gouvernement élu le 23.10.2011 pour mettre en œuvre le mécanisme de la **justice** transitionnelle, il y a de lourds défis relatifs par exemple **au dossier** du dédommagement des prisonniers politiques, au dossier des hommes d'affaires impliqués avec l'ancien régime. Quelle est la solution ? *Généralement, la volonté politique tend à vouloir rendre efficient le décret n° 01 de l'année 2011 en rapport avec l'indemnisation des prisonniers politiques ayant bénéficié de l'amnistie générale.* La **majorité** des composants de la société civile et politique estime que ces deux dossiers sont du ressort de la justice transitionnelle.

La société civile a joué un rôle très important dans le cadre des événements qu'elle a organisés pour pousser le gouvernement à la mise en œuvre de mécanismes de justice transitionnelle. La société civile a aussi eu une importance primordiale pour une transition démocratique et pacifique afin de promouvoir l'état de droit.

Les caractéristiques de la mise en œuvre de mécanismes de la justice transitionnelle

Cette phase représente la dernière étape du débat national sur le mécanisme de la justice transitionnelle. ce débat national a été lancé en avril 2012 sous la tutelle du ministère des droits de l'homme et la justice transitionnelle, avec participation de la société civile. L'objectif était d'obtenir, un projet loi jusqu'au 28.10.2012. Il y a lieu ici d'insister sur la nécessité d'accélérer l'installation de ce cadre juridique de justice sans précipitation. Les exactions ayant atteint plus qu'une région (un parti), il faut la faculté et le pouvoir d'émettre les recommandations et d'assurer le suivi de leur application.

Les fondements de la commission de la vérité

Les commissions indépendantes se composent de personnalités faisant l'unanimité quant à leur compétence et intégrité. Elles sont reconnues par l'Etat et leur mission est généralement limitée dans le temps. Elles sont constituées de commissions non judiciaires conçues dans une phase transitoire de l'Etat et ont pour mission d'examiner et d'ausculter les dossiers des violations graves des droits de l'homme ayant eu lieu dans le passé de diverses manières. Dans ce cadre la commission technique a rédigé un projet loi relatif à la justice transitionnelle. Ce projet de loi stipule l'imprescriptibilité des violations graves des droits de l'homme telles que définies dans les conventions internationales ratifiées par la Tunisie, dont l'assassinat, le viol, les violences sexuelles, la torture, la disparition forcée et l'application de la peine capitale sans garantie d'un procès équitable. Ce texte prévoit la réparation intégrale du préjudice moral et matériel, le recouvrement des droits et la réintégration des victimes. L'Etat se chargera de l'exécution des mesures de réparation. S'agissant de l'instance vérité et dignité, le projet de loi souligne son caractère indépendant et fixe son mandat à quatre ans à partir de la date du démarrage de ses travaux, avec possibilité de prolonger cette période d'une seule année.

Les raisons d'être de la commission

La commission de vérité doit avoir un mandat général conçu d'une façon claire et précise afin de répondre aux besoins spécifiques et à la conjoncture spéciale que traverse le pays. Sa mission doit aussi être délimitée afin qu'elle soit habilitée à concrétiser les attentes des victimes et les revendications du peuple dans l'édification de l'état de droit. Cela requiert un processus de concertation transparente autorisant la gouvernance du comité à enquêter sur les abus socioéconomiques sans entraves ni complications. Le comité de la vérité doit avoir l'autorité pour interroger les témoins, recueillir leurs témoignages et les répertorier. Ce comité doit bénéficier d'un espace temporel suffisant pour qu'il puisse engager sa mission d'investigation. Vu la nature des exactions ayant atteint plus d'une région et plus d'un parti, il doit avoir la faculté et le pouvoir d'émettre les recommandations et suivre leur application.

Conclusion

Pour réussir la transition démocratique, il faut établir le processus de justice transitionnelle pour aboutir essentiellement à la démocratisation et à la construction d'un état de droit et d'institution afin de parvenir à la réconciliation nationale et restaurer la confiance des citoyens et des victimes dans les institutions publiques de l'état.

VIII. Domestic Monitoring Mechanism - between International Norms and National Laws

8.1 El Proceso de ejercer observancia y control al ejercicio efectivo de los derechos de las víctimas: Lecciones aprendidas

Patricia Luna Paredes

La Defensoría del Pueblo de Colombia forma parte del Ministerio Público Colombiano junto con la Procuraduría General de la Nación, entidades que tienen el mandato de velar por la protección de los derechos humanos y garantizar acciones de promoción y divulgación en procura del cumplimiento de los mismos.

La característica fundamental de esta entidad se centra en lo que se conoce como la Magistratura Moral, entendida como la facultad del Defensor del Pueblo en su condición de garante moral de la sociedad colombiana para alertar sobre las violaciones de los derechos humanos, en particular de las personas en condición de mayor vulnerabilidad e indefensión.

Además de lo anterior esta institución con presencia en todo el territorio nacional presenta una característica mixta en su gestión puesto que por un lado realiza seguimiento para el cabal cumplimiento y observancia de los derechos humanos, y de otro lado, desarrolla un mandato de intervención directa con las comunidades afectadas, en particular con las víctimas de la violencia armada en Colombia, mediante acciones de orientación, asesoría y representación judicial a las víctimas considerando el enfoque de género, etnia y edad, así como la afectación psicosocial que las víctimas padecen como consecuencia de las conductas victimizantes que violan sus derechos humanos.

Precisamente en ese ámbito de actuación es que se consagra la facultad a la institución para realizar el seguimiento y monitoreo a la ley de víctimas y restitución de tierras, a través de un mecanismo específico para tales efectos, Junto con la Procuraduría General de la Nación, la Contraloría General de la República y representantes de las víctimas, los cuales deben ser elegidos conforme los protocolos de participación definidos.

La Ley de atención, Reparación y Restitución de Tierras a las Víctimas

El Gobierno de Colombia ha intentado en varias legislaturas promulgar una ley de atención y reparación que estableciera beneficios de carácter masivo a las víctimas y que tuviera en cuenta las experiencias y estándares internacionales sobre la materia. En ese sentido, Colombia desarrolló un Programa de Reparación vía administrativa de carácter individual, a las víctimas de violaciones a los derechos humanos por parte de grupos organizados al margen de la ley, el cual se adelantó en una vigencia de dos años bajo un enfoque de indemnización solidaria y un proceso previo de valoración de la solicitud. Por supuesto, este acercamiento directo de la víctima implicó esfuerzos institucionales encaminados a brindar la debida y pertinente orientación a las víctimas acerca del qué esperar o que nos es posible en este programa. Del análisis realizado al Programa por la Defensoría del Pueblo se evidenció que los daños generados producto de los hechos victimizantes, trascienden las pérdidas financieras y las dimensiones físicas. Los trastornos generados por la violencia, se han traducido en diferentes afectaciones psicosociales, rupturas del tejido social, debilitamiento de la identidad cultural y graves alteración de los procesos democráticos y organizativos, que difícilmente son contemplados por un programa de reparación de esta naturaleza. La reparación integral concebida conforme a estándares internacionales en materia de los derechos de las víctimas, plantea la obligación de reconocer, proteger y garantizar los derechos a la verdad, la justicia, la reparación y las garantías de no repetición. La Corte Interamericana de Derechos Humanos ha sostenido que la reparación hace referencia a un "término genérico que comprende las diferentes formas como un Estado puede hacer frente a la responsabilidad internacional en que ha incurrido, comprendiendo diversos modos específicos de reparar, que varían según la lesión producida".

En un plano ideal, lo deseable sería restituir las cosas al estado que guardaban antes de la ocurrencia del hecho violento. No obstante esta restitución no sólo es improbable, sino también imposible, porque la práctica indica que los resultados materiales e inmateriales de la violación constituyen en la mayoría de los casos, un imborrable dato de la experiencia de las víctimas. Sin embargo, existen otras medidas como la indemnización, rehabilitación, satisfacción y garantías de no repetición que pretenden proveer a las víctimas de medios de subsistencia claros que les posibiliten rehacer sus proyectos de vida económica, moral y emocionalmente. De otro lado, la Ley de Justicia y Paz, encaminada a generar condiciones de desmovilización de grupos armados y organizados por fuera de la ley, interesados en la dejación de armas e iniciar el camino hacia la reconciliación cumpliendo los requisitos de elegibilidad señalados en este instrumento jurídico, permitió que las víctimas de estos grupos violentos pudieran ser reparadas mediante un proceso judicial que conduzca a la investigación y juzgamiento, y cuya reparación se surte a través de un fondo de reparación constituido por los bienes entregados por los victimarios y recursos del Estado de manera subsidiaria en los casos en que los victimarios no puedan pagar la reparación. Ninguna de estas dos iniciativas de reparación a las víctimas (administrativa y Judicial) consagraba un mecanismo dirigido a monitorear y hacer seguimiento tanto al cumplimiento de las responsabilidades institucionales como de la reparación efectiva de las víctimas, bajo la responsabilidad de los organismos de control del Estado Colombiano y con presencia de representantes de las víctimas. Por lo que se torna en un desafío para Colombia contar con

herramientas que permitan analizar el contenido y alcance del derecho a la reparación consagrado en la reciente ley de víctimas, que perciba a las víctimas como ciudadanos y sujetos políticos que tienen el derecho inalienable a un resarcimiento pleno del daño causado, y entender que la reparación ha de ser una reparación adecuada, efectiva, oportuna y proporcional a la gravedad del daño sufrido.

Objetivo del Mecanismo de Monitoreo y Seguimiento

El objetivo fundamental de ejercer el seguimiento y monitoreo de la Ley 1448 de 2011, conocida como Ley de Víctimas y restitución de tierras, está dirigido a realizar el seguimiento al proceso de la ley desde el diseño y ejecución de los programas y medidas de asistencia y reparación integral tomando como referencia el conjunto de responsabilidades asignadas a las entidades involucradas en este proceso, tanto a nivel nacional como a nivel regional, con el fin presentar tales resultados al congreso de la República e incidir en modificaciones a la política pública.

El ejercicio de seguimiento se ha adelantado a través de una comisión conformada por La Procuraduría General de la Nación, la Contraloría General de la República, la Defensoría del Pueblo, y tres representantes de las víctimas. Su conformación plantea algunos retos no solo por la misión institucional y el ámbito de actuación de cada una de las entidades de control, sino por la propia capacidad de gestión y oportunidad de las víctimas para brindar sus aportes en este mecanismo de carácter nacional, dado el complejo proceso de elección de sus voceros.

Como quiera que no se regula de manera específica su funcionamiento, la Comisión goza de la autonomía para crear su propio reglamento, además de señalar y regular la metodología de trabajo, aspectos que facilitan su carácter de independencia tanto del ejecutivo como del legislativo, toda vez que tiene toda la facultad de presentar sus conclusiones respecto del cumplimiento de los programas de asistencia y reparación a las víctimas al órgano Legislativo y a las entidades del Sistema Nacional de Atención y Reparación a las víctimas.

Concertación del proceso de funcionamiento de la comisión

Para poner en marcha este mecanismo, se formuló un reglamento que orienta la actuación de la comisión a partir de la definición de un conjunto de funciones:

- a. Elaborar su plan de trabajo anual de acuerdo con los énfasis y prioridades de seguimiento y monitoreo definidos para el periodo correspondiente.
- b. Establecer los criterios, énfasis temáticos y de política pública, los marcos temporales y el grado de progresividad con base en los cuales desarrollará su tarea de seguimiento y monitoreo al proceso de diseño, implementación, ejecución y cumplimiento de las medidas contenidas en la Ley 1448 de 2011.
- c. Definir los mecanismos y las herramientas a través de las cuales se integrarán a favor de las tareas de la Comisión, los resultados del seguimiento y monitoreo que cada una de las entidades o representantes de víctimas que la integran desarrollan desde sus

funciones misionales o desde sus objetivos institucionales en el marco de la atención integral a las víctimas.

- d. Presentar informes de seguimiento a la Ley 1448 de 2011, ante el Congreso de la República, dentro del mes siguiente al inicio de cada Legislatura.
- e. Presentar recomendaciones sobre el proceso de diseño, implementación, ejecución y cumplimiento de las medidas contenidas en la Ley 1448 de 2011 a las entidades que conforman el sistema nacional de atención y reparación a las víctimas.
- f. Visibilizar el seguimiento desde la perspectiva de las víctimas, garantizando la participación efectiva de sus representantes al interior del proceso de seguimiento y monitoreo.

De otro lado, se organizó una estructura operativa que determinó los roles tanto a la entidad que preside la comisión como a la que ejerce la secretaria técnica, así como del procedimiento para adoptar las decisiones. Regular estos aspectos de alguna manera facilitó el proceso de trabajo en procura del cumplimiento de su fines. Como parte de la estructura de funcionamiento, se creó un comité técnico encargado de solicitar, acopiar y analizar la información de acuerdo con la estructura temática definida, el ámbito de interés de cada entidad y el alcance misional de cada una de ellas. Este comité se encargó de elaborar el informe preliminar de seguimiento y monitoreo, que luego de ser debatido ante los jefes de las entidades involucradas, fue presentado ante la plenaria del Senado de la República de Colombia. Otro aspecto importante tuvo que ver con la manera en que se adoptarían las decisiones de la comisión, para ello, se definió que la Comisión podía sesionar con la mitad más uno de sus miembros, y las decisiones en el seno de la sesión se adoptarán por la mitad más uno de quienes asisten. En el evento en que se presente empate en la votación, la decisión o recomendación de la Comisión, se discutirá en la próxima reunión y de persistir el resultado, se entenderá denegada. El disenso de uno o varios de los miembros sobre las decisiones, recomendaciones o conceptos adoptados por la mayoría, se dejará constancia en las actas donde se expondrán los motivos en que los disensos se fundan.

Vale la pena mencionar que en el proceso de funcionamiento de la comisión en esta etapa para la presentación del primer informe de seguimiento a la ley de víctimas correspondiente a la vigencia de junio 2011 a junio 2012, no se pudo contar con la participación de los representantes de las organizaciones de víctimas y de las organizaciones defensoras de los derechos de la víctimas, por cuanto no estaba reglado el protocolo de participación que define los mecanismos de elección de los representantes de las víctimas en cada uno de los espacios o instancias de decisión tanto a nivel regional y nacional.

Frente a la falta de estos miembros de la comisión, se clarificó al Congreso de la República, al Gobierno o Nacional y a la opinión pública, que los resultados del informe de seguimiento comprometen solamente a los Organismos de Control, conformados por la Procuraduría General de la Nación, la Contraloría General de la República y la Defensoría del Pueblo.

Metodología del mecanismo de seguimiento a la ley de víctimas

Como quiera que las entidades tienen un particular rol de carácter preventivo y de seguimiento en su condición de Organismos de Control fueron utilizadas estas fortalezas para adelantar las acciones de monitoreo. En tal sentido, las entidades a nivel interno organizaron los procesos que les permitiera a través de cada dependencia u oficina acordar desde el ámbito de actuación las temáticas objeto de análisis. De otro lado, la especificidad de las funciones de cada entidad, es decir, para la Contraloría General de la República el ejercicio del control de carácter fiscal respecto de los recursos apropiados para la atención de las víctimas del desplazamiento, la Procuraduría General de la Nación en su función preventiva que analiza el cumplimiento de las responsabilidades y obligaciones de las entidades a la luz del marco legal consagrado, y finalmente, la Defensoría del Pueblo, que evidencia el goce efectivo de los derechos de las víctimas a partir de la atención directa, facilitaron que la gestión de monitoreo y el seguimiento se adelantara de manera complementaria, incluyente e integral.

Las entidades acordaron la estructura temática del informe considerando que se trataba del primer informe de seguimiento a la ley y que era muy importante evaluar el proceso de diseño y operación en este primer año de la Ley de Víctimas. Para ello, se definieron un conjunto de temas sustanciales así como los aspectos específicos que cada entidad abordaría, de tal suerte que de manera consensuada se definieron temáticas, tales como, el marco presupuestal y de capacidad institucional, los procesos de articulación y coordinación entre la nación y el territorio, la operación de la red nacional de información, incluyendo el registro único de víctimas, el desarrollo de las medidas de asistencia en procura de satisfacer la subsistencia de las víctimas y las medidas de reparación en una perspectiva de integralidad, los adelantos para materializar el derecho a la restitución de las tierras despojadas y abandonadas, así como temáticas de orden transversal que impactan el desarrollo de la política de víctimas como el derecho de la participación de las víctimas y la atención a grupos especiales como la población étnica colombiana. Todo lo anterior permitió que el informe lograra un enfoque de integralidad temática.

De otro lado, se acordaron varias metodologías de trabajo, tales como, visitas institucionales, entrevistas semiestructuradas a los funcionarios encargados de diseñar y poner en marcha los programas de reparación y las acciones de asistencia, requerimientos institucionales a partir de cuestionarios de preguntas específicas, análisis de informes nacionales entregados como ejercicios de rendición de cuentas, entre otros. El proceso de redacción de cada uno de los capítulos del informe fueron adelantados por cada entidad y posteriormente se presentaban ante el comité técnico que los revisaba, proponía ajustes, modificaciones o precisiones, hasta llegar al documento final, que como ya se dijo fue presentado formalmente ante la plenaria del Congreso de la República.

Hallazgos en la ejecución de la política pública de atención y reparación a la ley de víctimas

La información acopiada evidencia aspectos de avance y desarrollo en la ejecución de la ley de víctimas y falencias de orden institucional y programático sobre las cuales se hacen

las advertencias correspondientes. Las entidades de control resaltaron varios aspectos del proceso de la ley de víctimas que de manera general se pueden resumir de la siguiente manera:

1. La voluntad política que permitió materializar el anhelo de múltiples sectores políticos, sociales, y de organizaciones de víctimas que presenciaron el trabajo conjunto entre el ejecutivo y legislativo, para contar con un marco legal que brindara la atención a las víctimas desde la asistencia inmediata hasta la reparación en un concepto de integralidad y de visibilidad de los diversos sujetos afectados por la violencia que requieren un enfoque de respuestas de carácter diferencial.
2. La ley de víctimas integra a nivel de principios, estándares internacionales sobre derechos de las víctimas contenidos en varios instrumentos y declaraciones que forman parte del bloque de constitucionalidad, los sirven de guía importante a la hora de establecer los lineamientos técnicos que sirven de soporte al desarrollo de los programas de reparación que están siendo reglamentados por el Ejecutivo.
3. Consagra el enfoque diferencial desde el proceso de diseño como su implementación y seguimiento, En particular, enfatiza en la realización de los derechos de las mujeres, niños y niñas, temas de suma importancia que podrá facilitar que se avance en la determinación de condiciones de acceso de tipo especial a este tipo de víctimas.
4. Regula el proceso de participación de las víctimas, el cual se constituye en un reto en perspectiva de política pública y de control social.
5. Acoge y desarrolla las medidas de reparación ya consagradas tanto en el ámbito internacional como en la propia constitución colombiana, bajo criterios de integralidad y complementariedad; esto es, restitución, compensación, satisfacción, rehabilitación y garantías de no repetición. De manera preferente señala el procedimiento con alcances administrativos y judiciales para la restitución de tierras en favor de las personas que han sido despojadas de sus tierras.

Al mismo tiempo que se señalan los avances, se plantearon dificultades o aspectos problemáticos que requieren ser considerados en términos de ajustar el proceso de atención y reparación a la víctimas:

1. Demoras en el proceso de reglamentación de algunos de los programas especiales para los grupos étnicos, los sujetos colectivos afectados por la violencia, los colombianos residentes en el exterior que huyeron de la violencia, los mecanismos preferente de acceso de las mujeres a tierras y de la medida de indemnización para los menores de edad.
2. Los Instrumentos de protección a las víctimas pueden constituirse como barreras de acceso frente a la garantía efectiva de sus derechos, de modo que la garantía de seguridad para las víctimas que van a acceder a los mecanismos, especialmente para los reclamantes de tierras, es un reto muy importante que ha resultado bastante cuestionado por las víctimas y sus organizaciones, así como por los propios organismos de control, dado la poca efectividad de los mismos.

3. Las adecuaciones institucionales necesarias para garantizar la atención oportuna a las víctimas resultan aún precarias y se advierte a partir de experiencias en procesos anteriores adelantados en el país, es evitar que no se genere excesiva concentración de funciones y programas en pocas instituciones e intervenciones limitadas por otras entidades responsables.
4. Los Presupuestos para la Participación Efectiva de las víctimas no se ha logrado por lo que hasta la fecha de este informe, las víctimas de manera formal y reglamentada no habían podido participar e incidir desde su perspectiva en las instancias o espacios de diseño de los programas de asistencia y reparación, lo cual evidencia una falencia estructural dado que asegurar el proceso de participación de las víctimas constituye uno de los pilares estructurales de la misma.
5. La Ley de víctimas por sí sola no superará el estado de cosas inconstitucional ECI, decretado por la Corte Constitucional Colombiana a partir de 2004 para lograr el goce efectivo de los derechos de la población desplazada, ya que el desplazamiento forzado (DP) por su connotación política, hace que no sea factible resolver las falencias institucionales solo por vía legal. Lo anterior para que el Gobierno Nacional haga un replanteamiento desde un enfoque de transición que brinde un marco de complementariedad y articulación entre ambas políticas y formule puentes operativos entre ambos esquemas de atención, respetando las diferencias entre los resultados de la política de desplazamiento y la política integral de víctimas.
6. El tema del impacto fiscal y presupuestal, y la inversión del Estado para poner en marcha los programas de asistencia, reparación y blindar a la institucionalidad con la capacidad y sostenibilidad requerida como bien se anota en el informe que fue entregado, sigue siendo el reto más importante, en la ejecución de la ley de víctimas.
7. La coordinación entre la nación y los entes territoriales resulta fundamental para lograr el goce efectivo de los derechos de las víctimas, aspecto que denota serias falencias en el ejercicio de seguimiento adelantado, no solo por la limitada capacidad de actuación de los entes territoriales de orden político, programático y presupuestal, sino además por las complejidades del proceso de acompañamiento técnico que deben surtir las entidades del Sistema Nacional de atención y Reparación a las víctimas.
8. La falta de la Red Nacional de Información no ha permitido el intercambio de datos entre las entidades responsables de los procesos de atención, asistencia y reparación y tampoco ha facilitado a las instituciones que tengan la información necesaria para planear, organizar la oferta y evidenciar el cumplimiento respecto de las medidas de reparación bajo su responsabilidad. Del mismo modo, las demoras en el proceso de valoración para el ingreso al registro único de víctimas, está limitando el acceso efectivo de las víctimas a los derechos consagrados en la mencionada Ley de

Retos de la comisión de seguimiento a la ley de víctimas en cumplimiento de los derechos de las víctimas

El aprendizaje logrado en esta primera etapa de la puesta en marcha de este mecanismo novedoso para realizar el seguimiento a un instrumento de política pública de gran magnitud

en el país, como lo es la atención y reparación de las víctimas en Colombia, obliga a introducir ajustes de índole programático y procedimental para la etapa o fase que se avecina en este periodo. En tal sentido, varios aspectos tendrán que ser considerados:

1. Modificar las herramientas e instrumentos hasta la fecha aplicados, con el fin de facilitar la acción de seguimiento y verificación sistemática al cumplimiento efectivo de los programas de asistencia y reparación de las víctimas en consideración a la naturaleza de los organismos de control que tienen este mandato.
2. Verificar que las acciones adelantadas por las distintas entidades responsables de la implementación de la ley de víctimas, han sido diseñadas y ejecutadas en una perspectiva de reparación integral y de enfoque de derechos.
3. Evidenciar el avance progresivo en la aplicación de la ley de víctimas a partir de la indagación directa con las víctimas, explorando el goce real de sus derechos, mediante diversos mecanismos y teniendo en cuenta no solo las condiciones particulares de las víctimas, y el daño producido (ejemplo, víctimas de tortura, o de delito sexual en el marco del conflicto armado) , para identificar el acceso real y efectivo de éstas a los programas y medidas disponibles en el marco de su reparación integral.
4. Identificar el enfoque de reparación integral a través de un conjunto de variables tales como: Accesibilidad, coordinación, proporcionalidad, integralidad, gradualidad y progresividad, enfoque diferencial, y participación.
5. Generar instrumentos específicos para las entidades del orden nacional, regional y local, diferenciando los énfasis de sus ámbitos de actuación en cumplimiento de sus responsabilidades legales.
6. Seleccionar indicadores clave en el proceso de seguimiento en dos niveles: Respecto de las obligaciones legales por parte de las instituciones, y, respecto del enfoque reparador incorporado en los programas definidos para satisfacer los derechos de los víctimas.
7. Establecer reportes periódicos de temas estratégicos en el desarrollo de la ley a la luz del acceso efectivo de las víctimas a su reparación integral, con el fin de advertir y procurar la adopción de medidas correctivas que superen los hallazgos, según el caso.

IX. International Dimension and Requirements: Organization of American States (OAS and IACHR), European Union (EU), African Union (AU)

9.1 La Corte Constitucional colombiana frente al control de convencionalidad

Humberto Sierra Porto

I. Introducción

Los estudios científicos de las relaciones entre el derecho internacional público y el derecho constitucional se centraron a comienzos del S.XX en una ardua polémica entre defensores de un esquema monista, con sus diversas vertientes, y uno dualista (Pellet 2005). Para los primeros, se trataba de un único ordenamiento jurídico, y por ende, el problema se desplazaba a determinar cuál primaba sobre el otro; los segundos alegaron siempre que debido a su disparidad de fuentes de producción normativa, a la existencia de marcadas diferencias entre la sociedad internacional y la interna, y por supuesto, a que los sujetos regulados por ambos ordenamientos jurídicos eran distintos, la norma internacional para poder ser invocada por los operadores jurídicos nacionales, debía ser previamente incorporada por las vías que cada Constitución estableciese para tales efectos (1).

En la actualidad, este debate ha perdido cierta vigencia y los análisis se han concentrado en el estudio del diálogo constante que se presenta entre los jueces internos, en especial, los constitucionales, y los jueces internacionales, más exactamente, aquellos dedicados al examen de las violaciones graves a los derechos humanos, al igual que entre estos últimos (vgr. entre la Corte Interamericana de Derechos Humanos, en adelante, la "CteIDH" y el Tribunal Europeo de Derechos Humanos, en lo sucesivo, el "TEDH"). Comunicación que, suele explicarse por el fenómeno de la globalización de la justicia y que tiene como telón de fondo el denominado "control de convencionalidad".

Desde esta perspectiva, entendemos por control de convencionalidad, siguiendo a Bazán

(2011), aquel que se desenvuelve en dos planos: el internacional y el interno. Así, en tanto que el primero consiste en que la CtIDH juzga si un determinado acto o normativa de derecho interno resultan contrarios a la Convención Americana sobre Derechos Humanos (en adelante, la CADH), “disponiendo en consecuencia vgr. la reforma o abrogación de dicha práctica o norma, según corresponda, en orden a la protección de los derechos humanos y a la preservación de la vigencia suprema de tal Convención o de otros instrumentos internacionales fundamentales en este campo” (Bazán 2011); el segundo, está a cargo de los jueces internos, consistiendo en la obligación de verificar la adecuación de las normas jurídicas locales, aplicables en casos concretos, con el texto de la CADH, así con frente a los estándares interpretativos acogidos por la CtIDH (Bazán 2011).

La razón de ser, pero al mismo tiempo las complejidades y dificultades que comporta el ejercicio práctico de esas dos manifestaciones del control de convencionalidad, se explican por la clásica paradoja que comporta la aplicación del principio de supremacía del derecho internacional sobre el interno. Veamos.

Por una parte, el principio de supremacía del derecho internacional sobre el interno no sólo constituye una condición vinculada con la existencia misma de aquél, sino que se encuentra consagrado, hoy por hoy, como norma de derecho positivo en la Convención de Viena sobre el Derecho de los Tratados de 1969:

“27. El derecho interno y la observancia de los tratados. Una parte no podrá invocar las disposiciones de su derecho interno como justificación del incumplimiento de un tratado. Esta norma se entenderá sin perjuicio de lo dispuesto en el artículo 46”.

De hecho, en la historia de las relaciones internacionales colombianas, en la sentencia arbitral del *asunto Montijo*, en el cual los Estados Unidos solicitaba el reconocimiento y pago de unos daños ocasionados a sus nacionales en el entonces Estado soberano de Panamá, el Tribunal desechó la argumentación colombiana, soportada sobre la estructura constitucional federal vigente a la sazón, por cuanto:

“Un tratado es superior a la Constitución. La legislación de la República debe adaptarse al tratado, no el tratado a la ley” (2)

De tal suerte que cualquier instancia internacional, sea judicial o cuasijudicial, siempre aplicará la norma convencional con preferencia a la interna; es más, esta última le resulta inoponible, es decir, no lo vincula. De allí que cuando la CtIDH ejerce el control de convencionalidad, no está haciendo nada distinto a aplicar y garantizar el principio de supremacía del derecho internacional sobre el derecho interno.

Por otra parte, y esta es la segunda parte de la paradoja, el principio de supremacía del derecho internacional sobre el derecho interno se encuentra *relativamente* asegurado ante los jueces internos, en función de la posición que ocupe el derecho internacional dentro de su respectivo sistema de fuentes, siendo posibles los siguientes modelos teóricos: (i) *supraconstitucionalidad* (la norma internacional condiciona el poder de reforma constitucional) (3); (ii) *constitucionalidad* (la norma internacional constituye un parámetro

para ejercer el control de constitucionalidad) (4); (iii) *supralegalidad* (la disposición internacional deroga la ley contraria pero no puede serlo por la ley posterior) (5); y (iv) *legalidad* (la norma internacional puede ser derogada por una ley posterior) (6) .

Pues bien, esta segunda parte de la paradoja, explica, en buena medida, algunas dificultades con las cuales se enfrenta el juez interno, en especial el constitucional, al momento de ejercer el control de convencionalidad.

Así las cosas, el objetivo central del presente escrito consiste en analizar tres perspectivas del control de convencionalidad en Colombia, a saber: (i) la manera como la Corte Constitucional ha *coadyuvado* a la eficacia del control de convencionalidad ejercido por la CtIcDH; (ii) la *praxis* del ejercicio del control de convencionalidad ejercido por la Corte; y (iii) algunas reflexiones sobre el ejercicio del mencionado control ejercido por los jueces ordinarios.

II. **El juez constitucional coadyuva a la eficacia del ejercicio del control de convencionalidad**

Partiendo de la base de que el control de convencionalidad ejercido por la CtIcDH comprende actos de contenido normativo, esto es, disposiciones constitucionales, legales o reglamentarias, así como conductas – activas u omisivas- imputables al Estado Parte en la CADH, pasemos a examinar de qué forma la Corte Constitucional colombiana ha coadyuvado a la eficacia de dicho control internacional.

Para ello debemos analizar, brevemente, los siguientes aspectos (i) los efectos de las sentencias de la CtIcDH; (ii) las vías procesales y las autoridades internas encargadas de ejecutar lo ordenado por aquélla; y (iii) el papel desarrollado por la Corte Constitucional.

Los efectos de las sentencias proferidas por la Corte Interamericana de Derechos Humanos

Las sentencias emitidas por la CtIcDH en asuntos contenciosos tienen efectos *interpartes inmediatos y directos* (Ayala 2007), esto es, en relación con el Estado demandado, la Comisión Interamericana de Derechos Humanos (en adelante, la CIDH) y las víctimas. Así pues, a partir de su ejecutoria, el Estado Parte debe adoptar las medidas necesarias para cumplir lo decidido por la CtIcDH, empleando para ello las vías procesales que su respectivo ordenamiento jurídico consagre para tales fines. En efecto, el artículo 68 de la CADH prescribe lo siguiente:

- “1. Los Estados partes en la Convención se comprometen a cumplir la decisión de la Corte en todo caso en que sean partes.
2. La parte del fallo que disponga indemnización compensatoria se podrá ejecutar en el respectivo país por el procedimiento interno vigente para la ejecución de sentencias contra el Estado”

Más allá de los clásicos efectos *interpartes*, la doctrina ha venido entendiendo que las sentencias proferidas por la CtIcDH gozan también de efectos generales o *erga omnes*,

esto es, frente a todos los órganos que integran el sistema americano, al igual que todos los Estados Partes en la CADH (Ayala 2007, p. 134). Tal postura se soporta en el siguiente artículo del instrumento internacional:

“Artículo 69

El fallo de la Corte será notificado a las partes en el caso y transmitido a los Estados partes en la Convención.”

Pues bien, la vinculatoriedad general de los fallos proferidos por la CteIDH se enfrenta, con todo, a ciertas dudas, tales como las siguientes: (i) ¿resulta vinculante sólo el *decisum* del fallo o igualmente su *ratio decidendi*?; (ii) ¿hasta dónde las consideraciones realizadas en relación con un Estado determinado, resultan aplicables, sin matiz alguno, al conjunto de Estados Partes en el sistema americano?; y (iii) ¿las cortes internacionales de protección de derechos humanos manejan un sistema de precedentes vinculantes, a semejanza de lo sucedido en los países del *common law*?

Se debe tener en cuenta, asimismo, el carácter declarativo o constitutivo que, según el caso, presenten las sentencias proferidas por la CteIDH. En efecto, en ciertas situaciones, la sentencia internacional es considerada, *per se*, una forma de reparación del daño sufrido (7), razón por la cual no se precisa de la adopción de medidas de ejecución internas. Sin embargo, en la mayoría de los casos la sentencia es constitutiva, es decir, crea, modifica o extingue una determinada situación jurídica. Al respecto, el panorama jurisprudencial americano resulta ser mucho más extenso y complejo que el europeo, por cuanto comprende medidas encaminadas a (i) investigar y sancionar efectivamente violaciones graves a los derechos humanos; (ii) pagar determinadas sumas de dinero; (iii) introducir modificaciones en el ordenamiento jurídico interno, incluidas, reformas constitucionales y legales; y (iv) adopción de medidas simbólicas, tales como construcción de monumentos conmemorativos a favor de las víctimas, planes de formación en derechos humanos a los integrantes de la fuerza pública, etc (8).

Vías procesales y autoridades internas encargadas de ejecutar las sentencias proferidas por la CteIDH

En derecho internacional público, la violación de obligaciones convencionales es atribuible al Estado, considerado como un todo, sin tomar en cuenta que el hecho generador haya sido ocasionado por una actividad administrativa, legislativa, judicial o, en determinados casos, incluso por particulares cuando el Estado hubiese fallado en sus deberes de vigilancia y control o aquéllos hubiesen actuado ilícitamente con la tolerancia o aquiescencia de las autoridades internas (Pellet 2005, p. 751) .

Pues bien, una vez declarada judicialmente la responsabilidad internacional del Estado, corresponderá a éste ejecutar el fallo condenatorio, de conformidad con las vías procesales existentes en su respectivo ordenamiento jurídico, y por supuesto, por sus autoridades judiciales o administrativas competentes. En efecto, el fallo condenatorio internacional tiene simplemente como destinatario al “Estado”, y no a alguna entidad o autoridad interna específica. De allí que, en función de lo ordenado por la CteIDH, será preciso determinar quién y cómo se cumplirá la condena.

Lo anterior, sin embargo, no suele estar exento de dificultades tales como, entre otras: (i) inexistencia, o existencia parcial, de vías procesales internas idóneas para ejecutar la condena internacional (9); (ii) presencia de sentencias penales absolutorias a favor de los responsables de violaciones a los derechos humanos (10); y (iii) falta de instrumentos de derecho interno que permitan determinar qué autoridad administrativa, o autoridades en muchos casos, debe entrar a responder con su respectivo presupuesto.

El juez constitucional frente a la ejecución de los fallos proferidos por la CtI/DH

Hasta la fecha, la Corte Constitucional colombiana no ha se ha visto confrontada a las manifestaciones más profundas o controversiales del ejercicio del control de convencionalidad ejercido por la CtI/DH, tales como (i) ordenarle al Estado que modifique una disposición constitucional, tal y como sucedió en el *asunto La última tentación de Cristo(11) vs. Chile* y en el caso *Caesar vs. Trinidad y Tobago (12)* ; (ii) declaraciones en el sentido de que una ley es incompatible con la CADH y que, en consecuencia, "carece de efectos jurídicos", como aconteció en los *asuntos Barrios Altos vs. Perú (13)*; *Gomes Lund y otros ("Guerrilha do Araguaia) vs Brasil (14)*; y más, recientemente, *Gelman vs. Uruguay (15)* o (iii) darle órdenes al Estado para que "adecue en un plazo razonable su derecho interno a la Convención", como sucedió con los tipos penales argentinos referentes a los delitos contra la honra y el buen nombre (16), o, de manera semejante, en el *asunto Cabrera García y Montiel Flores vs. México*, en materia de fuero militar (17).

No obstante lo anterior, lo cierto es que en algunos fallos recientes sobre Colombia, la CtI/DH ha expresado su concepto sobre determinadas leyes, aunque sin llegar a dejarlas sin efectos. Así por ejemplo, en el *asunto Manuel Cepeda Vargas vs. Colombia (18)*, en relación con la Ley 1312 de 2009, la CtI/DH afirmó lo siguiente:

"En cuanto a la futura posible aplicación de la Ley 1312 de 2009, la cual reforma la Ley 906 de 2004 en relación con el principio de oportunidad, el Tribunal nota que la misma contempla la posibilidad de aplicar dicho principio a las personas desmovilizadas de un grupo paramilitar y faculta a la Fiscalía General de la Nación a suspender, interrumpir o renunciar a la persecución penal en estos casos. En particular, la ley indica que para acceder a dicho beneficio la persona desmovilizada debe haber manifestado con actos inequívocos su voluntad de reintegrarse a la sociedad, no debe haber sido postulada al procedimiento de la Ley de Justicia y Paz, y no deben existir en su contra investigaciones por delitos cometidos antes o después de su desmovilización, con excepción de la pertenencia a la organización criminal, utilización ilegal de uniformes e insignias y porte ilegal de armas y municiones. Si bien dicha ley establece que "para la aplicación de esta causal, el desmovilizado deberá firmar una declaración bajo la gravedad de juramento en la que afirme no haber cometido un delito diferente a los establecidos en esta causal", la Corte ya ha constatado que este tipo de disposiciones normativas puede ser insuficiente si no se da en forma concomitante una verificación rigurosa por parte de las autoridades encargadas de las investigaciones, o del Ministerio Público, de tales aseveraciones (supra párr. 166). Cfr. Ley 1312 de 9 de julio de 2009 (expediente de prueba, tomo XXII, anexo 3 al escrito de alegatos finales de los representantes, folios 9061 a 9063)."

Como puede advertirse, si bien la CtI/DH no llega a dejar sin efectos la ley, pareciera fijar una postura acerca de la conformidad de ésta con el texto de la CADH. Lo anterior, ha generado diversas interpretaciones y debates acerca de la posibilidad de aplicar el principio de oportunidad para los desmovilizados de los grupos armados en Colombia.

En este orden de ideas, por el momento, la Corte Constitucional ha proferido algunas sentencias encaminadas a que el control convencional ejercido por la CtI/DH, en otras facetas distintas a las anteriormente señaladas, sea efectivo en el orden interno. En otras palabras, existen fallos proferidos por el juez constitucional que han abierto la puerta para que las condenas proferidas por el juez internacional puedan ser ejecutadas en Colombia, en especial, en punto al deber de investigar y sancionar a los responsables de violaciones graves a los derechos humanos.

Los matices al principio del non bis in idem

La Corte Constitucional, mediante sentencia C- 554 del 31 de mayo de 2001, analizó la conformidad con la Carta Política, de la siguiente expresión, contenida en el actual Código Penal:

“ARTICULO 8o. PROHIBICION DE DOBLE INCRIMINACION. A nadie se le podrá imputar más de una vez la misma conducta punible, cualquiera sea la denominación jurídica que se le dé o haya dado, salvo lo establecido en los instrumentos internacionales.

A juicio del demandante, la expresión legal señalada vulneraba de manera flagrante el artículo 29 constitucional según el cual toda persona tiene derecho a “no ser juzgada dos veces por el mismo hecho”, así como el artículo 93 constitucional referente a la prevalencia de las normas internacionales de derechos humanos, que reconocen derechos humanos y que prohíben su limitación bajo estados de excepción.

La Corte en su sentencia reconoce que existen diversos tratados internacionales de derechos humanos que recogen el principio de la prohibición de la doble incriminación, pero atina a precisar que, en la actualidad, se presenta asimismo una importante tendencia de la legalidad internacional encaminada a matizar la vigencia del conocido *non bis in idem*, en aras a garantizar determinados principios sobre los cuales se edifica la sociedad internacional.

Para efectos de nuestro estudio, merece la pena destacar que en este fallo la Corte Constitucional estableció una conexión entre la salvedad que consagra el artículo 8 del C.P. y el funcionamiento del sistema interamericano de protección de derechos humanos, por una parte, y la Corte Penal Internacional, por la otra.

En efecto, el concepto de reparación que maneja el sistema interamericano de protección de los derechos humanos comprende y desborda aquel de indemnización que se emplea en el orden interno colombiano. De tal suerte que es usual que la CIDH recomiende al Estado colombiano no sólo pagar a las víctimas una determinada cantidad de dinero sino que además se investigue y sancione penal y disciplinariamente, de manera efectiva, a los responsables de estos crímenes. En igual sentido, en los términos del artículo 17 del Estatuto

de Roma de la Corte Penal Internacional, la adopción de determinadas sentencias penales no impide el ejercicio de la competencia por parte de aquélla.

En suma, la sentencia C- 554 de 2001 se acompasa con los principios de *subsidiaridad*, que gobierna el funcionamiento del sistema americano de protección de los derechos humanos, al igual que aquel de *complementariedad*, que hace lo propio con la CPI.

El recurso extraordinario de revisión y los derechos de las víctimas

En sentencia C-004 del 20 de enero de 2003, la Corte Constitucional examinó las relaciones existentes entre la procedencia del recurso extraordinario de revisión en materia penal y los derechos humanos a la verdad, la justicia y la reparación. El problema jurídico que se planteaba consistía básicamente en determinar si la consagración de que la acción de revisión por hechos nuevos o pruebas no conocidas al tiempo de los debates únicamente procede para sentencias condenatorias, y en beneficio del condenado implicaba o no una discriminación que desconociese los derechos fundamentales a la igualdad, los derechos de las víctimas y el principio de prevalencia del derecho sustancial, o si por el contrario, bien podía el legislador consagrar esa restricción, pues se estaba ante un legítimo desarrollo de su libertad de configuración que encontraba además pleno sustento en el principio del *non bis in ídem* (19).

Para dar respuesta a este interrogante, la Corte se apoyó en gran parte de la jurisprudencia que ha venido sentando, en los últimos años, sobre los derechos humanos a la verdad, a la justicia y a la reparación de las víctimas de crímenes de lesa humanidad y de guerra, lo cual ha comportado diversos e importantes efectos en aspectos procesales, en especial, la ampliación del papel que está llamada a cumplir la parte civil en los procesos penales (20), así como su legitimación activa en sede de acción de tutela, amén de la actividad procesal de la víctima en la etapa de investigación previa (21).

Todos estos precedentes jurisprudenciales condujeron a la Corte a reconsiderar las finalidades del recurso extraordinario de revisión en materia penal, particularmente, en los procesos por violaciones a los derechos humanos. Para tales efectos, el juez constitucional adelantó un test de proporcionalidad estricto, labor en la cual se ponderó los siguientes principios en tensión: de una parte, el *non bis in ídem* y la seguridad jurídica; por la otra, los derechos fundamentales de las víctimas a conocer la verdad sobre lo ocurrido, a que se haga justicia y a ser reparadas, amén de los compromisos internacionales que ha asumido el Estado colombiano en materia de derechos humanos. Como resultado de ese juicio de proporcionalidad, la Corte consideró que, dada la gravedad de la lesión que comportan esta variedad de crímenes para los bienes jurídicos más preciados para el ser humano, en materia de derechos humanos el contenido del deber estatal de investigar y castigar a los responsables resultaba ser mayor en relación con los demás delitos y que, en últimas, prevalecían los derechos de la víctima sobre aquellos del victimario, y por ende, el recurso extraordinario de revisión procedía también para dejar sin efectos una sentencia a favor del sindicado. En palabras de la Corte:

“existe una afectación particularmente intensa de los derechos de las víctimas (CP art. 229), que obstaculiza gravemente la vigencia de un orden justo (CP art.

2º), cuando existe impunidad en casos de afectaciones a los derechos humanos o de violaciones graves al derecho internacional humanitario. Esta impunidad es aún más grave si ella puede ser atribuida al hecho de que el Estado colombiano incumplió con su deber de investigar, en forma seria e imparcial, esas violaciones a los derechos humanos y al derecho internacional humanitario, a fin de sancionar a los responsables."

Al respecto cabe señalar que la Corte articuló además la procedencia del recurso extraordinario de revisión con la labor desempeñada por el Comité de Derechos Humanos de las Naciones Unidas, la CIDH y la CtIJDH, en el sentido de que los pronunciamientos de estas instancias internacionales en los cuales se declarase que el Estado colombiano había incumplido gravemente sus deberes de investigar y sancionar a los responsables de las violaciones a los derechos humanos serviría de fundamento para que fuese revisada una sentencia absolutoria a favor del victimario. De allí que la parte resolutive de la sentencia C-004 de 2003 resulte ser tan recargada:

"Declarar EXEQUIBLE el numeral 3º del artículo 220 de la Ley 600 de 2000 o Código de Procedimiento Penal, en el entendido de que, de conformidad con los fundamentos 31, 36 y 37 de esta sentencia, la acción de revisión por esta causal también procede en los casos de preclusión de la investigación, cesación de procedimiento y sentencia absolutoria, siempre y cuando se trate de violaciones de derechos humanos o infracciones graves al derecho internacional humanitario, y un pronunciamiento judicial interno, o una decisión de una instancia internacional de supervisión y control de derechos humanos, aceptada formalmente por nuestro país, haya constatado la existencia del hecho nuevo o de la prueba no conocida al tiempo de los debates. Igualmente, y conforme a lo señalado en los fundamentos 34, 35 y 37 de esta sentencia, procede la acción de revisión contra la preclusión de la investigación, la cesación de procedimiento y la sentencia absolutoria, en procesos por violaciones de derechos humanos o infracciones graves al derecho internacional humanitario, incluso si no existe un hecho nuevo o una prueba no conocida al tiempo de los debates, siempre y cuando una decisión judicial interna o una decisión de una instancia internacional de supervisión y control de derechos humanos, aceptada formalmente por nuestro país, constaten un incumplimiento protuberante de las obligaciones del Estado colombiano de investigar en forma seria e imparcial las mencionadas violaciones.

A mi juicio esta sentencia integradora reviste una enorme importancia no sólo para la protección de los derechos de las víctimas, sino porque, en últimas, vino a colmar un sentido vacío de la legislación penal interna en materia de ejecutoriedad de las decisiones de las instancias internacionales de protección de los derechos humanos. En efecto, dado que el concepto de reparación que se maneja en el orden internacional, como lo hemos visto, es más amplio que aquel de indemnización pecuniaria, el operador judicial interno no contaba realmente con las herramientas necesarias para hacer cumplir las mencionadas decisiones, con lo cual, en la práctica, en el mejor de los casos, las víctimas recibían tan sólo una determinada cantidad de dinero, a título de indemnización.

Finalmente, el precedente sentado por la Corte en sentencia C- 04 de 2003 fue acogido por los redactores de la Ley 906 de 2004, es decir, el actual Código de Procedimiento Penal:

“CAPITULO X. ACCIÓN DE REVISIÓN.

ARTÍCULO 192. PROCEDENCIA. La acción de revisión procede contra sentencias ejecutoriadas, en los siguientes casos:

(...)

4. Cuando después del fallo en procesos por violaciones de derechos humanos o infracciones graves al derecho internacional humanitario, se establezca mediante decisión de una instancia internacional de supervisión y control de derechos humanos, respecto de la cual el Estado colombiano ha aceptado formalmente la competencia, un incumplimiento protuberante de las obligaciones del Estado de investigar seria e imparcialmente tales violaciones. En este caso no será necesario acreditar existencia de hecho nuevo o prueba no conocida al tiempo de los debates”.

Así pues, la labor iniciada por el juez constitucional fue culminada por el legislador ordinario.

La articulación entre la acción disciplinaria y la justicia internacional

En materia disciplinaria, la Corte en sentencia C- 014 de 2004 también dio unos pasos importantes en materia de compatibilizar la acción disciplinaria con el funcionamiento de las instancias internacionales de protección de los derechos humanos. En tal sentido consideró que (i) si bien la regla general indica que en el derecho disciplinario no existen víctimas por cuanto las faltas remiten a infracciones de deberes funcionales y no a lesiones de derechos (22), de manera excepcional puede hablarse de víctimas de una falta disciplinaria cuando de la infracción del deber que la constituye surge, de manera inescindible y directa, la violación del derecho internacional de los derechos humanos o del derecho internacional humanitario; (ii) las víctimas o perjudicados son personas legitimadas para acceder al proceso disciplinario, dado que son los titulares de los bienes jurídicos vulnerados como consecuencia inescindible y directa de la infracción del deber implícita en la falta disciplinaria; (iii) en el proceso disciplinario, las víctimas no pueden pretender el reconocimiento del derecho a la reparación pues esta pretensión no está ligada directamente a la infracción del deber funcional que vincula al sujeto disciplinable con el Estado; y (iv) cuando se trata de faltas constitutivas de violaciones del derecho internacional de los derechos humanos o del derecho internacional humanitario, también procede la revocatoria del fallo absolutorio y del auto de archivo (23).

En suma, en materia de ejecución de las sentencias de la CtIDH en el derecho interno colombiano, la Corte Constitucional ha jugado un papel importante, en especial, con ocasión del ejercicio del control abstracto de constitucionalidad sobre las leyes. Lo anterior no significa, de manera alguna, que en este tema no deban intervenir el legislador, quien debe adecuar el funcionamiento de los sistemas jurídicos interno e internacional.

III. **La praxis del ejercicio del control de convencionalidad ejercido por la Corte.**

La segunda vertiente del control de convencionalidad apunta a que los jueces internos verifiquen la adecuación de las normas jurídicas internas que aplican a casos concretos a la CADH, así como a los estándares interpretativos acogidos por la Corte IDH. Al respecto, esta instancia judicial internacional, en *asunto Almonacid Arellano y otros vs. Chile*, consideró lo siguiente:

“El Poder Judicial debe ejercer una especie de “control de convencionalidad” entre las normas jurídicas internas que aplican en los casos concretos y la Convención Americana sobre Derechos Humanos. En esta tarea, el Poder Judicial debe tener en cuenta no solamente el tratado, sino también la interpretación que del mismo ha hecho la Corte Interamericana, intérprete última de la Convención Americana” (24).

Pues bien, a efectos de analizar la manera como la Corte Constitucional colombiana ha venido ejerciendo dicho control de convencionalidad, será preciso analizar (i) el valor acordado por la Corte a la jurisprudencia americana; (ii) las situaciones en las cuales la jurisprudencia internacional ha sido acogida; y (iii) algunos casos problemáticos.

El valor acordado por la Corte a la jurisprudencia interamericana

La Corte Constitucional ha considerado que los fallos proferidos por instancias judiciales internacionales, sean de derecho humanos o penales internacionales, configuran un criterio relevante de interpretación de las cláusulas constitucionales de derechos humanos, sin que necesariamente hagan parte del bloque de constitucionalidad. Así por ejemplo, en sentencia C- 010 de 2000, al referirse al valor que ofrece la jurisprudencia de la Corte Interamericana de Derechos Humanos, la Corte Constitucional consideró lo siguiente:

“En virtud del artículo 93 de la C. P., los derechos y deberes constitucionales deben interpretarse de conformidad con los tratados internacionales sobre derechos humanos ratificados por Colombia de lo cual se deriva que la jurisprudencia de las instancias internacionales, encargadas de interpretar esos tratados, constituyen un criterio hermenéutico relevante para establecer el sentido de las normas constitucionales sobre derechos fundamentales”. (negritas agregadas).

En este sentido la Corte Constitucional ha sostenido que *“En virtud del artículo 93 de la C. P., los derechos y deberes constitucionales deben interpretarse de conformidad con los tratados internacionales sobre derechos humanos ratificados por Colombia de lo cual se deriva que la jurisprudencia de las instancias internacionales, encargadas de interpretar esos tratados, constituyen un criterio hermenéutico relevante para establecer el sentido de las normas constitucionales sobre derechos fundamentales”* . Postura reiterada en numerosas ocasiones (25), que permite concluir, que la jurisprudencia de las instancias internacionales constituye una pauta relevante para la interpretación de los enunciados normativos contenidos en instrumentos internacionales que hacen parte del bloque de

constitucionalidad, cosa diferente a atribuirle a dicha jurisprudencia directamente el carácter de normas constitucionales (Ramelli 2011, p. 40).

Más recientemente, en sentencia C- 442 de 2011, la Corte Constitucional, con ocasión del examen de una demanda de inconstitucionalidad contra los artículos del Código Penal referentes a los delitos de injuria y calumnia, consideró lo siguiente:

“De manera reiterada esta Corporación ha sostenido que “en virtud del artículo 93 de la CP, los derechos y deberes constitucionales deben interpretarse de conformidad con los tratados de derechos humanos ratificados por Colombia, de lo cual se deriva que la jurisprudencia de las instancias internacionales encargadas de interpretar estos tratados constituye un criterio hermenéutico relevante para establecer el sentido de las normas constitucionales sobre derechos fundamentales” .

En la misma línea argumentativa en años recientes en diversas decisiones de esta Corporación se ha señalado que la jurisprudencia de la Corte IDH es un criterio relevante para fijar el parámetro de control de las normas que hacen parte del ordenamiento interno colombiano, precisamente porque establece el alcance de distintos instrumentos internacionales de derechos humanos los cuales a su vez resultan relevantes al examinar la constitucionalidad de disposiciones de rango legal al hacer parte del bloque de constitucionalidad.

Dentro de esta línea argumentativa esta Corporación ha sostenido que la jurisprudencia de la Corte IDH contiene la interpretación auténtica de los derechos contenidos en la CADH, instrumento internacional que integra el parámetro de control de constitucionalidad .

Así, por ejemplo, en la sentencia C-228 de 2002 se destacó la importancia que la Corte Constitucional valorara la doctrina sentada por la Corte IDH, en relación a que las medidas legislativas que impidieran a las víctimas de violaciones de derechos humanos conocer la verdad de los hechos, resultaban contrarias a la CADH, para efectos de examinar la constitucionalidad del artículo 137 de la Ley 600 de 2000, demandado en aquella ocasión.

Finalmente, en la sentencia C-370 de 2006, al examinar distintas disposiciones de la Ley 975 de 2005 relacionadas con los derechos de las víctimas de graves violaciones de derechos humanos, se reconoció el carácter vinculante de la jurisprudencia de la Corte Interamericana de Derechos Humanos en los siguientes términos: “Por su relevancia como fuente de Derecho Internacional vinculante para Colombia, por tratarse de decisiones que expresan la interpretación auténtica de los derechos protegidos por la Convención Americana sobre Derechos Humanos, la Corte transcribirá algunos de los apartes más relevantes de algunas de las Sentencias de la Corte Interamericana de Derechos Humanos relativas a estándares sobre justicia, no repetición, verdad y reparación de las víctimas de los graves atentados contra el Derecho Internacional de los Derechos Humanos y el Derecho Internacional Humanitario.”

En suma, la Corte Constitucional ha considerado, de manera reiterada, que la jurisprudencia elaborada por la Corte Interamericana de Derechos Humanos es un criterio relevante al momento de examinar la validez de una ley o de adoptar un fallo de amparo.

La jurisprudencia interamericana es seguida con frecuencia por el juez constitucional.

En innumerables casos, al momento de fallar una demanda ciudadana presentada contra una ley, la Corte Constitucional ha traído a colación sentencias proferidas por la CtI/DH, en especial, a efectos de corroborar una determinada interpretación de una disposición de derecho fundamental. Veamos algunos ejemplos.

Así por ejemplo, en sentencia C- 205 de 2003, al momento de analizar la constitucionalidad de un tipo penal mediante el cual se tipificaba el delito de receptación de autopartes, el juez constitucional trajo a colación algunos extractos de la sentencia proferida por la CtI/DH el 12 de Noviembre de 1997, asunto *Suárez Rosero c. Ecuador*, referidas a la presunción de inocencia; otro tanto hizo con el fallo adoptado el 18 de agosto de 2000, referido al asunto *Cantoral Benavides c. Perú* (26).

En materia de control de constitucionalidad sobre medidas adoptadas bajo estado de excepción, la Corte Constitucional ha considerado igualmente valiosa la jurisprudencia sentada por la CtI/DH, a efectos de determinar si el legislador extraordinario se ajustó o no a la Carta Política:

“En primer lugar, los tratados internacionales sobre derechos humanos se caracterizan por contener cláusulas de salvaguardia, esto es, normas convencionales que inspiradas en el principio rebus sic stantibus, facultan a los Estados que las invocan para sustraerse, de manera temporal, al cumplimiento de las obligaciones acordadas en el texto del instrumento internacional. Esta manifestación de la teoría de la imprevisión, desarrollada en el derecho privado, fue recogida por el derecho internacional público y responde a la necesidad de que, en determinadas circunstancias excepcionales, se hace imposible el cumplimiento estricto de lo acordado, y en tal sentido, para evitar caer en violaciones reiteradas del tratado internacional, el Estado puede por cierto tiempo desconocer algunas cláusulas convencionales previo respeto de algunas solemnidades (declaración y notificación). Estas cláusulas de salvaguardia, contenidas en los artículos 27 de la Convención Americana sobre Derechos Humanos y 4o del Pacto Internacional de Derechos Civiles y Políticos, constituyen en consecuencia buena parte de la regulación internacional de los estados de excepción.

*Cabe advertir, que para poder comprender el verdadero sentido y alcance de estas cláusulas de salvaguardia, necesariamente se debe recurrir a la interpretación que de las mismas han realizado, en el caso del Pacto de San José de Costa Rica los órganos del sistema americano de protección de los derechos humanos, a saber: la Comisión Interamericana de Derechos Humanos (por medio del análisis de peticiones individuales y de informes sobre Estados) y la Corte Interamericana de Derechos Humanos (en especial, sus opiniones consultivas OC- 6/86 , OC-8/87 y OC-9/87 , así como en los asuntos *Neira Alegría c. Perú* ; *Loayza Tamayo c. Perú* ; *Castillo Petruzzi c. Perú* y *Durand y Ugarte c. Perú* .). En lo que concierne al Pacto Internacional de Derechos Civiles y Políticos será preciso remitirse a los pronunciamientos del Comité de Derechos Humanos de Naciones Unidas, en sede de peticiones individuales y en sus informes sobre Estados.*

Como puede advertirse, la Corte Constitucional ha recurrido con frecuencia a la jurisprudencia interamericana, como criterio para determinar si el legislador, ordinario o extraordinario, se ha ajustado a la Constitución. Tal situación se explica en la medida en que los tratados internacionales sobre derechos humanos, entre ellos la CADH, hacen parte del bloque de constitucionalidad, es decir, son parámetro para ejercer el control de constitucionalidad sobre las leyes, con lo cual, se podría asegurar que el juez constitucional colombiano está llamado a ejercer un control de convencionalidad, situación que no se presentaba bajo la Carta Política de 1886 (Ramelli 2011, p. 23).

Ahora bien, debemos precisar que si bien la CADH hace parte del bloque de constitucionalidad, y por ende, la Corte termina defendiéndola frente a las intervenciones que el legislador realiza a los derechos fundamentales, también lo es que tal control de convencionalidad, adelantado por el juez interno, no se realiza de manera aislada, sino en consonancia y armonía con la Constitución de 1991. En otros términos, al examinar la validez de una ley, el juez constitucional interpreta armónicamente el Texto Fundamental con el instrumento internacional, es decir, no se trata de oponer simplemente, o de manera directa, la ley al tratado internacional (27).

Precisemos igualmente que, en el caso colombiano, la Constitución de 1991 tiene una marcada vocación internacionalista. Diversas cláusulas constitucionales muestran un especial apego de los delegatarios a la Asamblea Nacional Constituyente por los principios y valores que inspiran a la Sociedad Internacional que surgió de las cenizas de la Segunda Guerra Mundial, y muy especialmente, al respeto incondicional por la dignidad humana. De allí que el artículo 93 Superior disponga que los tratados internacionales ratificados por el Estado colombiano, que prohíban su limitación bajo estados de excepción, "*prevalecen en el orden interno*". Y a renglón seguido señala que los derechos y deberes consagrados en la Carta Política "*se interpretarán de conformidad con los tratados internacionales ratificados por Colombia*".

Estas cláusulas constitucionales, cuya fuente de inspiración fueron los artículos 16 de la Constitución Portuguesa de 1976 y 10.2 de la Española de 1978, tienen hondas repercusiones en la hermenéutica de los derechos fundamentales en el sentido de que obligan al operador jurídico interno a que cuando quiera que, siguiendo a Hesse, "*debe darse contestación a una pregunta de Derecho Constitucional que, a la luz de la Constitución, no ofrece una solución clara*" , acuda a la legalidad internacional, a fin de crear normas adscritas de derechos fundamentales o, en términos usuales empleados en nuestro medio, "*subreglas constitucionales*", que le permitan solucionar un caso concreto .

En este orden de ideas, el intérprete de las normas constitucionales de derechos humanos no goza de una absoluta libertad al momento de elegir entre los diversos métodos hermenéuticos existentes, en el sentido, por ejemplo, de decantarse exclusivamente por el literal o el histórico, ya que necesariamente debe partir del sistemático, para lo cual integrará un contexto donde estarán presentes las normas internacionales y las constitucionales. Una vez determinado el enunciado será menester atribuirle aquel significado de los posibles más acorde con el fin concreto que persigue el precepto, y sólo después le será dable al operador jurídico nacional acudir a otros métodos como

los mencionados anteriormente. En otros términos, el recurso al método sistemático, y de contera al teleológico, constituye un mandato constitucional para el intérprete de las normas de derechos humanos. Por supuesto, como lo señala Ezquiaga Ganuzas, el clásico problema que plantea la interpretación sistemática es la determinación del contexto que se va a tener en cuenta para la interpretación de un enunciado concreto, “*de la cual depende en alguna medida el significado atribuido*”. En nuestro caso, será preciso que el intérprete establezca conexiones materiales, lógicas, gramaticales o históricas entre una norma constitucional y alguna o varias de aquellas que pueblan el amplio universo de la legalidad internacional.

Ahora bien, en la integración del contexto será preciso no olvidar la vigencia del principio según el cual, en materia de derechos humanos, siempre se debe escoger la interpretación que resulte ser más favorable o garantista, bien que ésta se apoye, con preeminencia, en la norma interna o en la internacional. En efecto, en ocasiones se tiende a pensar que las normas consuetudinarias o convencionales resultan ser más protectoras que las internas, cuando en muchos casos no es así, por la sencilla razón que las normas internacionales son el resultado de difíciles acuerdos políticos entre fuerzas progresistas y retardatarias; de allí que reflejen, casi siempre, unos mínimos que se conocen como estándares internacionales en una determinada materia. Por tal razón no es inusual toparse con normas constitucionales mucho más garantistas y por ello el cumplimiento del mandato del artículo 93 superior no puede conducir a bajar los niveles de protección de la persona humana (28).

Algunos casos controversiales

El proceso de ósmosis que ha operado la Constitución de 1991 entre los órdenes jurídicos interno e internacional en materia de derechos humanos, amén de las frecuentes citas que de la jurisprudencia interamericana se encuentran en la jurisprudencia constitucional colombiana, podrían llevar a pensar que el control de convencionalidad que realiza la Corte Constitucional ha sido un proceso siempre pacífico, libre de obstáculos. Ello es cierto, en la mayoría de los casos, debido a que ambos textos normativos, el internacional y el interno, comparten una visión humanista y protectora de la dignidad humana. Sin embargo, se han presentado casos que evidencian ciertas discordancias, las cuales muestran lo complejo que a veces resulta ser el control de convencionalidad. La principal fuente de dichas controversias se encuentra en algunas disparidades que existen ciertos artículos de la Constitución de 1991, por una parte, y determinados artículos de la CADH e interpretaciones que de los mismos ha realizado la CtI/DH, por la otra.

Así por ejemplo, la Constitución de 1991 permite que ciertos funcionarios aforados (29) sean juzgados en única instancia, en tanto que el artículo 8 de la CADH prescribe lo siguiente:

“Artículo 8. Garantías Judiciales

1. Toda persona tiene derecho a ser oída, con las debidas garantías y dentro de un plazo razonable, por un juez o tribunal competente, independiente e imparcial, establecido con anterioridad por la ley, en la sustanciación de cualquier acusación penal formulada contra ella, o para la determinación de sus derechos y obligaciones de orden civil, laboral, fiscal o de cualquier otro carácter.

2. Toda persona inculpada de delito tiene derecho a que se presuma su inocencia mientras no se establezca legalmente su culpabilidad. Durante el proceso, toda persona tiene derecho, en plena igualdad, a las siguientes garantías mínimas:

(...)

Derecho de recurrir del fallo ante juez o tribunal superior.”

Así mismo, en tanto que la CtIJDH ha considerado que un Estado no puede alegar, al momento de cumplir uno de sus fallos, que la acción penal prescribió (Ayala 2007, p. 159), la Corte Constitucional ha estimado que el legislador puede, para el caso de la desaparición forzada de personas, disponer la imprescriptibilidad de la acción penal (30), en tanto que al momento de examen la constitucionalidad del Estatuto de Roma de la CPI estimó lo siguiente:

*“No obstante lo anterior, la Corte Penal Internacional sí puede –en razón del principio de imprescriptibilidad de los crímenes de su competencia– llegar a investigar y juzgar conductas constitutivas de cualquiera de los mencionados crímenes, **así la acción penal o la sanción penal para los mismos haya prescrito, según las normas jurídicas nacionales.** (negritas agregadas).*

El tratamiento diferente que hace el Estatuto de Roma respecto a la imprescriptibilidad de los crímenes de competencia de la Corte Penal Internacional, tiene fundamento en el artículo 93 de la Constitución. Se trata de un tratamiento distinto respecto de una garantía constitucional que está expresamente autorizado a partir del Acto Legislativo 02 de 2001 y que opera exclusivamente dentro del ámbito regulado por dicho Estatuto.

Adviértase que, en este caso, la contradicción no es realmente entre la Constitución y la CADH, por cuanto ésta no regula *expressis verbis* el tema de la imprescriptibilidad, sino entre aquélla y la jurisprudencia sentada por la CtIJDH.

Otro caso que ofreció dificultad fue el atinente a la despenalización del aborto en determinados casos. En efecto, el punto de partida de la discusión fue el siguiente artículo 4.1. de la CADH:

*“Toda persona tiene derecho a que se respete su vida. Este derecho estará protegido por la ley y, en general, a partir del momento de la **concepción**. Nadie puede ser privado de la vida arbitrariamente.”*

Pues bien, la Corte en sentencia C- 355 de 2006, al momento de interpretar tal cláusula convencional, consideró:

“Ahora bien, este enunciado normativo hace alusión nuevamente al concepto de persona para referirse a la titularidad del derecho a la vida, pero acto seguido afirma que la protección del derecho a la vida será a partir del momento de la concepción. Este enunciado normativo admite distintas interpretaciones. Una es la que hacen algunos de los intervinientes en el sentido que el nasciturus, a partir de la concepción, es una persona, titular del derecho a la vida en cuyo favor han de adoptarse “en

general" medidas de carecer legislativo. Empero, también puede ser interpretado en el sentido que a partir de la concepción deben adoptarse medidas legislativas que protejan "en general" la vida en gestación, haciendo énfasis desde este punto de vista en el deber de protección de los Estado Partes.

Sin embargo, bajo ninguna de las posibilidades interpretativas antes reseñadas puede llegar a afirmarse que el derecho a la vida del nasciturus o el deber de adoptar medidas legislativas por parte del Estado, sea de naturaleza absoluta, como sostienen algunos de los intervinientes. Incluso desde la perspectiva literal, la expresión "en general" utilizada por el Convención introduce una importante cualificación en el sentido que la disposición no protege la vida desde el momento de la concepción en un sentido absoluto, porque precisamente el mismo enunciado normativo contempla la posibilidad de que en ciertos eventos excepcionales la ley no proteja la vida desde el momento de la concepción.

En efecto, de acuerdo con el primer párrafo del Preámbulo, el propósito de la Convención Americana es "consolidar en este Continente, dentro del cuadro de las instituciones democráticas, un régimen de libertad personal y de justicia social, fundado en el respeto de los derechos esenciales del hombre". El segundo párrafo adiciona que "los derechos esenciales del hombre" merecen protección internacional precisamente porque "no nacen del hecho de ser nacional de determinado Estado, sino que tienen como fundamento los atributos de la persona humana".

Desde esta perspectiva, es claro que ninguno de los derechos consagrados en la Convención pueden tener un carácter absoluto, por ser todos esenciales a la persona humana, de ahí que sea necesario realizar una labor de ponderación cuando surjan colisiones entre ellos. La Convención tampoco puede ser interpretada en un sentido que lleve a la prelación automática e incondicional de un derecho o de un deber de protección sobre los restantes derechos por ella consagrados, o protegidos por otros instrumentos del derecho internacional de los derechos humanos, ni de una manera tal que se exijan sacrificios irrazonables o desproporcionados de los derechos de otros, porque de esta manera precisamente se desconocería su finalidad de promover un régimen de libertad individual y de justicia social.

Finalmente, la Corte se decantó por una interpretación armónica del tratado internacional con la Constitución de 1991, en los siguientes términos:

"En esa medida, el artículo 4.1. de la Convención Americana de Derechos Humanos no puede ser interpretado en el sentido de darle prevalencia absoluta al deber de protección de la vida del nasciturus sobre los restantes derechos, valores y principios consagrados por la Carta de 1991."

Por último, en la ya citada sentencia C- 442 de 2011, referente al examen de los tipos penales de injuria y calumnia, la Corte Constitucional adelantó algunas precisiones importantes en relación con un tema que se encuentra en el centro del debate en materia de control de convencionalidad, como son los efectos *erga omnes* de los pronunciamientos realizados por la Corte Interamericana de Derechos Humanos:

“Ahora bien, aunque constituye un precedente significativo en torno al alcance de la libertad de expresión y del principio de legalidad en la tipificación de los delitos de injuria y calumnia, esta decisión no puede ser trasplantada automáticamente al caso colombiano en ejercicio de un control de convencionalidad que no tenga en cuenta las particularidades del ordenamiento jurídico interno, especialmente la jurisprudencia constitucional y de la Corte Suprema de Justicia que han precisado notablemente el alcance de los elementos normativos de estos tipos penales, a lo cual se hará alusión en un acápite posterior de esta decisión.

Por otra parte, es claro que la Corte IDH entiende en la providencia antes transcrita que la libertad de expresión puede ser limitada con medidas de naturaleza penal, que en todo caso han de estar sujetas a especiales requerimientos en cuanto a su configuración legislativa y en cuanto a su interpretación y aplicación por parte de los funcionarios judiciales. Por lo tanto, para evaluar la constitucionalidad de las disposiciones acusadas necesariamente se debe tener en cuenta los desarrollos de la jurisprudencia en torno a sus elementos normativos.

Así pues, a mi juicio, las conclusiones que hasta el momento han soportado la doctrina del control de convencionalidad deben ser matizadas y armonizadas con los avances que en materia de derechos humanos han realizado tanto las Cartas Políticas de los países latinoamericanos, como sus respectivas Cortes Constitucionales o Cortes Supremas de Justicia, cuando quiera que estas últimas ejerzan el control de constitucionalidad.

El control de convencionalidad ejercido por los jueces ordinarios

La Cteidh, en su sentencia *Almonacid Arellano y otros vs. Chile* (31), consideró lo siguiente:

“La Corte es consciente que los jueces y tribunales internos están sujetos al imperio de la ley y, por ello, están obligados a aplicar las disposiciones vigentes en el ordenamiento jurídico. Pero cuando un Estado ha ratificado un tratado internacional como la Convención Americana, sus jueces, como parte del aparato del Estado, también están sometidos a ella, lo que les obliga a velar porque los efectos de las disposiciones de la Convención no se vean mermadas por la aplicación de leyes contrarias a su objeto y fin, y que desde un inicio carecen de efectos jurídicos. En otras palabras, el Poder Judicial debe ejercer una especie de “control de convencionalidad” entre las normas jurídicas internas que aplican en los casos concretos y la Convención Americana sobre Derechos Humanos. En esta tarea, el Poder Judicial debe tener en cuenta no solamente el tratado, sino también la interpretación que del mismo ha hecho la Corte Interamericana, intérprete última de la Convención Americana.

Más adelante, en su sentencia del asunto de los *Trabajadores Cesados del Congreso (Aguado Alfaro y otros) vs. Perú*, la Cteidh precisó que dicho control de convencionalidad: (i) procede “de oficio” sin necesidad de que las partes lo soliciten; y (ii) debe ejercerse dentro del marco de sus respectivas competencias y de las regulaciones procesales correspondientes, considerando otros presupuestos formales y materiales de admisibilidad

y procedencia (32).

Ahora bien, en Colombia la aplicación de la Convención Americana por parte de los jueces ordinarios, al igual que la jurisprudencia elaborada por la Cteidh, ha sido catalizada y articulada, en buena medida, por la jurisprudencia constitucional. En efecto, según la tradición jurídica nacional, los jueces ordinarios, antes de la expedición de la Constitución de 1991, fundaban sus decisiones en los textos legales, siendo la argumentación constitucional inusual (33).

Así pues, con el advenimiento de la nueva Constitución y la construcción de una jurisprudencia constitucional robusta y soportada, en buena medida, en distintos instrumentos internacionales de derechos humanos, los jueces ordinarios, poco a poco, han venido aplicando en la resolución de los casos concretos, diversas disposiciones internacionales.

Sobre el particular, es necesario precisar que, en el caso de la jurisdicción de lo contencioso administrativo, la jurisprudencia del Consejo de Estado no sólo ha propendido por la aplicación de las normas internacionales, sino por articular su funcionamiento con aquel del sistema americano de protección de los derechos humanos.

En tal sentido, en auto del 22 de febrero de 2007, en el *asunto de Jorge Enrique Sánchez Chávez y otros contra el Ministerio de Defensa Nacional*, el Consejo de Estado decidió reponer una providencia del 30 de agosto de 2006, y en su lugar, aprobar la conciliación alcanzada por las víctimas con la autoridad pública demandada. Al respecto, cabe señalar que se trataba de un caso de una menor de edad que resultó muerta en un tiroteo con la Policía Nacional. El Tribunal Administrativo de Cundinamarca, mediante sentencia del 11 de septiembre había declarado responsable de esos hechos la Nación- Ministerio de Defensa- Policía Nacional. En consecuencia, ordenó el reconocimiento de los perjuicios morales equivalentes a 100 s.m.m.l., a favor de cada uno de los padres y a 50 s.m.m.l. para cada uno de los hermanos. No obstante lo anterior, negó el reconocimiento de los perjuicios materiales, ya que no se acreditó el daño emergente, como quiera que no se demostró que la niña de 14 años desarrollara actividad productiva alguna. La parte demandada decidió apelar el fallo.

Encontrándose el proceso para fallo, se citó a las partes a audiencia de conciliación a petición del Ministerio Público. El 17 de agosto de 2006, se celebró la misma en la cual las partes acordaron la cancelación de los daños morales, reconocidos en primera instancia, así como de daños materiales, a fin de atender la recomendación formulada por la CIDH, en el sentido de indemnizar a los familiares de la menor por violación a los derechos contemplados en los artículos 4, 8, 19 y 25 de la Convención Interamericana de Derechos Humanos.

La Sección Tercera del Consejo de Estado improbió dicho acuerdo mediante auto del 30 de agosto de 2006. Consideró que la Nación aceptó compensar los perjuicios materiales en su modalidad de lucro cesante cuando la sentencia de primera instancia no reconoció tal perjuicio; que no obra prueba que demuestre que la víctima desarrollara una actividad productiva para el momento de los hechos, sino que, por el contrario, la menor de edad se encontraba en formación académica. Concluyó entonces que el acuerdo logrado era

lesivo del patrimonio público, al reconocerse perjuicios que no fueron reconocidos y que no están acreditados. La anterior decisión fue objeto de recurso de reposición, alegando que la conciliación no era lesiva del patrimonio público toda vez que esta se logró por recomendación de la Comisión Interamericana de Derechos Humanos y no desbordaba los límites fijados por tal organismo internacional.

Ahora bien, en otros casos, la aplicación de tratados internacionales por los jueces internos ha sido más polémica, en especial, en asuntos penales. En efecto, en determinadas ocasiones, no se han interpretado adecuadamente ciertos instrumentos internacionales, en especial, aquellos referentes al derecho penal internacional. De igual manera, la denominada "*relativización de las garantías procesales en materia de derechos humanos*" no ha sido lo suficientemente soportada desde el punto de vista dogmático.

Sin duda, y sin perjuicio de los esfuerzos de sistematización realizados por vía de la jurisprudencia constitucional, el ejercicio de un "control de convencionalidad difuso" no escapa a las disfuncionalidades propias de tales mecanismos. En efecto, los controles difusos, como sucede por ejemplo con aquellos existentes en el derecho constitucional de algunos países de la región (vgr. excepción de inconstitucionalidad) carecen de las necesarias vías de articulación y armonización. En tal sentido, aquello que se gana en términos de extensión del ámbito de defensa judicial de los derechos humanos consagrados en el instrumento internacional, por cuanto todos los jueces son garantes del tratado, se pierde en términos de seguridad jurídica y aplicación uniforme de las disposiciones internacionales. En efecto, convertir a todos los jueces internos en intérpretes y aplicadores de la Convención Americana, sin que existan los necesarios instrumentos de articulación, puede generar un cierto nivel de riesgo, el cual se incrementa en la medida en que (i) no exista jurisprudencia internacional en la materia; (ii) ésta no sea lo suficientemente conocida; o (iii) peor aún, los jueces interpreten indebidamente el instrumento internacional, riesgo que no resulta deleznable, tomando en cuenta que usualmente aplican normas de rango legal, sirviéndose para ello de los tradicionales métodos de interpretación, desconociendo, por ejemplo, las particularidades que ofrece la interpretación de las normas internacionales (vgr. existencia de conceptos jurídicos autónomos).

A modo de conclusión

Primera. El tema de las relaciones entre el derecho internacional y el derecho interno ha dejado de ser percibido como un mero debate teórico acerca de la existencia o no de jerarquía entre dos sistemas jurídicos. Hoy por hoy, dicha problemática se aborda desde la óptica del "*diálogo constructivo permanente*" entre los jueces internos, en especial los constitucionales, y los internacionales. En efecto, en la actualidad resulta rutinario, por lo menos en Colombia, que los jueces interpreten y apliquen distintos instrumentos internacionales, en especial, de derechos humanos, al igual que normas de *soft law*. De igual manera, con mayor frecuencia se citan en sus providencias extractos de sentencias proferidas por la Corte Interamericana de Derechos Humanos, bien sea para crear normas adscritas de derechos fundamentales, o simplemente como un argumento de refuerzo o de apoyo.

Segundo. Sin lugar a dudas, los recientes desarrollos que ha conocido el denominado “control de convencionalidad” suscita toda suerte de controversias, en especial, cuando éste termina asemejándose, en materia de efectos, al control de constitucionalidad. Me refiero, por supuesto, a los casos en los cuales la Corte Interamericana de Derechos Humanos declara que determinada ley interna “carece de efectos”, lo que se asemeja a un control de anulación. Distinta es la situación, por supuesto, cuando aquélla simplemente le ordena al Estado condenado que modifique su legislación sobre un aspecto concreto o que simplemente lo exhorta para legisle sobre la materia (vgr, tipificación del delito de desaparición forzada de personas).

Tercera. El ejercicio del control de convencionalidad, en su faceta de control de anulación, puede implicar, en la práctica, un choque con el control de constitucionalidad. Piénsese, por ejemplo, en el caso de una ley que haya sido declarada exequible por el juez constitucional, pero que luego la Corte Interamericana de Derechos Humanos la declara carente de efectos. En tal caso, ¿Qué pasa entonces con el fenómeno de la cosa juzgada?; ¿se puede volver a demandar ante el juez interno alegando un “hecho nuevo”? Interrogantes estos cuya respuesta sólo la práctica responderá pero sobre los cuales es necesario ir reflexionando.

References

Ayala, C.M, “La ejecución de sentencias de la Corte Interamericana de Derechos Humanos”, *Estudios Constitucionales*, Universidad de Talca, 2007, pp. 127 y ss.

Bazán, V. *El control de convencionalidad: incógnitas, desafíos y perspectivas*, s.m.d.. 2011.

Pellet, A. y Daillier, P. *Droit International Public*, París: L.G.D.J., 2005, p. 125.

Ramelli, A. *Jurisprudencia penal internacional aplicable en Colombia*. Bogotá: Universidad de Los Andes- GIZ, 2011, pp. 40 y ss.

Endnotes

1. Ver al respecto, Ramelli, Alejandro, “Los derechos fundamentales de las víctimas de las violaciones graves a los derechos humanos y al derecho internacional humanitario y sus repercusiones en el constitucionalismo colombiano”, *V Jornadas de Derecho Constitucional y Administrativo*. Bogotá: Universidad Externado de Colombia, 2004, pp. 156 y ss.
2. Tribunal de Arbitramento, Estados Unidos vs. Colombia, *asunto Montijo*, 26 de julio de 1875, R.A.I., t. III, p. 663.
3. Un caso en el cual la Corte Constitucional consideró que los tratados internacionales sobre derechos humanos debían ser aplicados en tanto que límite al poder de reforma constitucional, fue la sentencia C- 702 de 2010, referida al trámite de la

consulta indígena. En palabras de la Corte: “En el caso concreto del procedimiento de consulta que debe ser seguido para la adopción de medidas legislativas que afecten a las comunidades étnicas, se tiene que el mismo, aunque no está recogido de manera expresa en ninguna norma de la Constitución ni en las disposiciones orgánicas que regulan el trámite de los actos legislativos, ha sido establecido como una exigencia previa de trámite, especialmente a partir de lo prescrito por el artículo 6° del Convenio 169 de la OIT, norma integrante del bloque de constitucionalidad en virtud del artículo 93 superior, en concordancia con el artículo 330 superior y las disposiciones constitucionales que reconocen el derecho a la participación efectiva, a la autonomía y a la libre determinación de los pueblos indígenas y afrocolombianos.”

4. Existen numerosos pronunciamientos de la Corte Constitucional sobre la material. Al respecto, se destacan los siguientes: C- 225 de 1995; C- 774 de 2002; C- 200 de 2002; C- 802 de 2002; C- 1076 de 2002; C- 355 de 2006; C- 617 de 2008; C- 228 de 2009; C- 307 de 2009; C- 776 de 2010.
5. Se trata de un caso de fuerza pasiva reforzada de la ley.
6. Sobre este tema se recomienda consultar: Carreau, Dominique, *Droit International*. París: Pédone, 1985, pp. 78 y ss.
7. Al respecto, existe una rica jurisprudencia arbitral y judicial. Ver, entre otros, los siguiente fallos: Tribunal de Arbitramento, *asunto Manouba*, 6 de mayo de 1913, R.S.A, XI, p. 449; y CIJ, *asunto del estrecho de Corfú*, 8 de junio de 1949, Recueil, p. 36.
8. Al respecto, resulta conveniente destacar que el Consejo de Estado colombiano, en varios fallos recientes, ha condenado al Estado a la adopción de medidas simbólicas a favor de las víctimas. Así por ejemplo, en sentencia de 2009, radicado R-200300158 01, M.P. Enrique Gil Botero, el Consejo dispuso lo siguiente: “CONDÉNASE a la Nación-Ministerio de Defensa, Policía Nacional-a la reparación por la violación de los derechos humanos de que fue víctima Wilson Duarte Ramón, para lo cual, de conformidad con la parte motiva de esta providencia, deberán adoptar las siguientes medidas de naturaleza no pecuniaria: La Policía Nacional presentarán públicamente, en una ceremonia en la cual estén presentes los familiares de Wilson Duarte Ramón, excusas por los hechos de tortura y muerte acaecidos entre el 26 y el 27 de marzo de 2002, en Saravena, Arauca. En similar sentido, el Comando de Policía de Saravena (Arauca), a través de su personal asignado en dichas instalaciones, diseñará e implementará un sistema de promoción y respeto por los derechos de las personas, mediante charlas en diversos barrios y centros educativos de dicha ciudad, y con entrega de material didáctico, en el cual la población tenga conciencia de los derechos humanos de los cuales es titular cada individuo”
9. Así lo consideró, por ejemplo, la Sala Disciplinaria del Consejo Superior de la Judicatura en sentencia 31 de mayo de 2011, al momento de resolver una acción de tutela presentada por el señor José Elías Guerra de la Espriella, quien demandaba por esta vía el cumplimiento de un dictamen emitido a su favor por el Comité de Derechos Humanos,. En palabras del juez de instancia: “es necesario reiterar que no existe en

nuestro ordenamiento jurídico un procedimiento regulado para dar cumplimiento a este tipo de decisiones emitidas por organismos de derecho internacional, tampoco existe precedente en este sentido, pues si bien se ha emitido al menos, otros dos dictámenes similares, en los que se ordena al Estado colombiano el suministro de un recurso efectivo, no se tiene noticia de las actuaciones adelantadas para su cumplimiento o si en efecto, las mismas fueron acatadas por nuestro país”.

10. Así por ejemplo; Corte Suprema de Justicia, Sala de Casación Penal, sentencia del 6 de julio de 2011, M.P. José Leonidas Bustos Martínez, (rad. 29.075) proceso adelantado contra José Alberto Angulo Osorio y otros. En igual sentido, acción de revisión fallada el 24 de febrero de 2010, (rad. 31.195) M.P. Sigifredo Espinosa Pérez, caso contra José Velandia Niño y otros.
11. CteIDH, asunto *La última tentación de Cristo vs. Chile*, sentencia de fondo del 5 de febrero de 2001.
12. CteIDH, asunto *Caesar vs. Trinidad y Tobago*, sentencia de fondo del 11 de marzo de 2005.
13. CteIDH, asunto *Barrios Altos (Chumbipuma Aguirre y otros vs. Perú)*, sentencia de fondo del 14 de marzo de 2001.
14. CteIDH, asunto *Gomes Lund y otros (“Guerrilha do Araguaia) vs Brasil*, sentencia proferida el 25 de noviembre de 2010.
15. CteIDH, asunto *Gelman vs. Uruguay*, sentencia proferida el 24 de febrero de 2011.
16. CteIDH, asunto *Kilme vs. Argentina*, sentencia proferida el 2 de mayo de 2008.
17. CteIDH, asunto *Cabrera García y Montiel Flores vs. México*, sentencia proferida el 20 de noviembre de 2010.
18. CteIDH, asunto *Manuel Cepeda Vargas vs. Colombia*, sentencia proferida el 26 de mayo de 2010.
19. Al respecto, el artículo 29 de la Constitución colombiana reza:

“El debido proceso se aplicará a toda clase de actuaciones judiciales y administrativas.

Nadie podrá ser juzgado sino conforme a leyes preexistentes al acto que se le imputa, ante juez o tribunal competente y con observancia de la plenitud de las formas propias de cada juicio.

En materia penal, la ley permisiva o favorable, aun cuando sea posterior, se aplicará de preferencia a la restrictiva o desfavorable.

Toda persona se presume inocente mientras no se la haya declarado judicialmente culpable. Quien sea sindicado tiene derecho a la defensa y a la asistencia de un abogado escogido por él, o de oficio, durante la investigación y el juzgamiento; a un debido proceso público sin dilaciones injustificadas; a presentar pruebas y a controvertir las que se alleguen en su contra; a impugnar la sentencia condenatoria,

y a no ser juzgado dos veces por el mismo hecho.

Es nula, de pleno derecho, la prueba obtenida con violación del debido proceso

20. Así por ejemplo, en sentencias C- 228 de 2002; C- 591 de 2005; C- 370 de 2006; entre otras.
21. Ver al respecto, C- 920 de 2007.
22. En palabras de la Corte: *“En estos supuestos, el fundamento de la imputación disciplinaria sigue siendo la infracción del deber funcional del servidor público o del particular que desempeña funciones públicas. Es decir, la índole del ilícito disciplinario se mantiene. Lo que ocurre es que, a diferencia de lo que sucede con la generalidad de las faltas disciplinarias, en aquellas la infracción del deber plantea, de manera directa, la vulneración de derechos fundamentales. Es decir, esas faltas conducen a un agregado valorativo que, sin mutar la naturaleza de la imputación disciplinaria, lesionan derechos humanos y colocan a su titular en una situación calificada respecto de aquella en que se encuentra cualquier ciudadano interesado en el ejercicio del control disciplinario. En ese sentido, para la Corte, si bien la regla general indica que en el derecho disciplinario no existen víctimas por cuanto las faltas remiten a infracciones de deberes funcionales y no a lesiones de derechos, de manera excepcional puede hablarse de víctimas de una falta disciplinaria cuando de la infracción del deber que la constituye surge, de manera inescindible y directa, la violación del derecho internacional de los derechos humanos o del derecho internacional humanitario.”*
23. Al respecto, es preciso aclarar que en la sentencia C- 014 de 2004 no se aborda expresamente el tema de la prescripción de la acción disciplinaria.
24. CtIDH, asunto *Almonacid Arellano y otros vs. Chile*, sentencia de excepciones preliminares, fondo, reparaciones y costas, fallo del 26 de septiembre de 2006, Serie C, Núm. 154, párr. 124.
25. Sentencias C-067/03 y T-1391/01, entre otras.
26. En palabras de la Corte *“Más, recientemente, la misma instancia internacional, en sentencia del 18 de agosto de 2000, asunto Cantoral Benavides c. Perú, señaló:*

El artículo 8.2 de la Convención dispone que:

Toda persona inculpada de delito tiene derecho a que se presuma su inocencia mientras no se establezca legalmente su culpabilidad.

La Corte observa, en primer lugar, que en el presente caso está probado que el señor Cantoral Benavides fue exhibido ante los medios de comunicación, vestido con un traje infamante, como autor del delito de traición a la patria, cuando aún no había sido legalmente procesado ni condenado (supra párr. 63.i.).[61]

El principio de la presunción de inocencia, tal y como se desprende del artículo 8.2 de la Convención, exige que una persona no pueda ser condenada mientras no exista prueba plena de su responsabilidad penal. Si obra contra ella prueba incompleta o insuficiente, no es procedente condenarla, sino absolverla.

En el caso concreto del artículo 447A del Código Penal, el legislador lo diseñó con una estructura que se aleja del cumplimiento de los deberes que está llamado a cumplir el Estado en materia de investigación criminal, en el sentido de que es menester que ésta se inicie con una prueba de cargo recaudada por el aparato estatal y del principio de presunción de inocencia a favor del acusado. Ciertamente, la indagación por la comisión de un hecho punible, por mandato constitucional, debe partir del principio de presunción de inocencia, la cual se mantiene hasta que en un fallo definitivo ésta quede completamente desvirtuada con base en el material probatorio recaudado por el Estado; es más, la duda en la realización del hecho y en la culpabilidad del sindicado, en virtud del principio del in dubio pro reo, debe resolverse a favor del acusado."

27. Así por ejemplo, la Corte en sentencia C- 059 de 2005, en relación con la aplicación de la Convención de Belém do Pará, el juez constitucional estimó lo siguiente: *"En consonancia con los mencionados instrumentos internacionales, nuestra Constitución en el artículo 42 dispone que el Estado y la sociedad garantizan la protección integral de la familia, y de manera perentoria establece que cualquier forma de violencia en la familia se considera destructiva de su armonía y unidad y será sancionada conforme a la ley. Quiso de esta forma el Constituyente, consagrar un amparo especial a la familia, protegiendo su unidad, dignidad y honra, por ser ella la célula fundamental de la organización socio-política y presupuesto de su existencia. También, quiso el constituyente otorgar una protección especial y prevalente a los niños y niñas, para lo cual consagró expresamente que sus derechos son fundamentales, entre ellos los derechos a tener una familia y a no ser separados de ella, y al cuidado y al amor; además se consagró que serán protegidos, entre otros, contra toda forma de violencia física o moral, y abuso sexual."*
28. Así por ejemplo, la Constitución colombiana, en su artículo 67 reza: *"El Estado, la sociedad y la familia son responsables de la educación, que será obligatoria entre los cinco y los quince años de edad y que comprenderá como mínimo, un año de preescolar y nueve de educación básica"*. Por el contrario, el artículo 3 del Convenio sobre la edad mínima de 1973, dispone *"La edad mínima de admisión a todo tipo de empleo o trabajo que por su naturaleza o las condiciones en que se realice pueda resultar peligroso para la salud, la seguridad o la moralidad de los menores no deberá ser inferior a dieciocho años."* La Corte, en sentencia C- 170 de 2004 prefirió aplicar la Constitución al tratado internacional.
29. Al respecto, el artículo 235 Superior dispone:
- " Son atribuciones de la Corte Suprema de Justicia:*
1. Actuar como tribunal de casación.
 2. Juzgar al Presidente de la República o a quien haga sus veces y a los altos funcionarios de que trata el artículo 174, por cualquier hecho punible que se les impute, conforme al artículo 175 numerales 2 y 3.
 3. Investigar y juzgar a los miembros del Congreso.
 4. Juzgar, previa acusación del Fiscal General de la Nación, a los Ministros

del Despacho, al Procurador General, al Defensor del Pueblo, a los Agentes del Ministerio Público ante la Corte, ante el Consejo de Estado y ante los Tribunales; a los Directores de los Departamentos Administrativos, al Contralor General de la República, a los Embajadores y jefes de misión diplomática o consular, a los Gobernadores, a los Magistrados de Tribunales y a los Generales y Almirantes de la Fuerza Pública, por los hechos punibles que se les imputen”

30. Corte Constitucional, sentencia C- 580 de 2002.
31. CtIDH, asunto *Almonacid Arellano y otros vs. Chile*, sentencia de excepciones preliminares, fondo, reparaciones y costas, fallo del 26 de septiembre de 2006.
32. CtIDH, asunto *de los Trabajadores Cesados del Congreso (Aguado Alfaro y otros) vs. Perú*, sentencia del 24 de noviembre de 2006.
33. Salvo el caso de la construcción de la responsabilidad extracontractual del Estado con base en el artículo 16 de la Constitución de 1886.

9.2 Assessing the impact of the African Union on Transitional Justice

Lukas Knott

Both at the continental and various (sub-)regional levels, African international law has been rapidly evolving since the 1990s. While many Conventions, Charters and other policy guidelines within the renewed *African Union* (AU) architecture and at the level of *Regional Economic Communities* (RECs) have addressed issues of transitional justice (TJ), concrete processes attempting to achieve TJ in the aftermath of internal conflicts have been engaged in various countries all over the continent. TJ experiences including special judicial or quasi-judicial components started in the 1990s with the famous cases of South Africa and Sierra Leone, and have multiplied since the millennium in western, central, and eastern Africa (AU Commission 2011).

Most contributions on the continental level have remained rather symbolic and suggestive in the fields of the judiciary and rule of law – unlike efforts in peacemaking and peacekeeping, in which the AU and many member states are increasingly engaging. Thus, without creating direct legal tools for TJ processes or policy guidelines for concrete cases, numerous AU documents address issues of TJ, for example the *AU Constitutive Act*, the *African Charter on Human and Peoples' Rights*, the *African Charter on Democracy, Elections and Governance*, the *African Charter on Rights of Women*, the *AU Framework on Post-Conflict Reconstruction and Development*, the *AU Human Rights Strategy for Africa*, and the *AU Panel of the Wise's* report on "Non-Impunity, Justice and National Reconciliation". Particular African ideas in these documents concern the importance given to local ownership, traditional justice mechanisms, and the necessity to go away from purely retributive justice and include considerations of socio-economic rights, gender justice and 'development' when negotiating TJ processes.

Genuine involvement of supranational instances in questions of TJ in Africa has mostly occurred through judiciaries, namely through the *International Criminal Court* (ICC) and the *Rwanda Tribunal* (ICTR), through the *Banjul Commission* and the *African Court on Human and Peoples' Rights* (African Court), and through the growing number of other regional courts. As Justice Oré has already presented the African Court's potential contributions to TJ processes in the previous chapter and as the ICC and the ICTR, on the other hand, are not genuinely African projects, although exclusively dealing with African cases, I would like to present the potential contributions of smaller regional courts to TJ processes in Africa, namely through their jurisdiction in the field of human and fundamental rights (**Part I**).

However, as much as TJ may become subject of regional judicial cooperation and integration in Africa, it appears that successful TJ at domestic levels is still needed to stabilize and institutionalize regional integration on the African continent in the first place. A closer look at regional cooperation as such indicates that an important challenge to the said cooperation may notably lay in a lack of TJ. Namely, the functional problems of today's regional courts often appear have as one root cause a lacking culture of rule of law at the concerned domestic levels, a deficiency that may be explained by unresolved internal conflicts (**Part II**).

What regional integration may contribute to Transitional Justice in Africa

There are now numerous regional courts in Africa, mostly as a part of the so-called regional economic communities (RECs) that have been promoted as important tools for economic development since the 1980 *Lagos Plan of Action*. While today virtually all RECs provide for a regional judiciary as an important element of their supranational, institutional architecture, only few of these institutional settings, and even fewer of the respective regional courts, exist on more than just paper. However, three regional courts that cover 34 sub-Saharan countries have developed an interesting jurisdiction and jurisprudence regarding TJ: the Community Court of Justice of the Economic Community of Western African States (ECOWAS Court), the Court of Justice of the East African Community (EACJ), and the Tribunal of the Southern African Development Community (SADC Tribunal), which received their first cases between the years 2004 and 2007.

Genuine human rights jurisdiction of regional courts, or the lack thereof

The ECOWAS Court in Abuja is the only regional court in Africa that enjoys a particular human rights jurisdiction under a special protocol. Since 2005 it has thus developed into a veritable human rights court, able to address human rights issues with regard to TJ. In its 2008 landmark decision in *Hadijatou Mani Koraou v. Niger*, the court made for the first time use of this new human rights jurisdiction in order to condemn the defending state for having failed to protect a citizen against slavery. While a number of other human rights cases have followed *Hadijatou*, this was the only one so far that can be brought more or less directly into connection with TJ, as it is about the continued violation of international engagements and domestic state law on slavery by the local, traditional custom of *Wahiya* (for a critical comment on the judgment, see Allain 2009).

The EACJ serves as an example of a court which is supposed to enjoy human rights jurisdiction through a special protocol (see Art. 27.2 EAC Treaty), but suffers from the fact that the member states have so far refrained from adopting such protocol. The following section shows how EACJ and SADC Tribunal as overall economic integration courts have eventually been conducted to adjudicate on cases that involved TJ related rule of law and human rights issues.

From economic integration to human rights and rule of law issues

While the EACJ has faced the tacit refusal of member states to adopt a special protocol on human rights jurisdiction, it has still found a way to consider human and fundamental rights violations through its *Katabazi* doctrine. In its 2007 decision in *James Katabazi v. Uganda*, it declared that “[while] the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction [...] merely because the Reference includes allegation of human rights violation.” The court did hence not effectively suspend its human rights jurisdiction awaiting the adoption of a respective supplementary protocol to the EAC Treaty, but it underlined its jurisdiction in matters clearly concerning human rights and the rule of law by making explicit reference to Art. 3 and 7 EAC Treaty, which recognize human rights, rule of law and democracy as basic principles of the Community.

Even though the EACJ has thus opened the door to adjudication on questions of TJ in the east African context, it has since then made only very prudent, restrictive use of it in its case law, and denied its jurisdiction in several TJ related affairs, e.g. in electoral cases (*Ariviza & Mondoh v. Kenya* [2011]), and in a case on ethnic violence in Kenya's Mount Elgon district on formal grounds (*Independent Medical Unit v. Kenya* [2012]). Similarly to the EACJ, the SADC Tribunal has not been granted an explicit, special mandate on human rights jurisdiction, let alone on TJ issues in particular, but has availed itself of such jurisdiction by basing itself on general references to human rights, democracy and rule of law as included in the SADC Treaty (Art. 4, 5 and 6). In its famous 2008 *Campbell* case, the regional court in Windhoek condemned Zimbabwe for its 2000 constitutional amendment and the consecutive land reform. The Tribunal found the expropriation of white farmers illegal, for being discriminatory and without compensation (*Mike Campbell Ltd. et al. v. Zimbabwe* [2008]).

The condemnation of Zimbabwe, followed by another one regarding the refusal to execute cost orders by Zimbabwean courts compensating victims of police and army violence (*Gondo v. Zimbabwe* [2010]), has created much controversy and ultimately led to the suspension of the SADC Tribunal by the SADC Heads of State since 2010 (Knott 2012). With regard to our present inquiry, the *Campbell* crisis appears as an important example for a lack of availability to internally engage in TJ as becoming a threat to regional judicial integration as a whole.

Why Transitional Justice is needed for regional integration

The aforementioned suspension of the SADC Tribunal by the member states since 2010 has profoundly disturbed an environment of African international relations that had until then completely incorporated the slogan of regional integration into its policy mainstream. Since the 1990s, African countries have been reproducing EU-style and WTO-friendly institutional schemes which on paper embrace a supranational rule of law logic: the RECs. With regard to the judicial element of regional integration, the Treaties of all existing RECs provide today for a strong judiciary, with jurisdiction in the field of individual actions, institutional disputes, state-to-state disputes, and preliminary references.

Before the *Campbell* crisis, other African regional courts had already tested the member states in their commitment to regional integration when issuing clear condemnations, for example in the ECOWAS Court's *Hadijatou* case, or after the EACJ's 2007 decision in *Anyang' Nyong'o*. While the latter decision provoked a reform to the EAC Treaty by which an Appellate Division was created and the revocability of regional judges eased, no controversial decision of a regional court before *Campbell* provoked a menace to the very existence of the supranational judiciary as part of regional integration. Yet, this relative tolerance of African states has at least in part to be explained by the enduring, relative unimportance of regional courts in African regional and domestic government.

The absence of Transitional Justice as a threat to the institutionalization of a continental rule of law

The main dilemma of supranational integration which African regional courts before *Campbell* did not unveil is twofold: In a regional environment of intergovernmentalist decision-making by mostly authoritarian heads of state, successful supranational integration would need an evolutionary step, first because it confines state sovereignty even more than other contemporary international law, second because successful supranational governance simultaneously depends on good domestic governance, in particular with regard to the judiciary, and a functioning rule of law.

The *Campbell* crisis has now uncovered this fundamentally unresolved issue on the way towards a comprehensive implementation of regional integration projects, as substantially shaping government and policy making regionally and domestically.

What the crisis has also uncovered is that unsatisfied needs for TJ may spoil already existing regional integration schemes. In the concrete case of Zimbabwe, for instance, the land issue remains a major obstacle towards a democratic transition towards rule of law: While the 2000 land reform arguably did not result in a fair and equitable redistribution of the country's natural resources, the adjudication on this question by the regional court did not contribute to a more effective transition neither, but provoked quite a counterproductive reaction by the member state governments, most of which face similar issues of land access and economic justice.

The interplay between internal Transitional Justice and sustainable regional integration

While the extreme consequence of the suspension of the SADC Tribunal might be rather exceptional, even the jurisprudence of well-established human rights courts such as the European Court on Human Rights has proven much less effective on the governance of member states in need for TJ, in particular with regard to issues that a government or the political majority in place is not (yet) ready to talk about. However, a lack of TJ should of course not prevent countries from regional cooperation. And TJ processes are not necessarily more successful without any pressure from supranational judiciaries. The remarks in this paper are simply aimed to highlight the limits of regional judicial contributions to TJ, and their marginal relevance when aiming for the internal reconciliation of societies and populations within one country. And also to underline the need, from a regional and international perspective, to promote internal TJ processes wherever such promotion is possible and productive, as they are a prerequisite for successful, sustainable regional cooperation and integration.

Finally, the particular case of Zimbabwe, but also the above-mentioned *Hadijatou* case on traditional forms of slavery in the Sahel region, show the importance to address economic and social rights questions in TJ justice processes. As other speakers during this conference have underlined, judicial institutions can play a useful role in enacting such aspects of TJ, too.

A current problem of regional adjudication with regard to Transitional Justice: non-exhaustion of local remedies

A distinct problem that comes to mind when contemplating the implications of regional courts on TJ is the contemporary challenge to the local remedies rule, in particular in western Africa.

In fact, plaintiffs have no obligation to turn to competent domestic judges before going to the ECOWAS Court. This innovation with regard to traditional international law is arguably a pragmatic short-term solution to pass over badly functioning domestic human rights protection mechanisms. It notably may encourage individuals or marginalized civil society groups to go to the ECOWAS Court in order to demand TJ, and it increases the accessibility of the Court in the short term.

However, a major problem is not only that the Court may in the longer term be heavily overburdened if any person can immediately attempt to claim her right at the regional level. More importantly even, in particular with regard to TJ, is the consecutive lack of incentives for domestic judiciaries to provide for effective, expedient and rule of law-based protection from human and fundamental rights violations, and to improve the existing domestic structures in this regard. The absence of a local remedies rule may hence prevent subsidiarity in human rights adjudication from developing – a subsidiarity that may often be an essential ingredient to successful TJ processes. Furthermore, accessibility to and affordability of human rights protection for the concerned populations may in the long term decrease.

Conclusion

TJ has not yet been enacted explicitly through regional judicial instances in Africa. However, supranational jurisdiction on the continent already provides for examples of both, the chances and the perils of elevating TJ projects beyond the municipal level. The various African examples also show that nothing can replace internal processes of TJ, and in certain cases the addition of external instances of support may in fact make the realization of TJ more complex, without necessarily improving its efficiency and effectiveness.

The AU and regional organizations such as ECOWAS, as well as the broader international community, have already been helpful in enacting TJ in the context of peacebuilding, e.g. through good offices, peacekeeping and peacebuilding missions, and international criminal law. However, more long-term, more substantial, and more conflictual processes of TJ remain to be articulated in many African countries, and regional organizations can only occasionally assist in this task: TJ processes may also need to address governance aspects of African regional relations. A fundamental dilemma in this regard is the certain contradiction between basic ideas of international law and of TJ: international law classically has a conservative, stabilizing function, consolidating the position of those who are in power. In Africa, this conservative, stabilizing function of international law is still particularly prevalent, for African international relations operate in a highly intergovernmental manner, and are often reduced to heads of state and (executive) government. TJ processes could eventually become windows of opportunity to overcome this preservative, inertial functioning of African international relations, and contribute to the evolution of African regional integration. What

appears to be the most important feature of regional concertation on TJ in Africa today are mutual learning processes between countries that share similar problems and challenges – in particular the interlinking of civil society organizations, for which regional integration schemes already offer additional fora.

References

African Union Commission, *Consultation with African Union Member States on Transitional Justice*, Consultation Report, Cape Town, 12-13 September 2011.

Allain, J. Comment on *Hadijatou Mani Koraou v. Niger*, *American Journal of International Law*, vol. 103 (2009), pp. 311-317.

Knott, L. How to reboot the SADC Tribunal: A European perspective, *SADC Law Journal*, vol. 2 (2012), pp. 304-318.

Okello, M. C. Dolan, C., Whande, U. Mncwabe, N. Onegi, L. and Oola, S. *Where law meets reality – Forging African transitional justice*, Pambazuka Press, Nairobi 2012.

X. International Context: The Rule of Law and Transitional Justice

10.1 Community Reparations in Morocco and the Challenge Facing Outreach Policy

Pierre Hazan (1)

Outreach efforts are a key element in transitional justice processes. Communication forges the link between a society and the government's declared intentions to remedy past violations of human rights. From this point of view, the collective reparations program implemented in Morocco to redress the victims of years of political repression constitutes an insightful case study to examine the importance of outreach in transitional justice settings, by raising an essential question: can outreach efforts "succeed" in a context as it is that of Morocco where the society and the human rights movement remain fundamentally divided over the nature of the democratic transition undertaken by King Mohammed VI? The aim of this chapter is to respond to this central question, with the awareness that Moroccan authorities have been at the forefront of transitional justice in the Arab world.

Generally, after periods of conflict and repression, transitional justice measures provide an opportunity for the new political authority to recast its image, to rewrite the official history of the country, and to promote the values of justice, democracy, and the rule of law—in short, to hold a political and ethical discourse on the nation, addressed both to its own society and to the rest of the world. This is what has happened, for example, in Germany since 1951, and then in 1980s and 1990s in Argentina, Chile, South Africa, and subsequently in many other countries. The idea that transitional justice, by effecting the recognition of past crimes, symbolically marks a caesura between the tragic past and the redeeming present, between the times of violence and the times of democracy and respect of human rights, is fundamental. Outreach and general communication efforts in such moments aim to deliver this message of rupture and democratic change to the whole of society. Victims, political parties, associations, the media, and society at large position themselves accordingly in response. Thus there progressively emerges what the South-African judge,

Albie Sachs, calls “the dialogical truth” (Boraine 2001, p. 287) —that is, the truth of a society in relation to its own past, attested to by the recognition of crimes and the allocation of symbolic and, sometimes, economic reparations to victims, and which, *in fine*, arrives at a reformulation of national identity. In South Africa, for example, this was seen in the passage from the apartheid regime to the “Rainbow Nation.”

The experience of Morocco, however, complicates this theoretical approach. The conclusions of this chapter suggest that perceptions of transitional justice measures depend, in the first place, on the social body’s conviction that the measures are integrated into a genuine process of breaking with the violations of the past and democratization. Only when these prior conditions are met can outreach efforts deploy its effects, insofar as they are carried out correctly as well.

In the following pages, we will analyze the challenges of the outreach approach in terms of reparations for human rights violations in Morocco: first and foremost, we will consider the context in which these violations were committed, and which has profoundly shaped the later perceptions of transitional justice. We will thus examine, from an outreach perspective, the reparations awarded by the Independent Arbitration Commission [*Commission indépendante d’arbitrage* – IAC] in 1999, and then turn to the collective reparations recommended in 2006 by the Equity and Reconciliation Commission [*Instance Équité et Réconciliation* – IER]. Taking the issue of collective reparations as our point of departure, we will finally see what the obstacles have been to the policies of effective communication and outreach in terms of transitional justice in Morocco.

I. The Genesis and Establishment of the Reparations Program

1. The Political Context of Human Rights Violations in Morocco: The Evolution of the Regime and the Origin of Reparations

Morocco gained its independence in 1956. In 1962, Hassan II became the new monarch, succeeding his father, Mohammed VI. In the context of the Cold War, and with the support of France and the United States, he introduced a policy of violent repression against radical leftist groups that called for an armed struggle to overthrow the monarchy. From the ‘60s through the ‘80s, the king engaged in a program of intimidation against his opponents, marked by massive violations of human rights including forced disappearances, torture, and collective punishments inflicted on entire communities. This period is known in Morocco as the “years of lead,” which underscores the extent to which the whole society lived in fear and silence.

With the end of the Cold War, facing severe criticism from international human rights organizations, especially Amnesty International and the International Federation of Human Rights, Hassan II undertook to progressively liberalize his regime. During these years, he proceeded to grant amnesty to many political prisoners, authorize the return of political exiles, and establish the Advisory Council on Human Rights [*Comité consultative des droits*

de l'homme – CCDH]. The latter recommended the creation of the the IAC in 1999, the principle of which was approved by the king, who passed away that year. The commission was then instituted by his son, Mohammed VI, on his succession. It was in this context, marked by a progressive liberalization of the regime embodied by a new king, that the first grants of reparations took place. These first individual reparations were followed, years later, by those recommended by the IER.

2. The Limits of the Independent Commission of Arbitration

Mohammed VI created the Independent Arbitration Commission in 1999, and, in so doing, he acknowledged for the first time in Morocco the fact that state agencies had been responsible for forced disappearances—an admission which his father had never made before. The IAC was given a mandate to compensate the victims or relatives of victims of forced disappearance and arbitrary detention during the “years of lead”. By the end of its work, the Commission had granted the equivalent of \$100 million to 7,780 people. Nevertheless, strong criticisms were voiced by civil society and victims groups, since the IAC granted reparations without establishing the precise nature of the misdeeds that were committed by the regime. To many, these reparations policies appeared thus to be an attempt to buy the silence of victims, as well as of local and international human rights NGOs. Indeed, this negative perception was so strong that many victims of Hassan II's regime declined to accept the payments, judging them to be tools to as serve a political objective to which they refused to subscribe

Within this particular historical context, reparations policies in Morocco went hand in hand with the goal of projecting a certain image of a monarchy that was renewing itself and democratizing. All of the ambiguity of the Moroccan situation, however, can be summarized by the following observation: while reparations were being granted, the men who committed human rights violations remained employed in the security services. Moreover, the state structures within which these men were following orders remained untouched. They were part of a chain of command in which King Hassan II was the ultimate authority. Under these conditions, it was unlikely that the son of Hassan II, whose legitimacy is secured by royal lineage, would promote criminal accountability among its own security ranks, as he demonstrated later in 2006, when he still invoked the “immaculate soul of his father” (2) before the victims of human rights violations who were present as guests in the royal palace. Such were the limits of The Independent Commission of Arbitration: the victims, and therefore society as a whole, were deprived of the rights to truth and justice, although certain sums of money—which were often considerable—were granted to them. It is difficult to imagine an outreach program that could have been effective under such circumstances.

The second line of criticisms of the IAC concerned the opacity of its criteria for determining the amount of monetary reparations awarded to each victim. This lack of transparency constituted an additional obstacle for all outreach programs: How can society become convinced of the legitimacy of reparations, if there is a widespread impression that they are being allotted unequally? Thus, instead of remedying the injustice of forced disappearance, the perceived unfairness of the reparations process compounded it.

Last, but not least, the Commission only partially accomplished its task. As a result, hundreds of cases of forced disappearances remained unexamined even after the conclusion of its mandate. No outreach strategy would have been able to remedy such deficiencies. In fact, the criticisms of the Moroccan regime by both domestic and international human rights organizations have not diminished. And yet, the creation of the Independent Commission of Arbitration was aimed precisely at “neutralizing” these critiques, which the regime believed tarnished the image of “Moroccan exceptionalism,” which portrayed the country as the pinnacle of progress in the Arab world, including within the sphere of human rights.

Under these conditions, it is not surprising that the Independent Commission of Arbitration was unable to convince Moroccan society of the effectiveness of its work. No outreach program would have been capable of changing this perception. To achieve their goals, transitional justice processes require that a majority of the social body is convinced that a transition to democracy is indeed underway. And yet, in Morocco, a great deal of doubt remains on this fundamental issue. The IAC's reparations, which proceeded without regard for truth and justice, left a problematic heritage to the Equity and Reconciliation Commission which followed it, although they did constitute a precedent on which the *IER* could build (3).

3. The Equity and Reconciliation Commission (IER)

The Mandate and Report of the IER

In January 2004, King Mohammed VI established the Equity and Reconciliation Commission by royal decree. It was the first truth commission ever created in the Arab-Islamic world. Its mandate was ambitious: it aimed both to establish the truth regarding the human rights violations that took place in the period spanning from Moroccan independence (1956) up to the development of the Arbitration Commission (1999), and to “oversee the reparation of all the wrongs suffered by victims of repression.” The IER was therefore charged with producing “a report (...) comprising an analysis of the institutional causes of human rights violations, and a formulation of recommendations and proposals that would serve to preserve memory, to guarantee a definitive break with the practices of the past, to repair the consequences of the suffering inflicted on victims, [and] to reestablish confidence in the rule of law and respect for human rights. (4)” The IER's mandate was especially ambitious first in a temporal sense, since it extended over a period of 43 years, making it one of the longest periods a truth commission has ever been charged with investigating. Second, the mandate was equally broad in its scope; it was tasked with inquiring into all violations that occurred over these decades, which collectively assumed a systematic character, and included forced disappearances, forced exile, arbitrary detention, torture, sexual violence, and violations of the right to life following the excessive use of force.

After two years of work, the IER issued a report that was courageous in its recommendations; however, these recommendations have hardly been followed. Substantively, the report advocates for the independence of the justice system, a parliament that would no longer merely behave as a registry, and a government endowed with genuine power. The report also recognizes the extent of the human rights violations committed, in particular those

perpetrated under King Hassan II, although it refrains from naming those responsible for the decades of repression—including the commander in chief himself, Hassan II, who controlled the levers of power. Moreover, the report does not touch at all on the most politically sensitive issues, such as the abduction and assassination of Mehdi Ben Barka, a Moroccan opposition leader and leading figure in the Third Worldist movement, in Paris in 1965.

Recommendations for Reparations

In its final report, the IER laid out its philosophy concerning reparations: they are a matter of “establishing the truth, of dressing the wounds of the past by recognizing and rehabilitating the victims, of reconciling Moroccans with their history and themselves, and of inscribing the process of truth, equity, and reconciliation within the framework of democratic transition. (5)” In their substance, the IER’s recommendations for individual reparations were designed to achieve a broad range of goals: “to establish the truth as a contribution to the reparations paid to the victims (6), to financially compensate them for material losses and moral injuries, to psychologically and medically rehabilitate the victims, to reinsert them socially and professionally, and to repair their juridical situation. (7)”

In addition to these recommendations for individual reparations, the IER also advocated collective reparations for groups that were particularly affected by repression, including the adoption of programs for socio-economic development and the preservation of memory. In this same spirit of repairing and guaranteeing the non-recurrence of the violations of the past, the IER made further proposals for institutional reforms at the state level.

In the following pages, we will focus our attention on the outreach efforts and activities in connection with the issue of collective reparations. For as already mentioned, for this analysis to be pertinent, however, it is necessary to first examine the public perception of the IER and the debates over its legitimacy and its work, as the perception of reparations has been directly influenced by the institutional body that recommended them and which, in consultation with its associates, determined the reparations measures that were implemented.

The Public’s Perception of the IER

Although there may be a consensus on the quality of the final report issued by the Equity and Reconciliation Commission, the commission has profoundly divided the Moroccan human rights movement, which is largely comprised of former political prisoners. This division has in turn influenced the perceptions of the rest of Moroccan society (Hazan 2011), and it was made even sharper by polarized perceptions of the IER’s commissioners. The IER was presided over by Driss Benzekri, a former Marxist activist who spent seventeen years of his life in Hassan II’s jails; while eight of its total seventeen commissioners were also former opposition members who had been forced into exile or imprisoned. Notwithstanding this composition, other former political prisoners have been, however, virulent critics of the IER. According to them, their former comrades and fellow detainees have been “*makhzenized*” (co-opted) by the regime, to the point of becoming its “*blanchisseurs*” (launderers).

In the final analysis the disagreement over the IER is fundamentally concerned with the nature of the transition undertaken since Mohammed VI's accession to the throne, in which "the process of truth, equity and reconciliation," was inscribed. The fault line separating the opposing camps runs as follows: one group of human rights activists believed that the creation of the IER in 2004 offered an historic opportunity to reform the core of the Moroccan political system, by making use of the truth commission as a transformative force for the democratization of other Moroccan institutions. The members of this party view themselves as "reformers," capable of rolling back the old guard of *Makhzen* (the small circle of elites that gravitate around the royal palace and maintain political and economic power), who had entrenched themselves in positions of privilege.

Conversely, another equally pugnacious group of human rights activists regarded the IER as a public relations operation on the monarchy's behalf, aimed at legitimizing King Mohammed IV's rule and placating public opinion in the West by projecting the image of a young, modern, and democratic monarchy. They do not believe that the regime has a genuine will for change. They highlight the arbitrary detentions of thousands of Islamists and the "use of torture" after the suicide bombings in Casablanca in 2003, the constraints placed on the opposition press, and the lack of independence of judicial authorities. They buttress their argument by pointing out the strict limits placed on the IER in its public hearings: victims could recount the torture inflicted upon them, and they could name the agencies that arrested or maltreated them, but they were required to refrain from explicitly stating the names of anyone who ordered or carried out the abuse. Such criticisms are given more force by the fact that certain of these men remain in positions of power. Phrasing their argument another way, critics of the IER such as Fouad Abdelmoumni of the Moroccan Association of Human Rights (*Association Marocaine des Droits de l'Homme* – AMDH) argue that with the end of the Cold War, "Morocco has undergone liberalization without democratization," arguing that "changes have been merely homeopathic," and that, taken as a whole, "the central architecture of the repressive system remains unchanged. (8)"

4. The Transformation of the National and Regional Context in Connection with the "Arab Spring"

The division among human rights activists has persisted to the present day, and has become even more pronounced in the context of the local uprisings connected with the "Arab Spring" of 2011. While the IER conducted its operations from 2004–2006, it was at the forefront of transitional justice in a still largely static Arab world that remained under the grip of authoritarian regimes. The community reparations it recommended were put into effect in 2011, as the region was undergoing transformation: the presidents of Tunisia, Egypt and Libya were deposed, agitation was brewing in Yemen and in Bahrain, and repression was reaching a ferocious pitch in Syria. In short, the political climate was transformed at both the national and regional levels, and the explosive social questions posed by the protest movement in Morocco came to overshadow the implementation of community reparations, and to complicate the tasks of those charged with promoting them.

The regional context and the new internal political environment has further divided the two principle players in terms of human rights in Morocco, namely, the AMDH and the

CCDH, the latter of which inherited the reparations project from the IER at the end of 2005. With the rebellions associated with the “Arab Spring,” the AMDH and the CCDH have increasingly become major players in Morocco, but they stand for opposing positions. This has repercussions for the manner in which community reparations are perceived. Thus, the AMDH, which, as noted above, was a leading critic of the work of the IER, has found itself at the forefront of the “February 20th movement,” which brought together tens, indeed hundreds of thousands of young people demanding the establishment of a parliamentary monarchy, a battle against corruption, the liberation of political prisoners, a genuine civil society, freedom of expression, and individual freedoms. In addition, the AMDH remains fundamentally skeptical of the authenticity of the democratic transition. On the other hand, the CCDH is charged with demonstrating the transition's reality, in particular by undertaking the process of community reparations.

Shortly after the protests began in February 2011, the king attempted to defuse the vindication movement that was emerging in the Moroccan society. On March 9th, he announced a referendum on a new constitution that would place limits on his own powers. He also announced—and this directly concerns our subject—the transformation of the CCDH (*Comité Consultatif des Droits de l'Homme*) into the CNDH (*Conseil National des Droits de l'Homme*), with the re-named institution explicitly enshrined in the new constitution. Thus, depending on the analytic lens one adopts, the CNDH (formerly the CCDH) can be regarded in two different ways: either as an institution that safeguards the project of repairing the past and the ongoing process of democratization in the country, or, alternatively, as mere window dressing for a regime that remains thoroughly entrenched in practical terms (9). This sociological sketch of the two principle players in human rights in Morocco provides some explanation for the very polarized political context in which of the CCDH/CNDH must carry out community reparations.

II. Community Reparations

The community reparations program implemented in Morocco can be classified into two distinct categories: material reparations for communities that were especially affected by the years of repression: and symbolic and memorial reparations, which are comprised of gestures of acknowledgment by the state for the human rights violations committed during the “years of lead.”

1. Material Reparations

The IER established two criteria for awarding material community reparations: the existence of secret detention centers within an area and/or the perpetration of collective punishments on certain groups in the wake of social or political movements. According to these criteria, eleven affected zones and, within them, seventy Moroccan provinces have been identified:

Figuig, Nador, Al Hoceima, Errachidia, Khénifra, Ouarzazate, Zagora, Hay Mohammadi (Casablanca), Tantan, Azilal, and Khémisset.

One of the key issues was to determine the form that these reparations should take in order to be carried out in a Moroccan way. At the initial stage, the IER conducted brainstorming sessions. The local populations, local authorities and elected representatives, human rights organizations, development associations, and governmental development agencies were included in this process, through the visits the IER paid to the different regions affected by collective wrongs.

Following these visits, the IER organized a national colloquium on community reparations. Convened in Rabat from September 31st–October 2nd, 2005, this colloquium brought together ministerial departments, regional development agencies, public and private foundations, and bilateral administrations, along with embassies, international foundations, human rights and feminist NGOs, local associations and networks that had written memoranda to the IER or organized regional seminars, and other experts (IER 2012). In total, more than 200 organizations and 50 national and international experts participated. Over the course of this colloquium, the concept of community reparations was elaborated by the IER. They were defined as measures designed to remedy damages suffered by communities and regions that had been subject to massive and systematic violations of human rights, the impacts and after-effects of which have threatened the whole of Moroccan society. The objectives of the community reparations were also clarified. They included:

- the restoration of the dignity of communities, on the basis of the nature and degree of the damages that were caused by violations related to social events, detention centers, or disappearances recorded in regions where these centers existed (IER 2007, p. 46);
- the rebuilding of trust in state institutions and the rule of law (IER 2007); and
- the reinforcement of a spirit of citizenship and belonging; the consolidation of the social fabric and of national solidarity; and the strengthening of social cohesion (and, consequently, the promotion of reconciliation) (IER 2006, p. 29).

In addition, different types of “reparative” activities that might be implemented were raised during the Rabat colloquium, including revenue-generating measures; “gender” projects for women whose husbands had been secretly detained; infrastructure, development, and capacity-building projects; and local memorial projects.

The political scientist Mohammed Tozy served as the rapporteur for the Rabat colloquium. Reflecting on its discussions, he emphasized that the associations from the regions that had been marginalized and divested of infrastructure wanted schools, clinics, and better roads and water canals, as well as revenue-generating measures, “at the risk,” he adds, “that these programs inspired by ‘positive discrimination’ would be confused with development programs. (10)” In effect, he worried that such measures might generate confusion and complicate the IER’s message about the theoretically “reparative” nature of these activities, as the local populations mainly sought to satisfy their infrastructure and development needs.

As a technical point, after the IER published its final report, the CCDH then bore the responsibility for carrying out its recommendations, including the Community Reparation

Program (PRC). The CCDH gave the CDG Foundation (*Fondation de la Caisse de gestion et de depot*), a branch of the state's development fund, a mandate to oversee the execution of these reparations. At the national level, a steering committee was formed (11), along with local joint committees in each of the regions where reparations would be carried out (12). These joint committees were organized in a tripartite structure, bringing together state agencies, elected officials, and cultural and development associations.

1.2. The Budget: “Money has a Smell”

The total budget allocated for material reparations was 56 million dirhams (USD 6.85 million), a modest sum, which was distributed equally among the ten zones that had been selected for reparations. Each zone thus received four million dirhams (USD 480,000) for projects, which, individually, could not exceed a cost of 500,000 dirhams (USD 60,000). The funds came from three sources: multilateral financial institutions (the European Union, ONUFAM); the Moroccan state along with its provincial councils and state development agencies; and, finally, other types of aid were provided from different national (Swiss, Belgian) cooperatives, as well as certain international organizations such as the International Center for Transitional Justice (ICTJ).

The European Union was the principle lender of funds for community reparations (60.82%). Its funding was provided within the framework of its development policies. Also, it is important to note that in 2008, Morocco became the first country south of the Mediterranean to benefit from an “advanced status” within the European Union, allowing it to enjoy the same benefits as a member state without participating in the EU's political institutions (13). Although from the EU's perspective, there was unquestionably a political rationale for offering financial support to community reparations, the perception that this generates is nonetheless troubling. The principle behind reparations for human rights violations is that the burden of paying for them ought to fall to the state responsible for the violations, so that through this payment, it may seek to remedy the suffering it inflicted.

Yet in the Moroccan case, the majority of the financial contributions come from countries that were not directly responsible for the “years of lead”—and to the extent that the contributing countries indeed ever bore any responsibility, their contributions are not presented with any recognition or acknowledgment of this. Contrary to the ancient French dictum, “l'argent n'a pas d'odeur” (“money has no smell”), when money is given, especially for the payment of reparations, it is significant which party provides it. Thus in Morocco, this crucial symbolic dimension was effaced, as the link between the violations committed and the identity of the primary payers is broken. The argument that the source of the money is not important but only the message with which it is given ignores the fact that reparations must repay both symbolic and material debts. In virtue of the principle of state continuity, it should be incumbent on the Moroccan state to take up the burden of funding reparations, and not on other financiers. The confusion resulting from the EU playing this role instead is exacerbated by the fact that the money it contributes is not officially given for reparations, but rather under the heading of development policy.

Budget of the PRC in millions of MAD (dirhams)		
Source of Funding	Amount	%
European Commission	34	60.82%
CDG Foundation (Fondation CDG)	7	12.52%
Conseil Consultatif de Droits de l'Homme (CCDH) ¹	3	5.19%
Oriental Agency (Agence de développement de l'Oriental)	2	3.58%
Provincial Councils (Conseils provinciaux)	10	17.89%
Total	56	100%

¹ Contribution Managed Directly by the CCDH.
Source: CDG Foundation (Fondation CDG).

3. Symbolic and Memorial Reparations

Morocco's symbolic and memorial reparations have comprised several programs endowed with a collective budget totaling eight million euros, which was financed entirely by the European Union over a four year period in the name of assisting democratization. As discussed above, it is problematic that a third party assumed the material responsibility for the country's symbolic and memorial reparations, which should have served as a concrete testimony to the Moroccan authorities' commitment to acknowledging and addressing the past. That said, the reparations were designed to meet the ambitious objectives set out by the IER: in particular, transforming the former detention sites into sites of memory, creating an Institute of Contemporary Moroccan History [*Institut Marocain de l'Histoire du Temps Présent – IMHTP*] to develop research and educational programs on the history of Morocco, and setting up a national archive, which the country had previously lacked.

4. The Absence of a Culture of Communication and Information-Sharing

As explained above, community reparations in Morocco have been carried out in a polarized political environment. In addition to this contextual difficulty, the program has faced a structural challenge relating to the ambiguous nature of the reparations it grants, which have often been understood by the associations on the ground as primarily constituting development efforts. The task is therefore considerable for those members of the CCDH engaged in the politics of communication: how do they convey their message while their own organization is perceived by the opposition as a tool of the powerful, and while their reparative activities are frequently not recognized as such?

An additional obstacle lies in the fact that communication was not a well-developed part of the culture of the CCDH. Although it was created in 1990, it was not until 2008 that the CCDH acquired a department of information and communication (14), following the decision of its president, Ahmed Herzenni, who noted that "he had suffered from a lack of information

in the press, which had had direct [and negative] impacts upon him personally. (15)" Before 2008, the heads of the different departments of the CCDH had been responsible for communications (Ibid). To this day, no dedicated "outreach" program exists. With the exception of commissioning an external communications bureau to recast the institution's visual identity, the department of information and communication has not generally made use of external consultants, nor has it organized internship programs (Ibid).

Constrained by its very limited means, the department has still not created a medium or long term strategy. In fact, the department believes that it has not yet attained the capacity necessary for elaborating comprehensive communication strategies, but instead remains at the level of developing more basic strategies for organizing, managing, and disseminating information (16). Fadoua Maroub, the head of the Department of Information and Communication of the CCDH, enumerates the causes of this communications deficit: "the absence of any internal culture of information-sharing, as is typical of societies coming out of a period of repression, the absence of any culture of communication within the CCDH/CNDH, and, furthermore, the absence of strategic planning and of guidelines for management and evaluation. (17)" In retrospect, the officials of the collective rights department of the CCDH/CNDH and the Program Management Unit (UGP) have recognized that, were they to do it again, they would have developed a strategy for outreach (18). However, even additional resources and a genuine communications strategy would not have resolved one of the major obstacles linked to the blurry identity of the PRC, which is that often viewed by the beneficiary communities as operating according the logic of a development project rather than a culture of reparations.

In practice, the Department of Information and Communication's work has primarily been communications in the traditional sense of the term, that is, "the publicizing of activities, (19)" whether in terms of internal communication (20), communication with the CCDH's partners (21); or communication with the public. With regard to communications among its associates, the CCDH's objective has been to follow up on and accompany its work, which it has pursued through the production and circulation of an information bulletin and other publications. To reach the larger public, the Department has drafted press releases, assembled dossiers for the media, prepared briefs summarizing events, and communicated with the news media—the national and international media both have correspondents in Rabat—and maintained the institution's website (22).

Due to the dearth of financial resources, the staff of the Department of Information and Communications have almost never been on the ground in affected areas, and they have equally rarely been put in direct contact with the communities targeted by the institution's activities. The relations between the Department of Information and Communications and the Department of Collective Rights and Regional Affairs—the department of the CCDH in charge of following up on the work of the community reparations program—have been limited to communications about events (23). In addition, the interaction between the Department of Information and Communications and the operational structure of the community reparations program (the FCDG, which is the management wing of the program and local associations) has not taken place in a direct manner, but rather always via the Department of Collective Rights and Regional Affairs (Ibid).

5. Organizing Communications and the Call for Projects

Given the lack of an overarching strategy for communications and awareness-raising concerning the operations of the community reparations program, improvisation prevailed (24). The fundamentals of communications on the ground have rested on local associations, especially those carrying out the community reparations projects (25). These include the tripartite local associations, comprised of elected officials, representatives of the authorities—often those who were previously responsible for repression—and the victims of the “years of lead.” These associations have carried out the work of dissemination, information, and assistance with the technical aspects of preparing project proposals for submission. By M’hammed Greene’s own admission, the establishment of regional associations was experienced “as a victory” by the project managers of the CDG, as there remained a deep mistrust between the victims and those that carried out acts repression during the “years of lead. (26)”

Several victims have noted that in carrying out these efforts, for the first time, they shared a common objective with the men that had been agents of repression. In this situation, they perceived “a recognition” of their past suffering within a relationship that was established from that point forward on the basis of equality, rather than domination. Fatna Elbouih is a member of the neighborhood association of the Hay Mohammadi district. She was held for seven months in the dark prison of Derb Moulay Cherif, located in the heart of this Casablanca neighborhood, and then for five more years in another prison. Today, she explains: “In these meetings, I meet with the governor, with people from the administration and elected officials, who were responsible for giving orders to the torturers. They are obligated to respect me. They have to obey directives. I sense their reticence. Nothing has been achieved, but it is a step in the right direction. (27)”

During the year following the launch of the program to support community reparations projects in July 2007, the focus was on putting operational and decision-making structures in place and reinforcing their capacities (28). Calls for proposals were made in the second phase of the program, which began in July 2008 (29). These were published on the websites of the EU, the CDG Foundation and the CCDH (30). However, in practice, it was the local associations and, in particular, their intermediaries, that actually carried out the work on the ground. When the second call for proposals was issued, its dissemination was accompanied by a one-month campaign in local languages (regional variants of Darija and Tamazight) (31) which generated more requests for financing for projects; a total of 90 were submitted after the first call and 240 after the second. The calls for proposals were accompanied by information sessions (32) organized by the CCDH’s Department of Collective Rights, the UGP, and, in particular, the local intermediaries in each of the beneficiary provinces, in order to help the associations prepare and submit their applications (33).

The role of local intermediaries in this effort proved to be a central one, since they were connected with the UGP while forging ties with local players. However, their principal mission was never to undertake communications activities, but rather to provide support for the technical aspects of administrative, financial, and operational management, which were not centralized under the community reparations program (34). This technical focus among

the local intermediaries has made the work of awareness-raising and communication dependent on the personalities and beliefs of the people employed in these positions (35). Only in a limited number of provinces that received benefits from the PRC did these people succeed in shifting their job profiles in the direction of greater interactivity (Ibid). As an additional obstacle, it is not the local intermediary, but rather the governor, who heads the local association. Thus, the governor inevitably does not enjoy the trust of the associations and may have himself been associated with the period of repression.

III. Community Reparations on the Ground

While, for the reasons discussed above, Moroccan society as a whole does not know much about the existence of community reparations, this is not the case within beneficiary communities. This observation was made by Ali Amahane, an anthropologist by training, who was tasked by the CDG Foundation with developing the methodologies for and identifying community reparations projects from 2007–2009. By his own admission, this undertaking was a profound challenge, as the wounds of the past were reopened and the potential power at stake in the reparations projects provoked competition among various actors in the regions which had been disadvantaged and isolated for so long. Amahane explains this as follows:

“We had a mandate to grant reparations to a dozen designated regions. This being our point of departure, how do we proceed? Within these regions, which groups are to be targeted and which are not? The first task to undertake was to reach a consensus among the people at the very heart of each community. For some said that others were traitors who had informed on them...Next, it was necessary to identify the NGOs with whom we wanted to work. For there were many parasitic NGOs, and others that purported to speak for the victims. What is more, the authorities balked at the idea of collaboration, the associations wanted to provide cover for them, and all of the prominent figures wanted to play a role; thus it became necessary to curb the appetite of the political parties while still involving the affected communities. (36)”

Amahane provides the very concrete example of the town of Sountate, located in the province of Errachidia: “The victims wanted a maternity hospital. From a logistical and technical point of view, it was preferable to set it up in the neighboring village. But the people of Sountate told us, ‘the people in the neighboring village were traitors. They informed on us. If you want to construct a maternity hospital there, then do it, but we forbid you from dedicating it to the victims. In the end, the people of Sountate got their maternity hospital. (37)” However, as Amahane points out, it was not so much the result as the process that was important, for it allowed them to let go of the past which had for so long hindered the relations between Sountate and the neighboring locality.

Looking back, Ali Amahane comes to a relatively positive conclusion: “These were small, experimental projects. They had a strong resonance in the peripheral regions. They were not

designed for the big cities. With these programs, we have aided in creating a space where people could speak freely, breaking the wall of silence that had been built over decades. The people spoke again about the past, and certain of them leveled accusations at others, but there were also new generations that wanted to move beyond the old wounds. (38)”

A hundred projects out of the three hundred presented were approved. Many communities gave priority to development projects. For example, in the region of Figuig, which endured violent repression in the 1970s and was “forgotten” by the central government when it came to development, the associations demanded reparations in the form of the construction of the dam of Sfisif; the financing of an hydraulic agricultural project and the renovation of potable water canals; the provision of radiological equipment for the hospital and equipment for a dairy cooperative; the creation of a center for handicapped people; the improvement of school infrastructure; and literacy and training courses for women (39). It would seem that many of these projects are gradually assuming the responsibility for many services that ought to be provided by the state, but given the state's failure to meet their needs, the reparations projects to some extent fill the gaps.

1. Field Projects in Ouarzazate

During the “years of lead,” the regime fostered a climate of intimidation throughout the population, which was further reinforced in the province of Ouarzazate by the area's geographic marginalization and the absence of any development policy. Under Hassan II, this southeastern region of Morocco was home to numerous secret detention centers, located in Agdez, Tagounite, Kelaa M'Gouna et Tamdaghte. In the 1970s, the authorities pressured the local populations to find and inform on rebel hideouts in the mountains, creating an atmosphere of general suspicion among the population. On top of this, there are memories of conflict and revenge between families, who often settled scores by making accusations of subversion. By the admission of human rights activists, who prefer to remain anonymous, “the burden of the past remains very heavy today in this region, all the more so because those who hold power locally oppose change, afraid of losing their privileges. (40)”

Mohamed Houkari, one of the two local representatives of the CNDH, points out that “traditionally the people have been afraid of demanding the recognition of their rights. Community reparations aim to change old reflexes and to promote a culture of human rights and development in these regions that have gone ignored by the authorities.” He adds, “Us, we have the burden of repairing the irreparable. We cannot take away the people's experience, which they carry in their flesh and hold in their minds. (41)”

Alongside the associations, the CNDH has organized workshops and seminars to put out calls for projects, with the associations charged with relaying the information to the population. A dozen projects have been chosen, including those of the Maqorn association and the “Afanour for Development” association, both located in Tinghir.

The Maqorn Association

The Maqorn association received a grant of 146,000 dirhams for a two-year project which aimed to provide the services of a legal advisory bureau, along with training in human rights law and in the rights of women against domestic violence and the rights of children, as well as an internet club. The association brought in lawyers from Rabat to carry out these training programs. For Hamid Abdedaim, the secretary of Maqorn, the outcome of this program has been positive: "Traditionally, the relationship between the authorities and the people has been very poor. The people hardly have any trust in the authorities. The memories of repression during the early 1970s remain alive today with the hundreds of arrests and executions. The people do not have the knowledge to be able to negotiate with the authorities or to fight corruption. Today, thanks to our work, we are noticing a change in attitude. The local authorities respect us more. (42)" According to Aabdedaim, some 700 people have benefited from his association's work, and he hopes that the state's budget will allow them to continue their work. It would be necessary to undertake sociological research to measure the impact of Maqorn's project, but in relatively isolated towns like Tinghir, such experiences can make a difference in the relations between the local authority and its constituents.

The "Afanour for Development" Project

The association "Afanour for Development" is located in a disadvantaged neighborhood of 5,000 inhabitants in Tinghir. The population of this district essentially lives off of small agricultural and construction jobs, and, above all, the money sent to them by family members living in Europe. Under the banner of community reparations, the Afanour association has obtained funding of 450,000 dirhams to plant 20,000 date palms over the course of ten years. To date, 3,000 have already been planted. It is a "revenue-generating" project ("activités génératrices de revenus" – AGR). The Afanour project illustrates the ambiguous relationship between community reparations and development policies, since the international development agencies have also contributed to this project, thus adding to the confusion regarding its nature.

Brahim Abbad, the treasurer of the association, explains: "the money has made it possible to pay for two water-pumping systems powered by solar panels, to construct a water basin and a safety chamber, and to buy 300 small date trees. There are 1,200 families (5,000 people), comprising the total number of inhabitants in this neighborhood, benefiting from this project a piece of land—in fact, a piece of desert—belonging to the city, with an area of 100 hectares, which has been distributed in 1,800 lots of 400 square meters. (43)" The people are responsible for working the land and buying the date palms. The small palm trees cost 300 dirhams and take three or four years before they start yielding dates. The large date trees cost 3,000 dirhams and yield dates within a year. According to Abbad, "the date palm trees will generate a revenue of 50,000 dirhams per family and they require no work other than pollination and harvesting. A date palm tree yields a hundred kilos of dates sold at 50

dirhams a kilo, in other words, three to five times more. This income then helps to send girls to school for a longer time. (44)" As a community reparations project which is also supported by Western development organizations, Afanour illustrates, in its mixed composition, the porous border that separates positive discrimination from development efforts.

The Projects in the Hay Mohammadi District of Casablanca

As we have already mentioned, the community reparations have been almost exclusively dedicated to marginalized zones. However, reparations have also been granted to the Hay Mohammadi district of Casablanca. Close to the industrial center of the metropolis, this district was historically resistant to authority and pervaded by a unionist and working-class culture. It was here that the "bread revolts" of 1981 began, provoking repressive acts that led to hundreds of deaths. As the district was symbolic of opposition to Hassan II's regime, the authorities hardly invested in infrastructure within its three square kilometers, where 150,000 inhabitants live. It is also in this district that the Derb Moulay Cherif prison is located, which, along with the Tazmamart prison, is one of the most powerful symbols of the repression of Hassan II. More than a thousand people were secretly detained there for years, with their families often living in close proximity, completely unaware that their loved ones were being subjected to horrifying tortures inside.

Under the impetus of activist associations, former prisoners, and human rights activists, several projects with symbolic and memorial dimensions have come to fruition as part of the community reparations. In many respects, these urban projects undertaken by the very politically conscious activist associations contrast sharply with the rural projects designed to promote economic and educational development. As an example of the projects developed in Hay Mohammadi, we can examine a 26-minute documentary titled *Sept histoires et demi* (Six and a half stories) about life in the district, directed by the CasaMémoire association, and the book *Mémoire et dignité* (Memory and dignity). A dozen young people trained as social workers but without employment conducted interviews with a hundred residents of Hay Mohammadi who were victims of or fought against human rights violations, collecting an oral history of the district. During their 18-month period of work, they also organized "memory cafes," where eight hundred people from the district were able to express their views on the past and the present. This plunge into the history of young people was materialized in the book *Mémoire et dignité*, which created a written record of local memory, and as a result, a source of pride for its residents, allowing young people to claim their space, the history of which had been largely unknown to them.

Fatna Elbouih, a former detainee of Derb Moulay Cherif who became the local intermediary for the community reparations program in Hay Mohammadi, and other human rights activists have seized the opportunity provided by the reparations programs to convert the district's police station into a free health clinic, which, thanks to their efforts, has become one of the few rehabilitation centers for victims of torture in Africa: "We have proven that by getting mobilized, by finding activist doctors who work for 40% of their usual costs, we were able—with the agreement of the authorities—to appropriate a space and obtain the right to health care. This sends a signal: mobilization allows us to assert our rights and, by force of obstinacy, to obtain them, (45)" she says. For activist associations, the conversion

of the police station into a clinic for victims of torture and victims of violence represents “an incredible victory”: “We have succeeded in implicating [*mouiller*] the state, in obligating it to take responsibility, and we did it all for 50,000 euros. But it needs to be made permanent, (46)” said one of their members. Fatna Elbouih insists, however, on one point: “Reparations cannot be separated from the process of democratization. Of course, as an ex-prisoner myself, I am afraid that repression could return one day. But the February 20th movement instills me with confidence in the pursuit of democratization. (47)” For these activists, the democratization of Morocco remains an end to be achieved, not an end that has already been achieved.

In the former police station-turned clinic, two rooms are used by the association “Epanouissement femmes” (“For the Flourishing of Women”), which provides legal defense and medical care for women. In the name of community reparations, this association, directed by Touria Emjouri, has obtained funding from one of the “AGR” projects (revenue generating activities – *projets d'activités génératrices de revenus*): forty women, who are affected by slight disabilities themselves or who are caregivers for persons with disabilities, are remunerated for processing aromatic herbs, including their selection, distillation, and packaging. For the vast majority of these women, it is the first time in their lives that they have had stable employment.

The Implementation of Memorial Reparations: Converting Secret Prisons into Sites of Memory

The CCDH/CNDH had expected to implement memorial projects in 2009, but the program was delayed. One of the reasons for this was the complexity of the European Union's funding procedures, which deterred small Moroccan organizations from applying. The other reason stems from the reluctance of certain authorities. Only one thing is certain: even if the political obstacles to such initiatives were lifted, these projects for sites of memory are expensive and cannot all be realized.

One of the main ideas for reparations projects was to convert former secret detention sites into sites of memory (48). The most advanced project of this type is the museum of Rif, which is designed to remind us of “human rights violations and also to emphasize local heritage. (49)” The president of the CNDH, Driss el Yazami, also wishes to convert the former detention center in Derb Moulay Cherif into a great national museum of the “years of lead,” seeing this as a “flagship project in an area with ten million residents (50).” Human rights activists were very pleased with this commitment; however, they draw attention to the obstacles authorities created when it came to putting it into effect. In the seven-story building of Derb Moulay Cherif, the acts of torture took place in the basement. Today, there are still dozens of families of police officers living in this property. Officially, the authorities explain that it is difficult to relocate them elsewhere. For the former prisoners and human rights activists, the real reason lies elsewhere: the former torturers and their superiors are afraid of being identified and of being indicted one day, and therefore they are doing all they can to prevent Derb Moulay Cherif from becoming a site of memory.

In the province of Ouarzazate, on a hill looking over the town, the fortress used as a secret

detention center from 1980–1991 has dominated the landscape of Kenaa M'Gouna like an ominous shadow. The residents were prohibited from referring to its existence despite it being impossible to open one's eyes without seeing it. The peasants who got too close to the fortress were severely beaten. During this period, 375 prisoners (of whom 57 were women) were secretly locked up, and sixteen of them met with death. The prisoners were Saharans, leftists activists, and unfortunates who were abducted. The people disappeared for years, and their families did not know if they were alive or dead. A former guard recalls, "there were two mute people among the prisoners. Nobody knew their names. They were called the 'X's. (51)'" Elected officials and local associations, along with former detainees, today dream of turning the fortress into an international memorial for the victims of secret detention sites.

2. The National Impact: Scarce Information, Few Debates

The Case: Debates in Moroccan Society

The granting of community reparations has almost exclusively been made to peripheral and marginalized regions (with the exception of Hay Mohammadi in Casablanca). Outside of these directly affected regions and communities, community reparations have hardly provoked debates at the core of Moroccan society, which remains largely indifferent. Without a doubt, many Moroccans have hardly—or never—heard anything about them. Driss Ksikès, who served as the editor-in-chief of two major publications in Morocco, points out that he has never seen the slightest allusion to or debate over the community reparations on social networking sites (52), which he follows closely and which provide a space for the freest expression in the country.

The reasons for this indifference and ignorance are multiple, to the detriment of those who carry out community reparations. Thus, Mustafa Iznasni, an adviser on reparations to the president of the CNDH, notes, "Morocco has done much better than South Africa in terms of individual and community reparations. However, we haven't had people as charismatic as Nelson Mandela and Desmond Tutu to bring attention to them. Moreover, the Arab Spring has captured all the attention (53). But let's consider in more detail the potential explanations for this situation:

Without a doubt, the primary reason for the lack of response to Morocco's reparations programs on the national and international levels has to do with the difference in the nature of its transition. While in South Africa, the break between the apartheid regime of the past and the multiracial democracy of the present was clearly apparent, the Moroccan situation is radically different. The absence of any political break and the ambiguity regarding the nature of its transition have blurred the perception of its reparations efforts.

In addition, it does not help that the total sum of community reparations is meager—50 million dirhams in all—to which eight million euros from the EU will be added for memorial reparations, which have been slow to be implemented. These community reparations

ultimately affect few people. The members of the CNDH and the CDG recognize the limited scale of the reparations, but insist on “the symbolic dimension” of the reparations, which aim to create “a lever effect” to attract other investors.

The third factor is that with few exceptions (in particular, the projects in the Hay Mohammadi district of Casablanca), the beneficiaries of community reparations live in peripheral and marginalized zones, and so the intellectual and political heart of the country is not very interested.

A fourth reason is that in a country with a population as young as Morocco's, the memory of the “years of lead” becomes faded among younger generations, which are not affected by the reparations (54). Proof of this can be seen in the fact that only 3% of the victims are under 30 years old.

And there is a fifth factor: the preoccupations of the vast majority of Moroccans are focused around social issues. These challenges are considerable: a quarter of the population lives below the poverty line, 30% of the 31 million Moroccans are illiterate, and half of these are women. Driss el Yazami, president of the CNDH, points to numerous problems to be overcome, which make the question of reparations appear secondary: “Two hundred thousand young people leave the education system without obtaining their diplomas every year; the number of college students is exploding (190,000 in the class of 2011 and 300,000 in the class of 2016) but the economy cannot absorb them; the country needs 10,000 engineers per year but only trains 6,000; the brain drain continues at an accelerated rate with fifteen to twenty thousand legal immigrants leaving for the north every year; and the entry of women into economic and political life is another seismic revolution....(55)”

Finally, the fact that the program officers of the CCDH/CNDH have carried out the publicity for their activities themselves has not contributed to general comprehension of the reparations program. They are not trained in communication, and believe that such efforts distract from the core of their work. It was not until 2008 that the CCDH/CNDH set up a communications unit. However, the gaps in communications policy are only a secondary factor in the public's perception—or, rather, its lack of perception—of community reparations.

The Formulations of the Criticisms

While there has not been a debate about community reparations at the national level, various opinions have still been expressed. Although the intermediary report made by the European Union auditors was generally positive (56), within Morocco itself, criticisms have been leveled, in particular by those who had already held negative views of the IER. These critics view the community reparations as a new marketing strategy employed by the authorities while Morocco's most fundamental problems go unaddressed, such as the concentration of power, corruption at the highest levels, the lack of transparency, and the absence of true democratization—all of the problems denounced by the February 20th Movement.

It is without doubt Fouad Abdelmoumni, one of the directors of the Moroccan Human Rights Association, who has leveled the most scathing critique:

“The political authorities wish to acquit themselves of the past at the lowest cost. They are trying to recover a party of elites. And, through their power, they have managed to get Europe to finance the memorial reparations. The fundamental question is if these community reparations have truly set into motion a dynamic of social and political transformation or if, in fact, they inhibit such a dynamic. Unfortunately, in my opinion, they inhibit it. Worse still, the community reparations lead the logic of development and the logic of responsibility away from the state. If the state wants to make reparations for the past and avoid its repetition, it would have to assume its responsibility directly and completely, including prosecuting those responsible for acts of repression. But the state is not prepared to do so. (57)”

The second critique is directed at “the confusion” and the mixing of genres between community reparations and development projects. We have already discussed the fundamental ambiguity of the community reparations programs: are the reparations truly “reparative” with regard to the victims of the past, or are they not inscribed in a classical logic of development in which the state must assume its responsibilities? As Adel Essadani, an activist and key player in the cultural life of Casablanca, points out, “the state releases itself from its responsibilities the easy way by shifting them to the associations for the community reparations projects, whose ends, such as the construction of infrastructures, should really be under the province of the state. (58)” Thus, the construction of the Zaoura Airport, the renovation of potable water systems, as well as the funding for hospital equipment and the dam near Figuig, reclamation of the great Casablanca cinema as a “site of memory,” and literacy and training programs for women have all been conceived as integral components of the community reparations programs. These programs were chosen at the impetus of local communities, which identified them as their most pressing needs. However, it is easy to argue that a good portion of these programs fall under the category of development. The counter-argument is to interpret these projects as being motivated by a philosophy of positive discrimination, with the goal of remedying past wrongs.

Mohammed Tozy, who, as noted earlier, served as the reporter on the key meeting on community reparations in 2007, provides the following analysis in retrospect: “The associations in these disadvantaged regions wanted infrastructures that they had been deprived of, as well as revenue-generating projects. This was understandable, and civil society reappropriated this space, which was a positive thing. The negative side of this was that it fed into the confusion between community reparations and development policies. It is true that if the regional policies had performed their roles in the past, the people would not need community reparations in order to build their infrastructures. (59)” Indeed, by the admission of certain officials in the reparations programs, the local populations have had difficulty distinguishing the development and infrastructure projects connected to the community reparations program from those connected to the National Initiative for Human Development (INDH), which enjoys a vastly superior budget.

The third line of criticism concerns the programs for revenue-generation (AGR). In monetary terms, the AGRs represent only a limited portion of the reparations. In theory, the AGRs were supposed to help women, and in particular, the spouses of former detainees who had been

the breadwinners of the household. The AGRs have been reproached for hoarding their funds instead of putting them toward projects that would serve the community as a whole, since, according to the authorities, the entire community was victimized by repression, and not only certain people.

The fourth critique is directed at the memorial and historical projects, arguing that, "history cannot be written if taboos remain, (60)" pointing out that the IER had forbidden the naming of agents of repression in its public hearings, and also that to this day, no detention site has yet been converted into a museum or cultural center, in spite of official commitments to do so (61).

Conclusion

There is a radical difference between the Moroccan situation and that of South Africa, Argentina, or the Czech Republic: in Morocco, there has been institutional continuity between the regime responsible for committing human rights violations during the decades of the Cold War and the regime that today speaks of a break from the repression of the "years of lead." The undertaking of reforms and the granting of reparations are designed to embody the democratic transition that is underway. However, Moroccan society remains divided over the true character of this transition. Thus, there is an immense challenge facing the few people involved in communications and outreach strategies pertaining to transitional justice. The obstacle they face is considerable: they must do more than simply make known and explain the tasks of transitional justice, an effort which would be complicated enough on its own—especially since, as was experienced with the Independent Commission of Arbitration in 1999, reparations measures have previously been designed to silence victims and international critics of the regime, without actually serving justice or even truth. This instrumentalization of transitional justice is being paid for today.

However, beyond this problematic legacy of the past, an effective outreach policy supposes as a prerequisite that there is a consensus on the reality of the democratic transition. It is clear that in Morocco today, such a consensus is lacking. This is demonstrated, in particular, by the virulent critiques of the Moroccan Human Rights Association, which denounces the measures undertaken in the name of transitional justice as merely "cosmetic," and judges that the discourse on democratic transition is nothing more than window dressing. Outreach efforts regarding reparations are made even more difficult because the CNDH itself is regarded as a political player. In short, in a context in which there is mounting social frustration and political conflict, it is hardly surprising that at the national level, the issue of reparations has had merely a residual impact among the vast majority of Moroccans, for whom the memory of the years of repression is distant, when it remains at all.

That said, at the local level, or for specific groups, community reparations have certainly had an impact. Drawing on specific examples, such as the work carried out by the Maqorn Association and the various projects developed in the Hay Mohammadi district

of Casablanca, we have seen that micro-projects have helped to foster positive social dynamics. Former victims have testified to the fact that these reparations have helped them to gain a bit more balance in their relations with local authorities, which until then had been all-powerful.

The impact at the heart of Moroccan society has, however, been slight. The reasons for this, as we have seen, are multiple: the ambiguity surrounding the process of democratization illustrated by the demands voiced by a part of the society which wants dramatic reforms; the absence—to this day—of sites of memory, due, in particular, to resistance on the part of certain government agencies; and, last but not least, the meagerness of the funds committed to reparations programs (USD 6.85 million). All of these things together have impaired the reach of reparations on a national scale. In addition, the predominately European financing of the community reparations (exceeding 60% of the program's total funds) has also attenuated their impact. In the transitional justice process, reparations are conceived as a symbolic debt which is paid by the responsible state. Yet, in Morocco, the link between the author of the violations and the payer of the debt is a remote one. Thus the responsibility of the Moroccan state has not been fully engaged, because it is only partially acquitting its debt. It is furthermore astonishing that the memorial reparations—the most symbolic form of reparations—have been financed exclusively by the European Union.

To these problems can be added the fact that community reparations often appear to serve as substitutes for services that the state has failed to provide, allowing the state to remain comfortable while shirking its responsibility. From the perspective of the communities residing in marginalized areas, their wish to see the construction of a new dam, the replacement of potable water systems, the renovation of health clinics, and the improvement of school infrastructures is completely legitimate. But is it really the role of reparations programs to meet these needs? Or is it not instead the responsibility of development policies and the ministers who oversee them?

Given all of this, we could argue that, in the case of Morocco, even if comprehensive outreach approaches had been fully adapted for these circumstances, they would not have been able to compensate for the problems enumerated above. These difficulties are the results of fundamental political choices, and not of deficiencies in the dissemination of the message of reparations. Ultimately, reparations do not convey much meaning unless populations subscribe to the idea of a clear rupture with the practices of the past. Yet, this critical connection between reparations and democratization is contested by a significant segment of Moroccan society. In this sense, the perceptions of community reparations are an accurate reflection of the ambiguities of the country's transition.

References

Boraine, A. *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*. Oxford and New York: Oxford University Press, 2001.

IER, "Forum National sur la Réparation," accessed June 2012, Available at http://www.ier.ma/article.php?id_article=1311.

IER, "Synthèse du rapport final," 2006.

IER, "Équité pour les victimes et réparations des dommages et préjudices," Final Report, Vol. 3, Conseil consultative des droits de l'homme, Rabat, 2007.

Hazan, P. *Judging War, Judging History: Behind Peace and Reconciliation*, Palo Alto: Stanford University Press, 2011.

Endnotes

1. I would like to express my gratitude to Julie Guillerot for her contribution to this article.
2. "Sa Majesté le Roi Hassan II, que Dieu sanctifie son âme." Mohammed VI, "Texte intégral du discours royal à l'occasion de la fin du mandat de l'Instance équité et réconciliation et de la présentation de l'étude sur le développement humain au Maroc" [Speech Delivered by the King on the Occasion of the End of the Mandate of the IER and on the Study of Human Development in Morocco] (Rabat, January 6, 2006), http://www.ier.ma/article.php?id_article=1531.
3. Notably, the final report of the IER makes mention of the "shortcomings" [carences] of the Independent Commission of Arbitration. IER, *Final Report of the IER*, vol. 3, 32.
4. "Un rapport...comportant l'analyse des causes institutionnelles des violations et de formuler des recommandations et des propositions à même de préserver la mémoire, de garantir la rupture définitive avec les pratiques du passé, de résoudre les conséquences des souffrances causées aux victimes, de rétablir la confiance en l'Etat de droit et le respect des droits de l'homme." *Final Report of the IER*, vol. 1, 15, 2009.
5. "D'établir la vérité, de panser les blessures du passé en reconnaissant et en réhabilitant les victimes, de réconcilier les Marocains avec leur histoire et eux-mêmes, et d'inscrire le processus de vérité, d'équité et de réconciliation dans le cadre de la transition démocratique." *Final Report of the IER*, vol. 3, 36–37.
6. The IER defines victims as men and women who have suffered forced disappearance, arbitrary detention, torture, maltreatment, extra-judicial execution, death due to excessive force (particularly in the context of urban riots), and executions following processes marked by irregularities.
7. "Établir la vérité comme contribution à la réparation des victimes, indemniser financièrement les préjudices matériels et moraux, réhabiliter psychologiquement et médicalement les victimes, les réinsérer socialement et professionnellement et régler leur situation juridique." *Final Report of the IER*, vol. 3, 39.
8. "Le Maroc a connu une libéralisation sans démocratisation... les changements n'ont été qu'homéopathiques... l'architecture centrale du système répressif est restée inchangée." Fouad Abdelmoumni (Moroccan Association of Human Rights – AMDH), interview with author, September 7, 2011.

9. Unsurprisingly, this very frame of reference conditioned the people's attitudes towards the referendum on the new constitution of July 1st, 2011, which was boycotted by the opposition. The fact that 98.5% of the population voted to approve it was interpreted as a plebiscite in support of the king, or, on the contrary, as a return to the old reflexes stemming from the era of Hassan II to marginalize any real opposition.
10. "Au risque...que ces programmes inspirés de la 'discrimination positive' soient confondus avec des programmes de développement." Interview with Mohammed Tozy, September 6, 2011.
11. The steering committee is composed of the CCDH, the FCDG, the Ministry of Finance, the Minister of the Interior, the lenders, representatives from local associations, and Program Management Unit (l'Unité de gestion du programme – UGP). Tasked with the role of guiding policy, the committee's objectives are to see that the program is carried out in conformity with the recommendations of the IER, to define the strategic vision for the reparations, to ensure the financial transparency and technical viability of its work, and to publicize the program on an international level, in order to attract foreign aid.
12. These associations are also charged with doing financial and technical follow-up for the programs. The council of local associations is made up of a representative of each of these 11 local associations, which facilitates the exchange of information among the associations, as well as communication between them and the national steering committee.
13. As part of its rank of "advanced status," a regular summit between Morocco and the European Union is organized, as along with informal meetings where problems of security, immigration, crisis management, and any other political issue of interest to both parties is addressed. Morocco participates in many agencies and committees, including, most notably, the Common Foreign and Security Policy (PESC), the European College of Police (EUROPOL), and the European Monitoring Center for Drugs and Drug Addiction (EMCDDA).
14. The Department of Information and Communication is composed of seven posts: an editorial division with four editors (Arabic, French, English, and Spanish); an internal communications official; a supervisor who oversees press relations, media-planning, and events; and a department chief in charge of coordinating the team.
15. "...qu'il a souffert d'un manque d'information dans la presse qui s'est répercuté directement [NDLR, négativement] sur sa personne." Interviews with Fadoua Maroub (Head, Department of Information and Communication, CCDH), December 4, 2009, and May 5, 2010.
16. Ibid. In addition, the mandate of the Department of Information and Communication covers all of the activities of the CCDH, of which the community reparations programs comprise only one part.
17. "...l'absence d'une culture interne de partage de l'information propre aux sociétés

sortant d'une période répressive, l'absence d'une culture de communication au sein du CCDH/CNDH et l'absence encore de planification stratégique et d'indicateurs de gestion et d'évaluation." Ibid.

18. Interview with Ahmed Touafiq Zainabi; interview with Rafiq El Amrani
19. "Propagande des activités." Interview with Fadoua Maroub.
20. Internal communication efforts are focused on information-sharing and keeping all members updated on the activities of the CCDH, through the circulation of a daily press review, a calendar of institutional activities, and a bulletin on internal information, along with notes, emails, activity reports, etc.
21. The partners of the CCDH are both private and public (ministries and state agencies). The CCDH, as part of the implementation of the community reparations program, has signed a set of conventions with different partners, including the Ministry of the Interior; the Ministry of Youth and Sports; the Oriental Agency; the CDG and the European Union; the United Nations Development Fund for Women; the Ministry of Employment and Professional Training; the Royal Institute of Amazigh Culture; the Ministry of the Housing, City-planning, and Land Use; the Ministry of National Education, Higher Education, Management Training and Scientific Research; the Agency for Development of Southern Provinces; the provincial Councils of Azilal, Tantan, and Khémisset; the Ministry of Agriculture and Maritime Fishing; the Moroccan Cinema Center; the National Mutual Aid, and the Ministry of Social Development, Family, and Solidarity. CCDH, "Partenaires du CCDH dans le Programme de Réparation Communautaire," accessed June 2012, <http://www.ccdh.org.ma/spip.php?article1764>.
22. According to the information furnished by the head of the Department of Information and Communication, the website receives an average of 20,000 visitors per month.
23. Interview with Fadoua Maroub.
24. Interview with Ahmed Touafiq Zainabi. Given the limitations of the Department of Information and Communication, the implementation of the communication and awareness-raising strategies and activities for the community reparations program rested on the initiative of (1): the collective rights and regional affairs department of the CCDH; and (2): the FCDG/UGP, which head the operational structure put in place to supporting community reparations. These organs, however, are not composed of units or personnel that are experts in communication. With regard to the budget, a portion of the costs related to the communications activities is supported by the CCDH, and another part is assumed by the EU project. In particular, according to M'ahmed Grine (Deputy President of the CDG Foundation), the EU project includes an "Information and Visibility" section, which allocates a budget of 12,000 euros.
25. Interview with Ahmed Touafiq Zainabi; interview with Rafiq El Amrani.
26. Interview with M'hammed Greene, September 6, 2011.
27. "Dans ces réunions, je me retrouve avec le gouverneur, des gens de l'administration

et des élus, qui furent les donneurs d'ordre des tortionnaires. Ils sont obligés de me respecter. Ils doivent obéir à des directives. Je sens leurs réticences. Rien n'est gagné, mais c'est déjà un pas." Interview with Fatna Elbouih, September 7, 2011.

28. The methodology that was followed included, at the central level, informational workshops (of five sessions) for the officials of the CCDH and the UGP (a total of 47 beneficiaries), which discussed, among other things, the formulation and administration of EU projects; the management of projects; and techniques for communications and advocacy (Presentation by M'hmed Grine, International Conference in Rabat on Community Reparations, February 2009). Through these workshops, the program's steering committee approved the Global Operational Plan (*Plan Opérationnel Global – POG*) for the period of 2007–2010, as well as the Annual Operational Plan for 2008 (*Plan Opérationnel Annuel – POA*). The methodology also involved training and planning workshops for local associations, the principle objectives of which were (1) to explain the general context of the program of community reparations, present its institutional organization, explain its objectives and approaches, and clarify the notions of transitional justice and reparations; and (2) to hold dialogues on potential projects that might be undertaken as community reparations. One year after the launch of the PRC, 8 training and planning workshops had been organized with local associations and more than 200 local actors have participated in different workshops. Of these, 68 were from associations, 72 were representatives from state social services, and 24 were local elected officials.
29. Initially, the applicants—that is, the non-profit local associations in the beneficiary provinces of the PRC, or, in their absence, a national association with a local office—must submit only a succinct project outline for evaluation. Following this evaluation, the applicants whose outlines have been pre-selected receive an invitation to submit a complete application. See CCDH, PRC, "Lignes directrices à l'intention des demandeurs pour présenter la note succincte de présentation," (Programme d'appui aux actions de réparation en faveur des régions touchées par les violations des droits de l'Homme), Project MED/2006/018-122, EuropeAid/127385/M/ACT/MA, April 9, 2008.
30. EuropeAid, "Appels à propositions et appels d'offres," <https://webgate.ec.europa.eu/europeaid/online-services/index.cfm?do=publi.welcome&nbPubliList=15&orderby=upd&orderbyad=Desc&searchtype=RS&aofr=127385>, CCDH, "Réparation Communautaire: Appel à Proposition," <http://www.ccdh.org.ma/spip.php?article705>; and "Réparation Communautaire: Appel à Proposition Restreint No. 01/2009," <http://www.ccdh.org.ma/spip.php?article1370>.
31. Interview with Rafiq El Amrani.
32. CCDH, "Sessions d'Information Relatives à l'Appel à Proposition Restreint No. 01 et 02/2009," <http://www.ccdh.org.ma/spip.php?article1425>.
33. These information sessions, which are directed at the local associations that might potentially apply, are held to assist with the preparation of project outlines for evaluation and preselection, as well as for the stage in which they must present the complete

- application for final selection. Eight information sessions were been organized in the target provinces for the preselection phase; eight information sessions were also organized for the selection phase. Moreover, local actors are always able to contact those who are responsible for conducting follow-ups and the executing the community reparations support program. As one means of contact, during the information sessions, they are told that there is a Q&A forum on the CCDH website where they may address their questions. In addition, the local intermediaries, who support the UGP and are permanently present on the ground, “ensure the coordination, monitoring, mobilization and awareness-raising; they allow for the humanization of the relationship and its visibility. There is thus an accompaniment by the UGP for the presentation of the projects.” (Interview with Rafiq El Amrani).
34. The local intermediaries are appointed, “To maintain the interface between the UGP and local actors; to provide technical assistance for local associations; to support local associations in formulating projects; to develop an institutional environment favorable to the implementation of the community reparations program at the local level; to elaborate the local Annual Operational Plans (*Plans Opérationnelles Annuelles Locaux*); to ensure administrative, accounting, and financial management of the program at the local level; to monitor the execution of projects on the ground; to draft periodical reports of activities regular reviews of the progress of the local program; to organize cross-cutting activities (training, seminars, information campaigns, etc.); to oversee improved coordination with other local actors; to promote exchanges among the beneficiary regions of the community reparations program; [and] to develop all activities inscribed within the framework of the program requested by the UGP.” See the call for applications for the recruitment of local liaisons, FCDG, CCDH, and EU.
 35. Interview with Fatna El Bouih, local liaison for Hay Mohammadi (Casablanca).
 36. “Nous avons les principes pour accorder des réparations et une douzaine de régions qui étaient désignées. A partir de là, comment procède-t-on ? A l’intérieur de ces régions, quels groupes sont ciblés et quels ne le sont pas ? Le premier travail à faire fut de mettre les gens d’accord au sein même de chaque communauté. Car il y avait ceux qui disaient que les autres étaient des traîtres, qui les avaient dénoncés... Puis, il fallait identifier les ONG avec lesquelles nous voulions travailler. Or, il y avait beaucoup d’ONG parasites. D’autres qui prétendaient parler au nom des victimes. De surcroît, les autorités rechignaient à collaborer, les associations voulaient tirer la couverture à elles, les notables voulaient jouer un rôle, il fallait modérer l’appétit des partis politiques tout en impliquant les communautés touchées.” Interview with Ali Amahan, September 7, 2011.
 37. “Les victimes voulaient une maternité. Du point de vue logistique et technique, il était préférable de l’installer dans la commune voisine. Alors, les gens de Sountate nous ont dit ceci : «Ceux de la commune d’à côté furent des traîtres. Ils nous ont dénoncés. Si vous voulez construire une maternité là-bas, faites-le, mais nous vous interdisons de l’appeler par le nom de nos victimes. Finalement, les gens de Sountate eurent leur maternité.” Ibid.

38. "C'étaient des petits projets expérimentaux. Ils ont eu une forte résonance dans des régions périphériques. Ils n'étaient pas conçus pour des grandes villes. Avec ces programmes, nous avons assisté à une libération de la parole, brisant le mur du silence qui s'était construit pendant des décennies. Les gens ont reparlé du passé, certains ont accusé d'autres, mais il y avait aussi les nouvelles générations qui voulaient dépasser les vieilles blessures." Ibid.
39. The programs are described in IER, *Final Report of the IER*, vol. 3.
40. "Le poids du passé reste très lourd aujourd'hui encore dans cette région, d'autant que ceux qui détiennent le pouvoir localement résistent au changement, craignant de perdre leurs avantages."
41. "Les gens ont eu traditionnellement peur de réclamer l'application de leurs droits. Les réparations communautaires visent à changer ces vieux réflexes et à promouvoir la culture des droits de l'homme et du développement dans ces régions oubliées du pouvoir... Nous, nous avons la charge de réparer l'irréparable. On ne peut enlever aux gens leur vécu, ce qu'ils portent dans leur chair et ce qu'ils ont dans la tête." Interview with Mohamed Houkari, September 4, 2011.
42. "Les relations sont traditionnellement très mauvaises entre le pouvoir et la population. Celle-ci n'a guère confiance en les autorités. La mémoire de la répression du début des années 1970 est encore vive avec des centaines d'arrestations, ainsi que des exécutions. La population n'a pas le savoir pour négocier avec les autorités et pour dénoncer la corruption. Aujourd'hui, grâce à notre travail, nous constatons un changement d'attitude. Les autorités locales nous respectent davantage." Interview with Hamid Abdedaim, September 4, 2011.
43. "L'argent a permis d'acheter deux systèmes de pompage alimentés par des panneaux solaires, de construire un bassin d'accumulation d'eau, une chambre de protection, et d'acheter 300 petits palmiers à dattes. 1200 familles (5.000 personnes), soit la totalité des habitants de ce quartier bénéficient de ce projet construit sur une terre-en fait, un bout de désert-qui appartient à la commune sur une surface de cent hectares répartis en 1800 parcelles de 400 mètres carrés." Interview with Brahim Abbad, September 4, 2011.
44. "Les palmiers dattiers vont générer un revenu de 50.000 dirhams par famille, et guère de travail si ce n'est la pollinisation et la récolte. Un palmier donne cent kilos de dattes vendues 50 dirhams le kg, soit trois à cinq fois plus. Cette rentrée d'argent aidera ensuite à scolariser les filles plus longtemps."
45. "Nous avons prouvé qu'en nous mobilisant, en trouvant des médecins militants qui travaillent à 40% de leurs honoraires habituels, nous pouvions -avec l'accord des autorités- nous approprier un espace et obtenir le droit à la santé. Cela envoie un signal: la mobilisation permet de revendiquer nos droits et, à force d'opiniâtreté, de les obtenir." Interview with Fatna Elbouih, September 7, 2011.
46. "Nous avons réussi à «mouiller» l'Etat, à l'obliger à prendre ses responsabilités, tout cela pour 50.000 Euro. Mais cela doit être pérennisé."

47. "Les réparations ne sont pas dissociables de la démocratisation. Bien sur, comme ex-prisonnière, j'ai peur que la répression puisse revenir un jour. Mais le mouvement de revendication du 20 février me donne confiance pour poursuivre la démocratisation." Interview with Fatna Elbouih, September 7, 2011.
48. Other projects include the creation of a set of films and books on the years of lead as well as an electronic site, and the publication of a book on the detention centers including commentaries from former prisoners.
49. "... les violations des droits de l'homme et mettra aussi en valeur le patrimoine local."
50. "Un projet phare dans une agglomération de dix millions d'habitants." Interview with Driss el Yazami, September 6, 2011.
51. "...qu'il y avait deux muets parmi les prisonniers. Personne ne connaissait leur nom. On les appelait les 'X .'"
52. Interview with Driss Ksikès, September 6, 2011.
53. "Le Maroc a fait bien davantage que l'Afrique du Sud en matière de réparations individuelles et communautaires. Mais nous n'avons pas eu des personnes aussi charismatiques que Nelson Mandela et Desmond Tutu pour les mettre en valeur. De surcroît, le Printemps arabe a cristallisé toute l'attention." Interview with Mustafa Iznasni, September 3, 2011.
54. In fact, one third of the individual compensations have been granted to people over 60 years old.
55. "Deux cent mille jeunes sortent chaque années du système scolaire sans diplôme, le nombre de bacheliers explose (190.000 bacheliers en 2011 et 300.000 en 2016) sans que l'économie puisse les absorber, le pays a besoin de 10.000 ingénieurs par an, mais n'en forme que 6000, l'exode des cerveaux se poursuit à un rythme accéléré avec quinze à vingt mille immigrés légaux qui s'en vont vers le nord chaque année, l'entrée des femmes dans la vie économique et politique est une autre révolution tellurique...." Interview with Driss el Yazami, September 6, 2011.
56. Georges Assaf and Cecilia Olmos, *Provisional Final Report, Support Program for Reparations in Favor of those Regions affected by Human Rights Violations* (Rapport final provisoire, Programme d'appui aux actions de réparation en faveur des régions touchées par les violations des droits de l'homme), April 2010.
57. "Le pouvoir veut solder le passé au moindre coût. Il cherche à récupérer une partie des élites. Et, dans son habilité, il parvient même à faire financer par l'Europe les réparations mémorielles. Le point fondamental est de savoir si ces réparations communautaires enclenchent une dynamique de transformation sociale et politique ou si justement, elle l'inhibe. Malheureusement, à mon sens, elle l'inhibe. Pis que cela, les réparations communautaires dévoient la logique du développement et la logique de la responsabilité de l'Etat. Si l'Etat veut réparer le passé et éviter que cela se reproduise, qu'il accepte sa responsabilité pleine et entière, y compris en poursuivant ceux qui

sont responsables de la répression. Mais l'Etat n'est pas prêt à le faire." Interview with Fouad Abdelmoumni, September 7, 2011.

58. "l'Etat se déresponsabilise à bon compte en faisant porter aux associations des projets de réparations communautaires qui sont du ressort de l'Etat, comme la construction des infrastructures." Interview with Adel Essaadani, September 5, 2011.
59. "Les associations de ces régions défavorisées voulaient des infrastructures dont elles avaient été privées et des activités génératrices de revenus. C'était compréhensible, et la société civile se réappropriait son espace, ce qui était positif. Le côté négatif fut d'alimenter la confusion entre réparations communautaires et politiques de développement. Il est vrai que si les politiques sectorielles jouaient leur rôle, la population n'aurait pas besoin de réparations communautaires pour bâtir des infrastructures." Interview with Mohammed Tozy, September 6, 2011.
60. "L'on ne peut pas écrire l'histoire avec des tabous."
61. The CCDH acknowledges that this program is behind schedule.

Biographies

Dr. jur. Helen Ahrens,

Director of Programme "Strengthening the Rule of Law", Colombia, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH - Bogotá – email: Helen.ahrens@giz.de

Dr. jur. Helen Ahrens is working with Deutschen Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH since 1992. She has been engaged by other Agencies such as EuropeAID, OAS and CEPAL/ECLAC. Helen Ahrens studied law at the Christian-Albrechts-Universität, Kiel/Germany. From 1989 –1992 she was scientific officer at the Max-Planck-Institut für ausländisches und internationales Privatrecht, Hamburg/Germany. 1992 Doctor of Juridical Science (Dr. iur.), University of Kiel.

Since 1996 appraisal, evaluation and monitoring of projects within the context of legal and judicial reforms and the promotion of human rights in Latin America (Bolivia, Chile, Columbia, Paraguay, Peru, Venezuela), in addition, since 2000, assumption of comparable tasks in South Africa and since 2004 in Asia (China, Mongolia, Vietnam).

Relevant topics:

- Law in matters of structure/organisation of the State and its competences (constitutional law, law of the State, regulations referring to law making, administrative law, penal and penal procedural law)
- Law and institutions for the protection of citizens against unlawful administrative behaviour (e.g. fundamental rights, human rights, institution of the ombudsman)
- Law pertaining to the interaction between citizens (civil and economic law)
- Comparative law, international law and international private law

Future-oriented topic: challenges arising out of the globalised law (supranational and transnational law) and its impact on national legal systems taking the development of international economic law and human rights as basing points. Since 2008 Director of programme "Strengthening the Rule of Law", Colombia. Within the aforementioned context Helen Ahrens organized and participated in several conferences within Germany, Europe, Latin America and Asia. Furthermore she published various articles and contributed with concept papers to expert workshops and seminars.

Judge Monia Ammar Feki,

Juge à la Cour de Cassation, Tunis – email: ammerfeki@yahoo.com

Madame Monia Ammar est tunisienne, mariée et mère de deux enfants. Après des études à la faculté des sciences économiques et politiques de Tunis où elle obtient sa licence en droit, elle intègre la magistrature en 1987. Elle est actuellement Magistrate Conseillère à la Cour de Cassation. Elle a été chargée de mission auprès du Ministère de la Justice et des Droits de l'Homme depuis 2000 et jusqu'à 2012, spécialiste des droits de l'homme et du droit international humanitaire.

En 2007, elle a été élue présidente de la Commission des Experts Arabes indépendants au sein de la Ligue des Etats Arabes. Elle est aussi membre du groupe des experts gouvernementaux chargés de l'élaboration et du suivi du plan arabe pour l'éducation aux droits de l'homme. Elle fait aussi partie du groupe des formateurs nationaux des Nations Unies sur la HRBA et la RBM depuis 2007. Madame Monia Ammar est aussi membre du Réseau ARADESC de l'UNESCO depuis 2006. En 2012, elle est devenue membre et formatrice avec le Centre Kawakbi sur la justice transitionnelle. Madame Monia Ammar fut aussi membre de la Commission Nationale du droit humanitaire, chargée du secrétariat permanent de ladite commission (2006-2009) et membre de la Commission des Femmes Arabes du Droit Humanitaire International au sein de l'organisation des Femmes Arabes.

En plus de ses activités liées à l'enseignement des droits de l'homme et du droit international humanitaire au sein d'écoles et d'institutions nationales de formations spécialisées, elle a participé à plusieurs colloques et réunions, nationaux, régionaux et mondiaux touchant aux questions des droits de l'homme et du droit international humanitaire. Madame Monia Ammar est également membre fondateur de l'association « Action Citoyenne », elle en est la porte parole chargée de la diffusion des principes de la citoyenneté et des droits de l'homme. Elle participe actuellement à la formation de plusieurs membres d'associations de jeunes sur la démocratie, les droits de l'homme, les droits des femmes, la HRBA et la RBM ainsi que sur la justice transitionnelle.

Judge Mohamed Avadi,

Former member of the National Commission to Investigate Corruption

– email : Md_ayadi@yahoo.fr

Mohamed Ayadi est Magistrat au Tribunal Administratif Tunisien où il occupe actuellement le poste de Commissaire d'Etat. Titulaire de diplômes approfondis en Fiscalité et ancien chef de service à la direction générale du contrôle des impôts relevant du Ministère des Finances, Secrétaire Général du Forum de transparence et d'intégrité, Trésorier de l'Union des Magistrats Administratifs et expert formateur auprès de l'académie de la justice transitionnelle. Auteur de contributions portant sur le pourvoi en cassation en matière fiscale, la jurisprudence du Tribunal administratif et les incitations aux investissements, rendre justice dans le processus transitionnel. Il enseigne à l'Institut Supérieur de Magistrature. Il a été membre de la Commission Nationale d'investigation sur la corruption et la malversation.

Prof. Elazar Barkan,

Columbia University, NY – email : eb2302@columbia.edu

Elazar Barkan is Professor of International and Public Affairs at Columbia University, Director of SIPA's Human Rights Concentration, and Director of Columbia's Institute for the Study of Human Rights. Barkan's research focuses on the role of history in contemporary society and politics, with particular emphasis on the response to gross historical crimes and injustices, and human rights. His recent books include *No Return, No Refuge: Rites and Rights in Minority Repatriation* (with Howard Adelman, Columbia University Press 2011), *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (2000); *Claiming the Stones/Naming the Bones: Cultural Property and the Negotiation of National and Ethnic Identity*, (co-edited, Getty, 2003); *Taking Wrongs Seriously: Apologies and Reconciliation* (co-edited, Stanford University Press, 2006); *Shared History - Divided Memory. Jews and Others in Soviet Occupied Poland, 1939-1941* (coedited, 2008).

Prof. Colm Campbell,

University of Ulster – email: c.campbell@ulster.ac.uk

Professor Campbell is one of the founding directors of the Transitional Justice Institute at the University of Ulster (UU), serving as Director/Associate Director between 2004-2010. He is also Professor of Law, in the School of Law at UU. In recent years he has held Senior Research Fellowships from the British Academy, the Leverhulme Trust, and from Jesus College, Oxford. Prior to joining UU (2000), he served as Professor of Law and Dean of the Law Faculty at the National University of Ireland, Galway, and as Director of the Human Rights Centre at Queen's University Belfast. Professor Campbell held the Civil Liberties Research Trust/Cobden Trust Studentship at QUB, completing his doctorate in 1989. He holds a BCL degree from UCD, and is qualified as a solicitor in Ireland. He combines a strong commitment to research in the field of human rights and international humanitarian law with a keen interest in human rights advocacy, locally and globally. A former chairperson of the Committee on the Administration of Justice (the Northern Ireland affiliate of the ICJ), he also co-authored one of the two human rights reports produced for the Irish Government's Forum for Peace and Reconciliation, and currently sits on the main project board of the Northern Ireland Council for Ethnic Minorities. He has an on-going focus on the Middle Eastern peace process, and has served on several expert groups addressing aspects of the process, including panels organized by the Munck Centre for International Studies, University of Toronto; by the Netherlands Institute of Human Rights (SIM); and by the Gaza Centre for Human Rights. He also co-edited a key collection on minorities in the region: 'Nationalism and Minorities in the Middle East: Identities and Rights'. Professor Campbell has acted as consultant to the United Nations Inter-regional Criminal Justice Research Institute, Turin (UNICRI); to the Northern Ireland Human Rights Commission; and to the Standing Advisory Commission on Human Rights (NI). He further served as a member of the European Co-ordinating Committee on Human Rights Documentation (a body organized under the auspices of HURIDOCS and the Council of Europe). Professor Campbell has published widely in the fields of both transitional justice, and of political violence and the law. Highlights include a monograph with OUP; several articles in *Modern Law Review*; and articles in *ICLQ*, *JLS*, *Crim LRev*, and *LS*. This work

has received significant international recognition, including being highlighted by academic research centers as far afield as India and Italy.

Prof. Horst Fischer,

EIUC President – GIZ, GmbH Brussels – email: president@eiuc.org

Prof. Dr. Horst Fischer is the President of EIUC since 2002 and he was the first Chairperson of the European Master's Programme in Human Rights and Democratisation from 1997 till December 2000. Prof. Dr. Fischer is Director of the Brussels Office of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH since 2007. Prof. Dr. Horst Fischer is Academic Director of the Institute for International Law of Peace and Armed Conflict (Institut für Friedenssicherungsrecht und Humanitäres Völkerrecht/IFHV) at the Ruhr-Universität Bochum in Germany; Professor of International Humanitarian Law at Leiden University in the Netherlands and adjunct Professor at SIPA/Columbia University, New York. From 1996 to 2004 he was the General Editor of the Yearbook of International Humanitarian Law. In 1999 he received a special prize for outstanding performance in international university co-operation by the German Rectors Conference and the Ministry for Education and Research. Prof. Dr. Fischer also covers the following other key posts in the area of human rights, humanitarian law, and humanitarian action:

- Co-founder in 1993 and since 1999 President of the ECHO-funded NOHA-Association in Brussels, offering the NOHA Master which has been selected as an Erasmus Mundus
- Co-founder of the European University Network comprising of 60 universities 'HUMANET' focusing on issues of humanitarian activities;
- Adviser for international affairs for the German Red Cross since 1986 and the Netherlands Red Cross since 2001; President of the Berghof Peace Foundation Board in Berlin since 2001;
- Member of the Board of the German Red Cross since November 2009.

Diana Contreras Garduno,

PhD-Candidate, Utrecht University – email: d.i.contrerasgarduno@uu.nl

Diana Contreras-Garduno is a PhD candidate at Utrecht University's Netherlands Institute of Human Rights. She is conducting PhD research on the victims' right to benefit from remedies and reparations in international criminal proceedings. Diana holds a Master's degree in International Law of Human Rights and Criminal Justice from Utrecht University and has a law degree from the University of the State of Mexico. Prior to coming to The Netherlands, Diana worked for several years as an Electoral Legal Advisor for a political party in Mexico. Alongside her PhD research, she works as a supervisor in the Utrecht Law School Clinic on Conflict, Human Rights and International Justice.

Fakher Gafsi,

Lawyer, Tunisian Bar Association – email: f.gafsiavocat@gmail.com

Mr. Fakher Gafsi is lawyer at the Tunisian Supreme Court. He is elected member of the Regional Division of Lawyers of Tunis, secretary general of the Tunisian League for Citizenship, member of the Academy of Transitional Justice and expert of Transitional Justice, chairman of the Commission on Transitional Justice established by the Tunisia Bar Association for the development of the Transitional Justice process implementation in Tunisia and expert in electoral observation.

Maria Clara Galvis,

Lawyer, senior legal advisor for the DPFL (Due Process of Law Foundation) – Consultant Program “Strengthening the rule of law”, Colombia, GIZ, GmbH – Bogotá
– email: mariaclaragalvis@hotmail.com

Maria Clara Galvis is a Colombian lawyer graduated from the Externado University in Colombia. She holds two masters degrees, in constitutional law from Università degli Studi di Genova, in Italy, and the National University of Colombia. In Colombia she has acted as advisor to the Attorney General and the Delegate Attorney for human rights and as a lawyer for the Prosecutors General's office of international affairs. In the United States Maria Clara served as the senior lawyer for the Center for Justice and International Law (CEJIL). In Peru she acted as the advisor to Consorcio Justicia Viva, created by the Instituto de Defensa Legal y the Catholic university of Perú. Currently Maria Clara is litigating and advising on litigation before the Inter-American Human Rights System. She is also working as an international consultant with Due Process of Law Foundation, amongst other organizations, on the subjects of inter-american law, international human rights law, justice systems and transitional justice. Maria Clara teaches international human rights law at the National, Santo Tomás and Sergio Arboleda universities and is a guest professor of constitutional law at the Catholic university of Perú. She published a recent article on the role of the victims in the transitional justice processes in Latin America.

Luís Jorge Garay,

Economist, Monitoring Commission on Public Policies in favor of the Forced Displaced Population in Colombia – resident in Spain – email: ljpgara@hotmail.com

Luís Jorge Garay Salamanca is Industrial engineer and magister in Economics at the Universidad de los Andes, and Ph.D. in Economics at the Massachusetts Institute of Technology. Visiting Scholar at the universities of Oxford and Cambridge. Formerly teacher at the universities de los Andes and Nacional de Colombia, Visiting Scholar and Consultant at the InterAmerican Development Bank, and Consultant at the United Nations Program for Development in Colombia, the National Planning Department and Ministries of Finance and of Foreign Trade in Colombia. Actually member of the Comisión de Seguimiento a la Política Pública sobre Desplazamiento Forzado en Colombia (Monitoring Commission on Public Policies in favor of the Forced Displaced Population in Colombia), Academic

Director of Vortex Foundation and Visiting Professor of Link Campus University in Rome, Italy. Has published and edited more than 50 books and published numerous essays in specialized journals in Colombia, Italy and the United States, in topics like international trade and economic integration, foreign debt management, industrial development and international competitiveness, globalization, social exclusion, and State capture and institutional reconfiguration.

Amine Ghali,

Lawyer, KADEM – Programme Director – email: amine.ghali@yahoo.com

Amine Ghali is the Program Director of Al Kawakibi Democracy Transition Center (KADEM) working on issues of democracy, reform and transition in the Arab region (activities and initiatives in more than 10 Arab countries). Currently he focuses his contribution on the democracy transition process in Tunisia, especially on political reform, elections and transitional justice issues. He is also a member of the National Commission to Investigate Corruption (March 2011 – Feb 2012) and currently a member of the National Commission on the Transitional Justice Debate (Since May 2012) Before joining KADEM (position held since 2008), he worked in a number of regional and international NGOs such as Freedom House and Center for Arab Women Training and Research (CAWTAR). Amine Ghali holds a Masters Degree in International Development Law from Université René Descartes, Sorbonne, Paris; and a Bachelor Degree in International Management from University of Houston, Texas. He took part in a number of special courses and trainings in human rights and democratization.

Prof. Felipe Gómez Isa,

University of Deusto - Bilbao - email: felipe.gomez@deusto.es

Felipe Gómez Isa is Professor of Public International Law and researcher at the Institute of Human Rights of the University of Deusto (Bilbao). He is National Director of the European Master in Human Rights and Democratization, EMA, organized by 41 European Universities in the framework of the European Inter-University Centre for Human Rights and Democratization (EIUC, Venice, Italy). Spanish representative to the UN Working Group for the elaboration of an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (New York, 1998 and 1999).

He has been Visiting Professor in several European, Latin American, and Asian Universities. His publications include *El derecho al desarrollo como derecho humano en el ámbito jurídico internacional* (The Right to development in Public International Law, University of Deusto, 1999), *Privatisation and Human Rights in the Age of Globalisation*, (Intersentia, co-edited with Koen de Feyter, 2005), *International Human Rights Law in a Global Context* (University of Deusto, co-edited with Koen de Feyter, 2009), *Rethinking Transitions. Equality and Social Justice in Societies Emerging From Conflict* (Intersentia, co-edited with Gaby Oré, 2011), or "Freedom From Want from a Local Perspective: Evolution and Challenges Ahead", in *The Local Relevance of Human Rights* (Cambridge University Press, edited by Koen de Feyter, Stephan Parmentier et al., 2011).

Christian Grünhagen,

Lawyer, Vice-Director Programme "Strengthening the rule of law", Colombia,
Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH - Bogotá
- email: christian.gruenhagen@giz.de

Christian works with GIZ and coordinates the component "effective realization of rights" in the rule of law programme FortalEsDer in Bogotá, Colombia. In addition, he is chairperson of the GIZ Sector Network "State and Democracy in Latin America and the Caribbean (RED LAC)". He grew up in the German Democratic Republic and lived there until 1990. He is a lawyer and obtained a M.A. in Development Studies from Bremen University. He specialized in the promotion of democracy, civil society, rule of law and transitional justice. He previously worked in Germany with the Project on Good Governance and Democracy in GIZ Headquarters in Eschborn; with the Division on Governance, Democracy, Human Rights and Gender in the German Federal Ministry for Economic Cooperation and Development (BMZ) in Bonn; with the Programme on Civil Conflict Resolution in the Institut für Auslandsbeziehungen (IFA) in Berlin and with the Friedrich-Ebert-Foundation in Bolivia and Guatemala.

Dr. Pierre Hazan,

Transitional Justice Consultant UNHCHR, Geneva - email: phazan@gmail.com

Dr. Pierre Hazan was a political advisor to Louise Arbour, the U.N. High Commissioner for Human Rights, in Spring 2008. He works as a consultant with the U.N. and with the Swiss Ministry of Foreign Affairs and as an expert with the International Committee of the Red Cross. He is member of the International Contact Group in the Basque Country, facilitating a peaceful resolution of the conflict. The ICG co-organised in October 2011 the Peace Conference which led to the announcement by ETA of the end of the armed conflict. The last few years, Pierre Hazan was a lecturer in SciencesPo Paris and in Geneva, Sankt-Gallen and Neuchâtel Universities. Pierre Hazan is writing op-eds for various publications and appears regularly on electronic media. Pierre was a senior fellow at the United States Institute of Peace, in Washington DC (2006- 2007) and a fellow at Harvard Law School (2005-2006). Prior to that, he was a U.N. correspondent in Geneva for the French newspaper Libération and the Swiss daily Le Temps. In this position, he has covered many international crises including those in Afghanistan, the Balkans, the Great Lakes region of Africa, the Middle East, Somalia and others. He has produced four television documentaries with the Franco-German channel ARTE and Swiss Public Broadcasting TV; these documentaries explored such subjects as the International Criminal Tribunal for Rwanda and universal jurisdiction.

Pierre Hazan is also one of the founding members of the International Film Festival on Human Rights in Geneva. He has organized international conferences on International Justice. In October 2006, with Rosalind Shaw and Lars Waldorf, he organized a seminar on Transitional Justice in Bellagio, Italy (sponsored by the Rockefeller Foundation), with 15 practitioners and theoreticians of TJ, which led to the publication of *Localizing Transitional Justice: Justice Interventions and Local Priorities After Mass Violence*, Stanford University Press, 2009. Pierre's last books are *Judging War, Judging History* (Stanford University Press, 2010), for

which he received the Drieyfuss Prize, and *Justice in A Time of War, the Secret History of the International Tribunal for Former Yugoslavia*, (Texas A&M, 2004). Pierre Hazan was a member of the Board of MSF-Switzerland and of the Geneva Call Committee, an organization which promotes Humanitarian Engagement of Armed non-State Actors. Pierre Hazan holds a PhD in Political Science from Geneva University and a master's in Strategic Studies from Aberdeen University (UK). In 2012 Pierre Hazan has edited the online publication: "10th Anniversary of the International Criminal Court: the Challenges of Complementarity", available online at http://www.eda.admin.ch/etc/medialib/downloads/edazen/doc/publi/aussen.Par.0029.File.tmp/Politorbis_2_2012_No54.pdf.

Lukas Knott,

PhD-candidate, University of Sorbonne, expert of Regional Tribunals
- email: lukasknott@gmail.com

Lukas Knott studied German and French law at Universität zu Köln and Université Paris 1. He specialized in international economic law and human rights law at Paris 1, Sciences Po Paris and Columbia Law School, and wrote his Master's thesis on corporate liability for human rights violations abroad. PhD Fellow at the Ecole doctorale de droit international et européen and member of the research group Justice et droit international dans un monde global since 2009, he has been conducting doctoral research on the role and functioning of regional courts in sub-Saharan Africa. He has also written on slavery and forced labor issues, on transnational law, and on African globalization. He has worked for the UN and the World Bank and is currently teaching at the Ecole militaire de St-Cyr in France.

Sameh Krichah,

Labo Démocratique - email : krichahsameh@gmail.com

Since the Tunisian revolution, this young 23-year old woman was committed to providing the most to the Tunisian democratic transition. With a formation as high industrial biology engineer, she began to be passionately involved in politics, with an unshakeable determination to defend the right causes for a better tomorrow in Tunisia. Working in charitable associations and entrepreneurship in young age, her fight changed after January 14th. She joined a political party, but soon realized that she was facing the same vertical political mentality. She therefore left the party and embarked on a fascinating adventure: crossing Tunisia to promote an awareness campaign in view of the elections of October 23rd, 2011, called "Citizen Bus". Later she joined an association for young partners within the "Citizen Bus" project, called "SAWTY", whose mission was to promote democracy and civic engagement among young people. She spent her days attending political parties' meetings and courses on democratic transition, constitutional law, mechanisms of pressure, given by several international institutions and organizations.

She was also selected by UNFPA to be part of its "Regional Youth Advisory Panel", an advisory panel to prepare ICPD beyond 2014. Within her epic "democratic learning", while attending the seminar of archives of the political police organized by her association «Labo Démocratique», she caught the "virus" of wanting to defend the cause of memory.

Meanwhile she continuously documented herself on the subject, and became so aware of these issues and so motivated to deepen her knowledge, as to pursue a career in law after her engineering degree.

Dr. Patricia Luna Paredes,

Human Rights Defendor and Officer, Defensoría del Pueblo - Colombia
- email: patricia.luna.paredes@gmail.com

Patricia Luna Paredes is a lawyer, has specialized in human rights and has a broad experience in design and implementation of public policies on human rights, particularly for the displaced population and victims of armed conflict. She has been director of the special unit for human rights in the Colombian Ministry of the Interior, director of the assistance for the displaced population, commissioner representing the ombudsmen at the National Commission for Reparation and Reconciliation and coordinator of the justice and peace programme of the ombudsmen institution. Currently she is the Delegated Ombudsman for Victims in Colombia. She has participated in the creation of various laws and decrees, regulating displacement issues and victims' rights. Recently she has participated in the revision of protocols and guidelines for the assistance of victims, such as protocols related to assistance of victims of sexual abuse, forced disappearance and torture. In particular, she participated in the design of a model for inter-institutional assistance of victims of the armed conflict in Colombia.

Prof. Anja Mihr,

Netherlands Institute of Human Rights, Utrecht University - email: A.Mihr@uu.nl

Prof. Mihr is Associate Professor at the Netherlands Institute of Human Rights (SIM), University of Utrecht, Netherlands. She teaches Human Rights, Transitional Justice and Democratization in International Relations. She is one of two principal investigators and research directors of the ORA project on the Impact of Transitional Justice on democratic institution building. Her work focuses on Governance, Human Rights, Democratization and benchmarking. In 2011 she was awarded to complete a Briefing Paper for the subcommittee on human rights of the European Parliament on Human Rights Benchmarks for EU's external policy. In 2008 she was Visiting Professor for Human Rights at Peking University Law School in China and worked for the Raoul Wallenberg Research Institute on Human Rights, Lund University. From 2006-2008 she was the European Programme Director for the European Master's Programme in Human Rights and Democratisation (E.MA) at the European Inter-University Centre for Human Rights and Democratisation in Venice (EIUC), Italy. She received her Ph.D in Political Sciences from the Free University in Berlin, Germany, in 2001.

Mihr has worked for Amnesty International and the German Institute for Human Rights. Starting as a assistant professor with UNESCO Chair in Human Rights at the University of Magdeburg in 2002 in Germany, she was later a research director at the Humboldt University of Berlin carrying out the research project "Teaching Human Rights in Europe" from 2003-2006. From 2002-2006 Anja Mihr also served as Chair of Amnesty International Germany. She has published a number of books and articles on international human rights regimes, human

rights education, transitional justice, democratization, European human rights system and NGOs and has been co-editor of the European Yearbook of Human Rights as well as the German Journal for Human Rights.

Judge Sylvain Oré,

Judge at the African Court for Human and People's Rights - Abidjan, Côte d'Ivoire
- email: oresylvain@yahoo.fr

Justice Sylvain Oré is a national of Côte d'Ivoire. He was elected Judge of the African Court on Human and Peoples' Rights in 2010 for a four-year term. He has been an Advocate and Member of the Ivorian Bar since 1998. He is a holder of a Master's degree in Law and an Advocates Proficiency Certificate (CAPA) obtained from the University of Abidjan-Cocody. He is also holder of a Postgraduate degree (DESS) in Human Rights awarded by the "Institut de la dignité et des droits humains" of the Centre for Research and Action for Peace (Abidjan, Côte d'Ivoire). He attended an advanced course in human rights litigation at the Economic Community of West African States (ECOWAS) Court of Justice in Abuja, Nigeria. He also pursued higher studies in international and comparative law of human rights at the International Institute of Human Rights (Strasbourg, France). In 2001, he won the public speaking competition for Advocates organized by the Ivorian Bar and was awarded the prestigious title of "Secrétaire de Conférence". He is a resource person at seminars and conferences on human rights. In particular, he is the usual representative of the African Court for debate on transitional justice initiated within the framework of the African Union. Justice Oré is the author of a postgraduate dissertation on "The protection of human rights by the ECOWAS Court of Justice".

Prof. Iván Orozco Abad,

Universidad de los Andes – Colombia - email: orozcoivan@hotmail.com

Iván Orozco Abad is a lawyer graduated from Universidad Javeriana (Colombia). He obtained a PhD in political sciences from Universität Mainz (Germany) and is a professor at Universidad de Los Andes (Colombia). He has served as an advisor in peace issues to the High Commissioner for Peace in Colombia, to the 1st Commission in the Congress of the Republic of Colombia and to the Human Rights Office of the Vice President of the Republic of Colombia. He was member of the historic memory unit in the National Commission for Reparation and Reconciliation, which at present belongs to the Center for Historic Memory in Colombia. He is author of a variety of books and essays on war and peace, political criminal law, human rights and transitional justice.

Prof. Leigh A. Payne,

Oxford University - email: leigh.payne@sant.ox.ac.uk

Professor Payne is professor of Sociology and Latin America at the University of Oxford (St Antony's College). She has written extensively on transitional justice drawing from the

Transitional Justice Data Base (<http://www.tjdbproject.com>) that she developed with Tricia D. Olsen and Andrew G. Reiter. For that project they received funding from the US Institute of Peace, the Smith-Richardson Foundation, and the Zennstrom Foundation. They subsequently expanded their team at the University of Oxford and began a collaboration with Kathryn Sikkink and her research team at the University of Minnesota to carry out a US National Science Foundation and UK Arts & Humanities Research Council project on the Impact of Transitional Justice. They are currently generating findings from this project. They have recently received additional funding from the NSF-AHRC to conduct research on "Alternative Accountabilities for Past Human Rights Violations," a project on civil trials, reparations, lustration/vetting, and customary justice to be completed in 2014. In addition to these projects, Payne has also solo authored a number of books, book chapters, and articles. She is currently working on new projects that emerge from her book *Unsettling Accounts: Neither Truth nor Reconciliation in Confessions of State Violence* (Duke University Press, 2008).

Dr. Humberto Antonio Sierra Porto,

Magistrado de la CIDH, Ex-Magistrado de la Corte Constitucional Colombiana - Colombia
- email: humbertoasierra@gmail.com

Humberto Antonio Sierra Porto is a lawyer graduated from Universidad Externado (Colombia). He specialized in constitutional law and political sciences at the Center of Constitutional Sciences (Centro de Estudios Constitucionales) in Madrid (Spain). He obtained a PhD in constitutional law from Universidad Autónoma de Madrid (Spain). He is professor of constitutional law at Universidad Externado (Colombia) and researcher at the Institute of Constitutional Studies (Instituto de Estudios Constitucionales Carlos Restrepo Piedrahita). He is author of a variety of publications in the area of constitutional justice, sources of rights, parliamentary law, constitutional reforms and administration of the justice sector. He has served as a lawyer at the Administrative Court of Colombia, as an advisor on legislation to the Congress of the Republic of Colombia, as Prosecutor Delegate for Public Function and since 2004 as Magistrate at the Constitutional Court of Colombia. From 10th of February 2008 to 10th of February 2009 he was President of Constitutional Court of Colombia. In June 2012 he was elected by the General Assembly of the Organization of American States (OAS) Justice of the Inter-American Court of Human Rights for the period 2013-2019.

Prof. Mouna Tabei,

University of Tunis - member of National Commission on Transitional Justice, Tunis
- email: mouna.tabei@gmail.com

Mouna Tabei is Professor at the Faculty of Tunisia in Constitutional Law and Human Rights. Member of the technical commission responsible for overseeing the national dialogue on Transitional Justice and of the editorial board on the bill, she graduated at the International Academy of Constitutional Law, board member of the DCRA, consultant and expert for the Center Kawakabi, the AIHR and the NYO. Publications and speeches: "The protection of economic and social rights in Tunisia", proceedings of the Conference organized by UNDP 24-25 November 2011 "The Constitutional Council and Constitutional Rights" in Proceedings

of the Symposium on the 50th Anniversary of the Tunisian Constitution 2009 "Constitutional Justice in Maghreb" in Proceeding of the Conference in Constitutional Justice 2008 "The reference standards of judicial review in the opinion of the Tunisian Constitutional Council" DEA, 2007.

Prof. Rodrigo Uprimny Yepes,

Director Center for the Study of Law, Justice and Society (Dejusticia) - Bogotá-Colombia
- email: ruprimny@yahoo.com

Lawyer, Ph. D. in Political Economy at the University of Amiens Picardie, DSU (Master's Degree) in Sociology of Law at the University of Paris II, and DEA (Master's Degree) in Economy of Development at the University of Paris I (IEDES). Currently, he is Director of the Center of Studies on Law, Justice and Developmente "Dejusticia", and professor of Constitutional Law, Human Rights, and Theory of the State at the Universidad Nacional, in Bogotá. He is author of numerous articles on human rights, constitutional law, tensions between law and economics, drug trafficking, judicial system and transitional justice. Some of his publications in English are: With Saffon M.P, "Uses and Abuses of Transitional Justice Discourse in Colombia" in PRIO Policy Brief (2008); "Transformative reparations of massive gross human rights violations: between corrective and distributive justice" in *Netherlands Quarterly of Human Rights* (2009) Vol 27 No 4; With Maria Paula Saffon. "Report on Colombia" in Cherif Bassiouni (ed) *The pursuit of International Criminal Justice: A world Study on Conflicts, Victimization and Post conflict Justice*. Antwerp, Intersentia, 2010 "The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges", 89 *Texas L. Rev.* 1587 (2011).

Omar Weslati,

Judge - Member of the Observatoire d'Indépendance de la Magistrature - Tunis
- email: Amorweslati22@gmail.com

Omar Oueslati is Judge in the Court of First Instance in Manouba. He was born in Siliana-Tunisia, where he had his primary and secondary education. He left it to live in the capital Tunis and got his Baccalaureate Diploma in 1994, from the Secondary School of Manouba. He graduated in 1998 from the university of Law and Political Sciences in Tunis and then joined the Supreme Judicial Institute from where he graduated in 2002. He prepared a Graduation Project which topic was the Implementation of International Arbitration Provisions. During the 11 years of judicial work, he worked in different courts all over the country namely in Sidi Bouzid and Kasserine.

He participated in several training courses such as a Training session with the Arab Institute for Human Rights on the Activation of Economic, Social and Cultural rights, a training session with KAWAKIBI Center for Democratic Transition. Which is a training course on transitional justice. He is interested in spreading a culture of human rights and strengthening the rule of law in transitional periods. He is active in the civil society as a member of the Tunisian Observatory for the Judiciary Independence, as a member in the Tunisian Judges Association and he is the founder of the Tunisian Association for Development and Training.

ANNEXES

ANNEX I

Declaration of Venice

on

RULE OF LAW AND TRANSITIONAL JUSTICE: TOWARDS TRIANGULAR LEARNING

Colombia and Tunisia are both undergoing processes of democracy building, of rule of law strengthening and of transitional justice. In Colombia these began some years ago (despite an on-going conflict). In Tunisia they are at the initial stages, having begun after the Arab Spring brought an end to more than two decades of authoritarian rule.

The Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, on behalf of the Federal Ministry for Economic Cooperation and Development (BMZ), supports a program to strengthen the rule of law in Colombia, as well as one to foster good governance in the Magreb region. Both programs witnessed the fragmented discussions on strengthening the rule of law, proliferating human rights and applying mechanisms of transitional justice. In response to these challenges GIZ interacted with the European Inter-University Center for Human Rights and Democratization (EIUC) in order to develop the kind of complementary strategies for rule of law strengthening and for transitional justice suggested in the 2004 and 2011 Reports of the Secretary General of the United Nations on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616 & S/2011/634).

Thus, EIUC and GIZ, with their respective partners such as Kawakibi Democracy Transition Center (KADEM), joined forces to bring together experts and practitioners from both countries so that they could exchange experiences with regards to the rule of law, transitional justice and good governance. During this meeting they met with academics who exchanged ideas on relevant theoretical frameworks. The goal of the conference was to create an scenario for dialogue and discussion – a triangular learning process with GIZ and EIUC acting as facilitators and contributors, and with the Governments of Colombia and Tunisia sharing experiences on the rule of law and transitional justice.

Participants declare:

The GIZ/EIUC Conference on Rule of Law and Transitional Justice 11-14 November 2012 proved to be an excellent platform of discussion. While the many differences in the countries were striking at first, in the course of the conference many similarities and complementarities were uncovered. The potential for Colombia and Tunisia to assist each other in strengthening their respective rule of law, democracy-building and transitional justice process soon became apparent. In this spirit, Colombian and Tunisian participants, as well as participants from GIZ and EIUC, state their intention to cooperate towards triangular learning on the rule of law and transitional justice. This learning process will cover the following interest areas:

- Rule of law:
 - Institution building: authorities/commission of control like an Ombudsman's office or a Human Rights commission, regulation, elections, transition, fight against corruption, media, etc.

- Independent judiciary: the functioning and independence of the Constitutional Court and other Courts
- Horizontal (formal relationships within the state itself) and vertical (citizens holding the powerful to account) accountability
- Neutrality of administration and public services: capacity to maintain public services in times of crisis, archive quality
- Land: experience on land registry and property courts
- Democracy/ Good Governance:
 - Leverage accountability, citizen awareness and responsiveness through free and transparent elections,
 - Increase level of civic and public participation,
 - Enhance governmental and governance accountabilities through guaranties and monitoring
 - Increase level of transparency of decision making processes
 - Leverage citizen mobilization
 - Focus on gender issues
 - Problems of gender and violence based on gender: mechanisms of protection of women's rights and gender equality
 - Revise the governance mode and make it more horizontally accountable
- Transitional Justice:
 - Combination of mechanisms in a holistic view
 - Material and moral victims' advocacy
 - Expertise on reparations
 - Expertise on Commission of Memory
 - Experience on the dynamic of law elaboration
 - Army's role in the transition: neutrality, civil role
 - Management of the refugees' situation

In order to formalize the triangular cooperation, Colombian and Tunisian participants will consult with relevant institutions in their respective countries, the aim being to prioritize areas of cooperation, and to concretize means for information exchange. Subsequently, GIZ and EIUC on their part will concretize their offer as facilitators and contributors to the triangular cooperation.

As a result of the Conference GIZ and EIUC will publish a Conference Report as well as an academic publication on the relation of rule of law and transitional justice.

Venice, 14.11.2012

Participants from Colombia:

- Ms Maria Clara Galvis, Consultant – Rule of Law Programme – GIZ, Bogotá
- Mr. Luis Jorge Garay, Economist, Madrid
- Ms Angela Marcela Guevara Medina, Agencia Presidencial de Cooperación Internacional de Colombia
- Ms Maria del Mar Gutierrez Valderrama, Specialist Africa, Agencia Presidencial de Cooperación Internacional de Colombia
- Ms Patricia Luna Paredes, Delegated Ombudsperson for Victims, Bogotá

- Mr. Ivan Orozco, Universidad de los Andes, Bogotá
- Judge Humberto Sierra Porto, former Judge at the Constitutional Court and from 2013 at the Inter American Court for Human Rights, Bogotá
- Mr. Rodrigo Uprimny Yepes, Director Center of the Study of Law, Justice and Society (Dejusticia), Bogotá

Participants from Tunisia:

- Judge Monia Ammar Feki, Judge at the Tunisian Cour de Cassation, Tunis
- Judge Mohamed Ayadi, Judge, former member of the National Commission to Investigate Corruption
- Mr. Fakter Gafsi, Lawyer, Tunisian Bar Association
- Mr. Amine Ghali, KADEM – Programme Director, Tunis
- Ms Sameh Krichah, Representative of NGO “LaboDémocratique”
- Prof. Mouna Tabei, University of Tunis – member of the National Commission on Transitional Justice, Tunis
- Judge Omar Weslati, Member of the Observatoire d’Indépendance de la Magistrature, Tunis

Participants from Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and European Inter-University Centre for Human Rights and Democratisation (EIUC):

- Prof. Kalliope Agapiou-Josephides, EIUC Deputy-President/E.MA National Director University of Cyprus
- Dr. Helen Ahrens, Director – Rule of Law Programme – GIZ, Bogotá
- Prof. Florence Benoît-Rohmer, EIUC Secretary General
- Prof. Horst Fischer, EIUC President
- Mr. Christian Grünhagen, Vice-Director – Rule of Law Programme – GIZ, Bogotá
- Prof. Fabrizio Marrella, Dean of Human Rights Village/University of Ca' Foscari, Venice
- Dr. Angela Melchiorre, E.MA Programme Director of EIUC
- Prof. Anja Mihr, Conference academic coordinator – Utrecht University
- Ms Lucie Monney, Assistant – Rule of Law Programme – GIZ, Bogotá
- Prof. Teresa Pizarro Beleza, EIUC Board Member/E.MA Director New University of Lisbon
- Mr. Nelson Socha, Senior Adviser – Rule of Law Programme – GIZ, Bogotá

International Academics and Observers:

- Prof. Elazar Barkan, Columbia University, New York
- Prof. Colm Campbell, Transitional Justice Institute, University of Ulster, Belfast
- Ms Diana Contreras Garduno, Utrecht University
- Prof. Felipe Gomez Isa, University of Deusto, Bilbao
- Prof. Pierre Hazan, Transitional Justice, Geneva University
- Mr. Lukas Knott, Expert on Regional Tribunals, Université Paris 1 Panthéon-Sorbonne
- Dr. Eva Maria Lassen, Director of Danish Institute of Human Rights, Copenhagen
- Hon. Just. Sylvain Oré, African Court for Human and People’s Rights
- Prof. Leigh Payne, Oxford University

ANNEX II

Acta de Venecia sobre

ESTADO DE DERECHO Y JUSTICIA TRANSICIONAL HACIA UN APRENDIZAJE TRIANGULAR

Colombia y Túnez están en el proceso de fortalecer el estado de derecho, construir democracia y justicia transicional. En Colombia los procesos comenzaron hace años no obstante el conflicto constante; están en el inicio en Túnez, donde empezaron después de la primavera árabe y la transición de un liderazgo autoritario por décadas a un gobierno democrático.

La Deutsche Gesellschaft für internationale Zusammenarbeit (GIZ) GmbH apoya al mismo tiempo por encargo del Ministerio Federal de Cooperación Económica y Desarrollo (BMZ), un programa para fortalecer el estado de derecho en Colombia, así como, un programa para promocionar el buen gobierno en la región del Magreb. Ambos programas tuvieron que enfrentar la discusión fragmentada sobre el fortalecimiento del estado de derecho, la proliferación de derechos humanos y la aplicación de mecanismos de justicia transicional. La GIZ se dirigió al European Inter-University Center (EIUC) para obtener sugerencias sobre cómo relacionar el Estado de Derecho, como está listado en el informe del Secretario General de las Naciones Unidas del 2004, sobre el estado de derecho y la justicia transicional en las sociedades que sufren o han sufrido conflictos (S/2004/616).

En consecuencia, el EIUC y la GIZ, así que sus socios respectivos, como el Kawakibi democracy Transition Center (KADEM) reunieron fuerzas para conectar expertos y personas de la práctica de ambos países para facilitar el intercambio de experiencias en cuanto al Estado de Derecho, justicia transicional y buen gobierno. En el marco de esa reunión los países se encontraron con especialistas y científicos académicos que fijaron el marco teórico. El objetivo de la reunión fue, aparte del intercambio, propiciar un espacio de dialogo y discusión con el propósito de definir hacia el futuro un mecanismo de cooperación entre Colombia y Túnez, a través de sus gobiernos, en el ámbito Estado de Derecho y justicia transicional, con la participación de la GIZ y del EIUC como facilitadores y cooperantes para un proceso de aprendizaje triangular.

Los participantes declaran:

La Conferencia de GIZ/EIUC sobre Estado de Derecho y justicia transicional del 11 al 14 de noviembre 2012 mostró una excelente plataforma de discusión. Mientras que las diferencias fueron ostensibles a primera vista, en el curso de la Conferencia muchas similitudes y complementariedades fueron descubiertas.

El potencial para Colombia y Túnez de asistirse mutuamente, para fortalecer su Estado de Derecho, construir democracia y el proceso de justicia transicional se manifestó pronto. En ese espíritu, tantos los participantes colombianos y tunecinos, como los participantes de la GIZ y de la EIUC, declararon su intención de cooperar hacia un aprendizaje triangular sobre Estado de Derecho y justicia transicional.

Ese proceso de aprendizaje cubrirá las siguientes áreas de interés:

- Estado de derecho:
 - Construcción de instituciones: autoridades/comisiones de control como el Defensoría del Pueblo, regulación, elecciones, transición, lucha contra la corrupción, etc.
 - Judicatura independiente: funcionamiento e independencia de la Corte Constitucional y de las otras cortes
 - Responsabilidad horizontal (relación formal dentro del Estado mismo) y vertical (los ciudadanos exigen que los gobernantes rindan cuentas)
 - Neutralidad de la administración y de los servicios públicos: capacidad de mantener los servicios públicos en tiempos de crisis, calidad del archivo
 - Tierras: experiencia con el registro de tierra y tribunal de propiedad
- Democracia / Buen Gobierno:
 - Influencia de responsabilidad, conciencia ciudadana y susceptibilidad a través de elecciones libres y transparentes
 - Aumento de nivel de participación civil y pública
 - Mejora de las responsabilidades de gobiernos y responsabilidades gubernamentales a través de garantías y monitoreo
 - Aumento del nivel de transparencia en procesos de decisión
 - Mejora de la movilización del ciudadano
 - Focalización en asuntos de género
 - Problemas de género y violencia basada en género: mecanismos de protección de los derechos de la mujer y de igualdad de géneros
 - Revisar el modo de gobernanza y hacerlo más horizontal
- Justicia Transicional:
 - Combinación de mecanismos desde un punto de vista holístico
 - Defensa moral y material de las víctimas
 - Experticia sobre reparaciones
 - Experticia sobre comisiones de memoria
 - Experiencia en la dinámica de elaboración de leyes
 - Papel de las fuerzas armadas en la transición: neutralidad, papel civil
 - Gestión de la situación de los refugiados

Para concretar y formalizar la cooperación triangular, los participantes colombianos y tunecinos, consultarán posibilidades de cooperación en las áreas arriba mencionadas con las instituciones gubernamentales competentes en sus países, para facilitar la definición de la oferta y de la demanda y la priorización de posibles intercambios de cooperación.

A continuación la GIZ y el EIUC de su parte, concretizarán su oferta como facilitadores y cooperantes para la cooperación triangular.

Como resultado de la Conferencia la GIZ y el EIUC publicarán tanto un informe de la misma, como una publicación académica sobre la relación entre el estado de derecho y justicia transicional.

Venecia, 14 de noviembre 2012

Participantes de Colombia:

- Sra. Maria Clara Galvis, Consultora – Programa Fortalecimiento de Estado de Derecho – GIZ, Colombia
- Sr. Luis Jorge Garay, Economista, Madrid
- Sra. Angela Marcela Guevara Medina, Agencia Presidencial de Cooperación internacional de Colombia
- Sra. Maria del Mar Gutierrez Valderrama, especialista de África, Agencia Presidencial de Cooperación internacional de Colombia
- Sra. Patricia Luna Paredes, Delegada mediadora para victimas, Bogotá
- Sr. Ivan Orozco, Universidad de los Andes, Bogotá
- Juez Humberto Sierra Porto, Ex juez de la Corte constitucional y desde 2013 Juez de la Corte Interamericana de Derechos Humanos, Bogotá
- Sr. Rodrigo Uprimmy Yepes, Director Centro de Estudios de Derecho, Justicia y Sociedad (Dejusticia), Bogotá

Participantes de Túnez:

- Juez Monia Ammar Feki, Consultora de la Corte de Casación tunecina, Túnez
- Juez Mohamed Ayadi, Juez, antiguo miembro de la Comisión Nacional para la Investigación de la Corrupción
- Sr. Fakher Gafsi, abogado, Asociación del Colegio de Abogados Tunecinos
- Sr. Amine Ghali, KADEM – Director del Programa, Túnez
- Sr. Sameh Krichah, Representante de la ONG “LaboDémocratique”
- Prof. Mouna Tabei, Universidad de Túnez – miembro de la Comisión Nacional de Justicia Transicional, Túnez
- Juez Omar Weslati, miembro del Observatorio de Independencia de la Magistratura, Túnez

Participantes de la Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH et European Inter-University Centre for Human Rights and Democratisation (EIUC):

- Prof. Kalliope Agapiou-Josephides, vice-presidente del EIUC /Director nacional E.MA, Universidad de Chipre
- Dr. Helen Ahrens, Directora – Fortalecimiento del Estado de Derecho – GIZ, Bogotá
- Prof. Florence Benoît-Rohmer, Secretaria General del EIUC
- Prof. Horst Fischer, Presidente del EIUC
- Sr. Christian Grünhagen, Vice-director – Fortalecimiento del Estado de Derecho – GIZ, Bogotá
- Prof. Fabrizio Marrella, Decano del pueblo de Derechos Humanos / Universidad de Ca'Foscari, Venecia
- Dr. Angela Melchiorre, Directora del programa E.MA del EIUC
- Prof. Anja Mihr, Coordinador académico de la Conferencia – Universidad de Utrecht
- Sra. Lucie Monney, Asistente – Fortalecimiento del Estado de Derecho – GIZ, Bogotá
- Prof. Teresa Pizarro Beleza, Miembro del Consejo del EIUC/Director E.MA Nueva Universidad de Lisboa
- Sr. Nelson Socha, Consultor senior – Fortalecimiento del Estado de Derecho – GIZ, Bogotá

Académicos internacionales y observadores:

- Prof. Elzar Barkan, Colombia University, Nueva York
- Prof. Colm Campbell, Director, Instituto de Justicia Transicional, Universidad de Ulster, Belfast
- Sra. Diana Contreras Garduno, Universidad de Utrecht
- Prof. Felipe Gomez Isa, Universidad de Deusto, Bilbao
- Prof. Pierre Hazan, Justicia Transicional, Universidad de Ginebra
- Sr. Lukas Knott, Experto de tribunales regionales, Université Paris 1 Panthéon-Sorbonne
- Dr. Eva Maria Lassen, Directora del instituto danés de Derechos Humanos, Copenhague
- Hon. Just. Sylvain Oré, Corte africana de Derechos Humanos y de Pueblos
- Prof. Leigh Payne, Universidad de Oxford

ANNEX III

Déclaration de Venise

sur

l'ETAT DE DROIT et la JUSTICE TRANSITIONNELLE : VERS UN APPRENTISSAGE TRIANGULAIRE

La Colombie et la Tunisie passent toutes les deux par des processus de renforcement de l'Etat de droit, de construction de la démocratie et de justice transitionnelle. Alors que les processus ont commencé il y a plusieurs années en Colombie malgré la persistance du conflit, ils sont à leur début en Tunisie, où ils ont commencé après le Printemps Arabe et la transition d'un régime autoritaire installé depuis plusieurs décades à un gouvernement démocratique.

La Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH appuie simultanément, au nom du Ministère Fédéral de la Coopération Economique et du Développement (BMZ), un programme pour renforcer l'Etat de droit en Colombie ainsi qu'un programme qui promeut la bonne gouvernance dans la région du Maghreb. Les deux programmes ont dû se confronter à la discussion fragmentée sur le renforcement de l'Etat de droit, la prolifération des droits de l'homme et l'application des mécanismes de justice transitionnelle. La GIZ s'est adressée au Centre Européen Interuniversitaire pour les Droits de l'Homme et la Démocratisation (EIUC) afin de renouveler et continuer à développer des suggestions sur comment joindre l'Etat de Droit et la justice transitionnelle comme indiqué dans le rapport de 2004 du Secrétaire Général des Nations Unies au Conseil de Sécurité sur l'Etat de droit et la justice transitionnelle dans les sociétés en proie à un conflit ou sortant d'un conflit (S/2004/616).

Ainsi EIUC et la GIZ, avec leurs partenaires respectifs, comme le Kawakibi Democracy Transition Center (KADEM), ont unis leurs forces pour rassembler des experts et des praticiens des deux pays, afin qu'ils puissent échanger sur leurs expériences respectives avec l'Etat de droit, la justice transitionnelle et la bonne gouvernance. Lors de cette rencontre, ils se sont rencontrés avec des spécialistes et des chercheurs de l'académie qui ont présenté le cadre théorique.

Le but de la Conférence était de créer un scénario pour le dialogue et la discussion, afin d'initier un mécanisme de coopération entre la Colombie et la Tunisie, à travers de leur gouvernement, dans le domaine de l'Etat de droit et de la justice transitionnelle, avec la participation de la GIZ et d'EIUC comme facilitateurs et contributeurs afin de créer un processus d'apprentissage triangulaire.

Les participantes et participants déclarent :

La Conférence sur l'Etat de droit et la justice transitionnelle organisée par la GIZ et EIUC du 11 au 14 novembre 2012 s'est avéré une excellente plate-forme de discussion. Alors que

ce sont les nombreuses différences entre les pays qui frappaient au début, au cours de la conférence nombre de similarités et de complémentarités ont été mises en exergue. Le potentiel pour la Colombie et la Tunisie de s'appuyer mutuellement dans leur processus de renforcement de l'Etat de droit, de construction de la démocratie et de justice transitionnelle est rapidement devenu apparent. Dans cet esprit, les participants colombiens et tunisiens, ainsi que les participants de la GIZ et EIUC, manifestent leur intention de coopérer vers un apprentissage triangulaire sur l'Etat de droit et la justice transitionnelle. Ce processus d'apprentissage couvrira les domaines d'intérêt suivants :

- Etat de droit :
 - Construction d'institutions : autorités/commission de contrôle comme médiateur, régulation, élections, transition, lutte contre la corruption, etc.
 - Système judiciaire indépendant : le fonctionnement et l'indépendance de la Court constitutionnelle et d'une institution indépendante de magistrature
 - Responsabilité horizontale (relations formelles au sein de l'Etat lui-même) et verticale (les citoyens demandent des comptes à celui qui est au pouvoir)
 - Neutralité de l'administration et des services publics : capacité de maintenir les services publics en temps de crise, qualité des archives
 - Terre : expérience du cadastre et du Tribunal immobilier
- Démocratie/Bonne Gouvernance :
 - Améliorer la responsabilité, la conscience citoyenne et la réceptivité à travers d'élections libres et transparentes
 - Augmenter la participation civique et publique
 - Améliorer la responsabilité gouvernementale et de gouvernance par les garanties et le contrôle
 - Augmenter le niveau de transparence des processus de prise de décision
 - Améliorer la mobilisation citoyenne
 - Focaliser sur les problèmes de genre
 - Problème de genre et de violence basée sur le genre : mettre en place des mécanismes de protection des droits de la femme et égalité des genres
 - Revoir le mode de gouvernance et le rendre plus horizontal.
- Justice transitionnelle
 - Combinaison des mécanismes dans une approche holistique
 - Soutien moral et matériel aux victimes
 - Expertise sur les réparations
 - Expertise sur la Commission de Mémoire
 - Expérience sur la dynamique de l'élaboration de lois
 - Rôle de l'armée dans la transition : neutralité, rôle civil
 - Gestion de la situation des réfugiés

Afin de concrétiser et formaliser cette coopération triangulaire, les participants colombiens et tunisiens consulteront les possibilités de coopération dans les domaines mentionnés ci-dessus avec les institutions pertinentes de leur pays afin d'endosser la concrétisation de l'offre et la demande ainsi que la priorisation d'activités possibles de coopération. Ensuite, la GIZ et EIUC concrétiseront pour leur part leur offre en tant que facilitateurs et contributeurs à la coopération triangulaire.

Comme résultat de la Conférence, la GIZ et EIUC publieront un rapport de Conférence ainsi qu'une publication académique sur la relation entre l'Etat de droit et la justice transitionnelle.

Venise, 14.11.2012

Participants de Colombie :

- Mme Maria Clara Galvis, Consultante – Programme Etat de droit – GIZ, Colombie
- M. Luis Jorge Garay, Economiste, Madrid
- Mme Angela Marcela Guevara Medina, Agence présidentielle de Coopération internationale de Colombie
- Mme Maria del Mar Gutierrez Valderrama, spécialiste de l'Afrique, Agence présidentielle de Coopération internationale de Colombie
- Mme Patricia Luna Paredes, Médiatrice déléguée pour les victimes, Bogota
- M. Ivan Orozco, Universidad de los Andes, Bogota
- Juge Humberto Sierra Porto, ancien Juge de la Cour constitutionnelle et dès 2013 Juge à la Cour interaméricaine des droits de l'homme, Bogota
- M. Rodrigo Uprimny Yepes, Directeur du Centre d'Etude de la Loi, de la Justice et de la Société (Dejusticia), Bogota

Participants de Tunisie :

- Juge Monia Ammar Feki, Conseillère à la Cour de Cassation tunisienne, Tunis
- Juge Mohamed Ayadi, Juge, ancien membre de la Commission nationale pour l'investigation de la corruption
- M. Fakher Gafsi, avocat, Association du Barreau tunisien
- M. Amine Ghali, KADEM – Directeur de programme, Tunis
- Mme Sameh Krichah, représentante de l'ONG "LaboDémocratique"
- Prof Mouna Tabei, Université de Tunis – membre de la Commission nationale de justice transitionnelle, Tunis
- Juge Omar Weslati, membre de l'Observatoire d'Indépendance de la Magistrature, Tunis

Participants de la Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH et European Inter-University Center for Human Rights and Democratisation (EIUC):

- Prof. Kalliope Agapiou-Josephides, vice-président d'EIUC /Directeur national E.MA, Université de Chypre
- Dr. Helen Ahrens, Directrice – Programme Etat de droit – GIZ, Colombie
- Prof. Florence Benoît-Rohmer, Secrétaire général EIUC
- Prof. Horst Fischer, Président EIUC
- M. Christian Grünhagen, Vice-directeur – Programme Etat de droit – GIZ, Colombie
- Prof. Fabrizio Marrella, Doyen du Village des Droits de l'Homme/Université de Ca' Foscari, Venise
- Dr. Angela Melchiorre, Directeur du programme E.MA de l'EIUC
- Prof. Anja Mihr, Coordinatrice académique de la conférence – Université d'Utrecht
- Mme Lucie Monney, Assistante – Programme Etat de droit – GIZ, Colombie
- Prof. Teresa Pizarro Beleza, Membre du Conseil d'EIUC/Directeur E.MA, Université de Lisbonne
- M. Nelson Socha, Conseiller sénior – Programme Etat de droit – GIZ, Colombie

Académiciens internationaux et observateurs :

- Prof. Elazar Barkan, Columbia University, New York
- Prof. Colm Campbell, Directeur, Institut de justice transitionnelle, Université d'Ulster, Belfast
- Mme Diana Contreras Garduno, Université d'Utrecht
- Prof. Felipe Gomez Isa, Université de Deusto, Bilbao
- Dr. Pierre Hazan, Consultant sur la justice transitionnelle, HCR, Genève
- M. Lukas Knott, expert sur les tribunaux régionaux, Université Paris 1 Panthéon-Sorbonne
- Dr. Eva Maria Lassen, Directrice de l'Institut danois des Droits de l'Homme, Copenhague
- Hon. Just. Sylvain Oré, Cour Africaine des Droits de l'Homme et des Peuples
- Prof Leigh Payne, Université d'Oxford

Conference

**Rule of Law and Transitional Justice:
Towards a triangular learning – The case of Colombia**

Venue:

European Inter-University Centre for Human Rights and Democratisation (EIUC)
Monastery of San Nicolò, Venice Lido
11-15 November 2012

Sponsor: GIZ offices, Bogota & Brussels

Programme

This conference aims at bringing together scholars, researchers, NGOs and practitioners that work in the field of Transitional Justice, the Rule of Law and governance. Experts and practitioners from Colombia, from Tunisia and academics will share their experience in respect to the long term impact of Transitional Justice mechanisms and measures such as reparations, trials, commissions of inquiry or memorials, as well as on the impact of international norms and standards on the domestic development of the Rule of Law. The experience of stakeholders in Colombia over the past decade is the main reference point of the meeting.

Conference participants are asked to support a triangular learning concept between stakeholders from Colombia, from Tunisia and the GIZ as a mediator and facilitator to strengthen the Rule of Law in both regions. The conference aims to establish and encourage continued cooperation between agencies, scholars and practitioners from both regions well into the future. Towards the end of the conference the organizers will compose a monitoring/observer group to continue the triangular learning process. A handbook based on academic research, guidelines, best practice and advice on cooperation in the field of Transitional Justice will be published in 2013.

All programme items, changes, papers and presentation have to be coordinated with the conference director. Please contact directly:

Assoc. Prof. Dr. Anja Mihr

Netherlands Institute of Human Rights (SIM)
University of Utrecht
The Netherlands, Email: A.Mihr@uu.nl

Sunday 11 November 2012

- 13:00-17:00 Arrival
17:00-17:45 Introduction to the History of Venice
20:00-22:00 Dinner Restaurant La Laguna

Monday 12 November 2012

Rule of Law and Transitional Justice - Theoretical approaches, empirical research and the practitioner's perspective

Legal, historical and political Transitional Justice (TJ) measures assumingly lead to strengthen the Rule of Law. Trails, memorials, legal reforms and the establishment of an independent administrative judiciary can enhance the Rule of Law, if different political monitoring bodies and civil society engagement is guaranteed. Victim groups ought to be allowed to act free from fear of vengeance. Empirical research has shown that a mix of different TJ measures and the free participation of organized (victim) groups can enhance the Rule of Law and democracy. However, TJ often is treated as a self-contained subject within the context or regime transformations. Thereby TJ is often dying the relevance or utility of comparisons and analogies between transitions and the wide variety of cases and countries in transition. This first day will focus on some of the most recent academic research cross countries and regions about the interface between rule of law and TJ and share it with practitioners' views from Colombia and Tunisia.

8:30-9:15 **Registration** at EIUC

9:15-9:45 **Opening & Introduction**

- **Prof. Horst Fischer**, GIZ, Brussel / President EIUC, Venice
- **Dr. Helen Ahrens**, Director, Rule of Law Programme (FortalEsDer) GIZ, Bogota
- **Amíne Ghali**, Programme Director, KADEM, Tunis
- **Prof. Anja Mihr**, SIM, Utrecht University, Utrecht

9:45-11:00 Session
Conditions of Transitional Justice – theoretical concepts and empirical research
Mod: Prof. Horst Fischer, GIZ, Brussels

- **Prof. Leigh Payne**, Oxford University, Oxford
"Justice Balance: When TJ improves Human Rights"
- **Prof. Felipe Gomez Isa**, Deusto University, Bilbao
"Challenges for Transitional Justice in Contexts of Non-transition"

11:00-11:30 Coffee Break

- 11:30-13:00 Session
Transitional Justice Policies: Memory and Common Narrative
 Mod: Prof. Horst Fischer, GIZ, Brussels
- **Prof. Elazar Barkan**, Columbia University, New York
 „Beyond Transitional Justice Policies: Memory and Identity and historical Dialogue”
 - **Prof. Iván Orozco**, University of the Andes, Bogotá
 “Finding the common narrative in Colombia”
 - **Samah Krichah**, Officer, Labo Démocratique, Tunis,
 “Sur la mémoire”
- 13:00-14:30 Lunch Mabapa Restaurant, Lido
- 14:30-16:00 Session
From a practitioner’s perspective – Rule of Law through Transitional Justice vs. Impact of Transitional Justice on the Rule of Law in Colombia
 Mod: Dr. Helen Ahrens, GIZ, Bogota
- **Miguel Samper Strouss**, Vice-Minister, Ministry of Justice and Law, Bogotá
 “The Rule of Law and TJ process in Colombia”
 - **Prof. Iván Orozco**, University of the Andes, Bogotá
 “Rule of Law and Peace in Colombia”
 - **Prof. Rodrigo Uprimny Yepes**, Director, Center for the Study of Law, Justice and Society, Bogota
 “The Rule of Law and Social Justice in Colombia”
- 16:00-16:30 Coffee Break
- 16:30-18:00 Session
From a practitioner’s perspective – Rule of Law through Transitional Justice vs. Impact of Transitional Justice on the Rule of Law in Tunisia
 Mod: Prof Anja Mihr, SIM, Utrecht University
- **Amíne Ghali**, Programme Director, KADEM, Tunis
 „L’Evolution de la JT en Tunisie, de la révolution à nos jours”
 - **Fakter Gafsi**, Lawyer, Tunisian Bar Association, Tunis
 “Réparation et indemnisation entre principe et législation et pratique”
 - **Mohamed Ayadi**, Judge and former member of National Commission for the Investigation of Corruption, Tunis
 “Justice Transitionnelle et lutte contre la Corruption en Tunisie
- 18:00-18:30 **Brief summary about synergies and discrepancies**
- **Dr. Helen Ahrens**, GIZ, Bogota
 “The idea of a Monitoring group”
- 19:30 Dinner Restaurant Do’ Forni, Lido

Tuesday 13 November 2012

Implementing Transitional Justice, Governance and Rule of Law Mechanisms

Implementing TJ mechanisms and measures over an extended period of time has to be seen in a historical context. The political as well as legal cultures of the particular country or region often depend on them. These mechanisms aim at leveraging civic trust and thus political and civic engagement by citizens with political institutions. TJ therefore can enhance good governance and democratic structures. Reparations and compensations aim at a political and societal acknowledgement of past violence while memorials aim at achieving a common narrative about past wrongdoings in societies. Both of these measures influence the political and legal culture in a country: about who is a victim and who was responsible for violence and wrongdoings. These TJ measures help to delegitimize previous policies and enhance to legitimize current political actions and Rule of Law compliance.

9:30-11:00 Session

Transitional Justice Policies: Reparations and Compensations

Mod: Prof. Anja Mihr, SIM, Utrecht

- **Prof. Rodrigo Uprimny Yepes**, Director, Center for the Study of Law, Justice and Society, Bogota
"Reparations and compensations in difficult contexts: the Colombian case"
- **Diana Contreras, PhD candidate, SIM, Utrecht University**, Utrecht
"Reparation being an imperative part of TJ"

11:00-11:30 Coffee Break

11:30-13:00 Session

Rule of Law through Transitional Justice vs. Impact of Transitional Justice on the Rule of Law

Mod: Prof. Anja Mihr, SIM, Utrecht

- **Prof. Colm Campbell**, Director, Transitional Justice Institute, University of Ulster, Belfast
"The overlapping views of Rule of Law and TJ"
- **Prof. Mouna Tabei**, University of Tunis, National Commission on Transitional Justice, Tunis
"Une présentation du projet de loi sur la JT"

13:00-14:30 Lunch Restaurant Mabapa, Lido

14:30-16:30 Session

Governance and Rule of Law: Legal and political cultures in transition processes

Mod: Dr. Helen Ahrens, GIZ, Bogota

- **Prof. Luis Jorge Garay**, Economist, Bogotá/ Madrid
"TJ and democratic transition in Colombia"
- **Prof. Anja Mihr**, TIDI-Research Director, SIM, Utrecht University, Utrecht
"Transitional Justice, civic trust and democratic institution building"

- **Omar Weslati**, Judge, Member of the Independent Observation Committee, Tunis
"La relation entre justice transitionnelle et transition démocratique"

16:30-17:00 Coffee Break

17:00-18:00 Session
Domestic monitoring mechanism - between international norms and national laws
 Mod: Christian Grünhagen Vice-Director, Rule of Law Program (FortaLEsDer)
 GIZ, Bogota

- **Patricia Luna Paredes**, Delegated Ombudsman for Victims, Ombudsman Institution, Bogotá
"Monitoring the Rights of victims in Colombia"
- **Monia Ammar**, Judge, Tunisian Court of Cassation, Tunis
"Evolution de la justice et des procès vers les standards internationaux de procès équitable"

18:00 Reception

20:00 Dinner Restaurant La Favorita, Lido

Wednesday 14 November 2012

Triangular Learning between Colombia, Tunisia and GIZ

Based on the experience of establishing a stronger Rule of Law in Colombia and Tunisia, the GIZ aims to bring together stakeholders, academics and policy makers to establish a triangular learning process between the two regions. Sharing and learning from practice, experience and the different policies in how and when to apply Transitional Justice measures can be an asset to any transition process in the world. International actors and inter-governmental institutions such as the OAS, EU or AU are key to this process. They shape and facilitate transition processes, set norms and standards, provide monitoring bodies, establish guidelines and make decisions to fill domestic legal and political gaps. The experience with external actors in the transition process towards an enhanced Rule of Law will be taken into consideration of the planned triangular learning process.

9:30-12:00 Session
International dimension and requirements: Organisation of American States (OAS and IACHR), European Union (EU), African Union (AU)
 Mod: Dr. Helen Ahrens, GIZ, Bogota

- **Humberto Sierra Porto**, Judge, Constitutional Court/ Inter American Court for Human Rights, San José – Costa Rica
"The international dimension of TJ and the Inter-American Court"
- **Hon. Justice Sylvain Oré**, Judge, African Court on Human and Peoples Rights, Arusha, Tanzania
"The African Court and Transitional Justice"

- **NN**, European Union, Brussels
"TJ policies of the European Union"
- **Lukas Knott**, PhD candidate, Sorbonne University, Paris
"Assessing the impact of the African Union on Transitional Justice"

11:00-11:30 Coffee Break

12:00-13:00 Session

National dimension and response to international requirements

Mod: Prof. Anja Mihr, SIM, Utrecht

- **María Clara Galvis**, Consultant, Rule of Law Program (FortalEsDer) GIZ, Bogota
"International Standards of TJ in the case of Colombia"

13:00-14:30 Lunch Restaurant Mabapa, Lido

14:30-15:30 Session

International Context: The Rule of Law and Transitional Justice

Mod: Prof. Anja Mihr, SIM, Utrecht

- **Dr. Pierre Hazan**, Political Advisor, UN Office of the High Commissioner for Human Rights/ University of Geneva, Geneva
"The development of TJ in the international context"

15:30-16:00 Coffee Break

16:00-17:00 Discussions & Conclusions

Triangular cooperation between Colombia, Tunisia and GIZ

Mod: Christian Grünhagen, GIZ, Bogota

"Realizing a transnational monitoring group"

17:00-18:00 Final Session

About a triangular cooperation

- **Dr. Helen Ahrens**, GIZ, Bogota
- **Prof. Horst Fischer**, President EIUC/ GIZ, Brussels

20:00 Farewell Dinner "Casinò Palace". Grand Canal, Venice

Thursday 15 November 2012 Departure

EIUC giz

**RULE OF LAW
AND TRANSITIONAL JUSTICE**

12-14 NOVEMBER 2012

Rule of Law and Transitional Justice
Towards a triangular learning. The case of Colombia

TRANSITIONAL
INTERNATIONAL
COLOMBIA
EU
EUROPEAN UNION
UNESCO
UNITED NATIONS HUMAN RIGHTS

CONFLICTS, LEGITIMIZE, CONSTITUTIONAL, FUTURE, CONFLICTS, CRIME, GOVERNANCE, RESPONSIBILITY, POLITICS, RIGHTS, COMMISSIONS, JUSTICE, PERSPECTIVE, WOMEN, ENEMIES, PRACTICES, DRS, CHILDREN, BALANCE, COLOMBIA, INQUIRY, VICTIMS, PROTECTION, RULE, JUSTICE, MAGHREB, SWAYM, RECIME, TRANSITIONAL, FOCUS, TRUST, BALANCE, FUTURE, CRIME, EU, VIOLENCE, CRIME, RESOLUTION, REGIME, EXPERIENCE, TRANSITIONAL, MEMORIALS, PERSPECTIVE, LEARNING, WOMEN, TRUST, TUNISIA, FUTURE, EXPERIENCE, LEGITIMIZE, MANAGEMENT, AFFECT, SUPPORT, CRIME, IACHR, PROTECTION, CASE, FOCUS, ARMED, TRAILS, RESTORATION, CASE, TRAILS, IMPLEMENTATION, PAST, HUMAN, LAW, VIOLENCE, BUILDING, INDUSTRY



MONDAY 12TH NOVEMBER	
	RULE OF LAW AND TRANSITIONAL JUSTICE THEORETICAL APPROACHES, EMPIRICAL RESEARCH AND THE PRACTITIONER'S PERSPECTIVE
8:30-9:15	REGISTRATION
9:15-9:45	OPENING <i>H. Fischer, H. Ahrens, A. Ghali, A. Mihr</i>
9:45-11:00	CONDITIONS OF TRANSITIONAL JUSTICE - THEORETICAL CONCEPTS AND EMPIRICAL RESEARCH <i>L. Payne, F. Gomez</i>
11:00-11:30	COFFEE BREAK
11:30-13:00	TRANSITIONAL JUSTICE POLICIES: MEMORY <i>E. Barkan, I. Orozco, S. Krichah</i>
13:00-14:30	LUNCH
14:30-16:00	FROM A PRACTITIONER'S PERSPECTIVE - RULE OF LAW THROUGH TRANSITIONAL JUSTICE VS. IMPACT OF TRANSITIONAL JUSTICE ON THE RULE OF LAW IN COLOMBIA <i>M. Samper Strouss, I. Orozco, R. Uprimny Yepes</i>
16:00-16:30	COFFEE BREAK
16:30-18:00	FROM A PRACTITIONER'S PERSPECTIVE - RULE OF LAW THROUGH TRANSITIONAL JUSTICE VS. IMPACT OF TRANSITIONAL JUSTICE ON THE RULE OF LAW IN MAGHREB <i>A. Ghali, F. Gafsi, M. Ayadi</i>
18:00-18:30	BRIEF SUMMARY ABOUT SYNERGIES AND DISCREPANCIES <i>H. Ahrens</i>
TUESDAY 13TH NOVEMBER	
	IMPLEMENTING TRANSITIONAL JUSTICE, GOVERNANCE AND RULE OF LAW MECHANISMS
9:30-11:00	TRANSITIONAL JUSTICE POLICIES: REPARATIONS AND COMPENSATIONS <i>R. Uprimny Yepes, D. Contreras</i>
11:00-11:30	COFFEE BREAK

11:30-13:00	<p>RULE OF LAW THROUGH TRANSITIONAL JUSTICE VS. IMPACT OF TRANSITIONAL JUSTICE ON THE RULE OF LAW</p> <p><i>C. Campbell, M. Tabei</i></p>
13:00-14:30	<p>LUNCH</p>
14:30-16:30	<p>GOVERNANCE AND RULE OF LAW: LEGAL AND POLITICAL CULTURES IN TRANSITION PROCESSES</p> <p><i>L.J. Garay, A. Mihr, O. Weslati</i></p>
16:30-17:00	<p>COFFEE BREAK</p>
17:00-18:00	<p>DOMESTIC MONITORING MECHANISM - BETWEEN INTERNATIONAL NORMS AND NATIONAL LAWS</p> <p><i>P. Luna Paredes, M. Ammar</i></p>
<p>WEDNESDAY 14TH NOVEMBER</p>	
<p>TRIANGULAR LEARNING BETWEEN COLOMBIA, MAGHREB AND GIZ</p>	
9:00-11:00	<p>INTERNATIONAL DIMENSION AND REQUIREMENTS: ORGANISATION OF AMERICAN STATES (OAS AND IACHR), EUROPEAN UNION (EU), AFRICAN UNION (AU)</p> <p><i>H. Sierra Porto, L. Knott, S. Oré</i></p>
11:00-11:30	<p>COFFEE BREAK</p>
11:30-13:00	<p>NATIONAL DIMENSION AND RESPONSE TO INTERNATIONAL REQUIREMENTS</p> <p><i>M.C. Galvis, P. Hazan</i></p>
13:00-14:30	<p>LUNCH</p>
14:30-16:00	<p>TRIANGULAR LEARNING TOWARDS A RULE OF LAW</p> <p><i>Group Discussion</i></p>
16:00-16:30	<p>COFFEE BREAK</p>
16:30-17:00	<p>CONCLUSIONS: TRIANGULAR COOPERATION BETWEEN COLOMBIA, MAGHREB AND GIZ</p> <p><i>Realizing a transnational monitoring group</i></p>
17:00-18:00	<p>OUTLINE FOR A MOU ABOUT A TRIANGULAR COOPERATION</p> <p><i>H. Ahrens, H. Fischer</i></p>

THE CONFERENCE

This conference aims at bringing together scholars, researchers, NGOs and practitioners that work in the field of Transitional Justice, the Rule of Law and Good Governance. Experts and practitioners from Colombia, Tunisia and academics will share their experience and observations in respect to the long term impact of Transitional Justice Mechanisms and measures, as well as international norms and standards on the domestic development of the Rule of Law. The experience of stakeholders from Colombia is one of the reference points.

Conference participants are asked to contribute to the triangular learning concept between stakeholders from Colombia and from Tunisia, and from GIZ as a mediator and facilitator, to strengthen the Rule of Law in both regions. The Conference is aimed at increasing social competences, problem-solving capacities and creativity to enhance transitional justice processes in the future.

EIUC

The European Inter-University Centre for Human Rights and Democratisation (EIUC) is one of the main European academic institutions, supported by the European Union, aimed at pursuing the continued promotion of Human Rights and Democratisation through education, specialised training, research cooperation, and an expanding range of other activities. EIUC is committed to fostering a community of leaders to improve human rights implementation worldwide.

GIZ

The Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH is a federal enterprise that offers customized solutions to complex challenges. GIZ is an experienced service provider and supports the German Government in achieving its objectives in the field of international cooperation for sustainable development. GIZ offers demand-driven, tailor-made and effective services for sustainable development

EIUC European Inter - University Centre
for Human Rights and Democratisation

Monastery of San Nicolò
Riviera San Nicolò 26
30126 Venice - Lido - Italy

Tel. +39 041 2720911
Fax +39 041 2720914

secretariat@eiuc.org
www.eiuc.org

