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Global Cooperation in Transitional Justice: Challenges, Possibilities, and Limits

Noemi Gal-Or and Birgit Schwelling (eds.)

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Introduction

Global Cooperation in Transitional Justice

Noemi Gal-Or and
Birgit Schwelling

When law professor Ruti Teitel invented the neologism 'transitional justice' in 1991 at the time of the collapse of the Soviet regime, the end of Apartheid in South Africa, and on the heels of the late 1980s Latin American transitions to democracy, she coined a new term for an old problem, namely that of how to deal with the legacies of human rights violations and mass atrocities in post-conflict societies emerging from war and/or dictatorship. Attempts at reckoning with past atrocities can be traced back at least as far as to the Reconciliation Agreement of 403/402 B.C. in Athens in the aftermath of the Peloponnesian War,[1] but transitional justice in its contemporary understanding did not become a major concern until the end of the Second World War, and in particular, in the wake of the war crimes and the crimes against humanity committed by the National Socialist regime. Since that time and in different parts of the world, a great variety of concepts, instruments, and measures of coming to terms with violent pasts have been developed and established, including special courts and tribunals, both domestic, international and hybrid, truth commissions as either an alternative or concomitant to retributive justice, apologies and healing circles, memorials, museums and days of mourning and commemoration, as well as instruments to tackle the distributional inequities underlying, and resulting from, armed conflict.

Teitel initially defined 'transitional justice' as 'the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes',[2] therefore referring to legal instruments and mechanisms applied in transitions from authoritarian rule to democracy only. But as early as the

[1] Loening, Thomas C. (1987). *The Reconciliation Agreement of 403/402 B.C. in Athens. Its Content and Application*, Stuttgart: Steiner.

[2] Teitel, Ruti G. (2003). 'Transitional Justice Genealogy', *Harvard Human Rights Journal* 16: 69–94, here: 69.

mid-1990s, the term had elicited such a widespread response that it came to be applied to fields beyond judicial attempts at coping with the violence of past regimes.[3] While initially covering instruments and mechanisms such as trials, vetting, restitution, or reparation, 'transitional justice' now also includes non-judicial instruments such as apologies, truth commissions, healing circles, or forms of remembrance and commemoration. In this volume, we engage with this broad concept of transitional justice by referring to concepts, mechanisms, and instruments employed by societies that emerge from war or repressive rule to deal with the legacies of conflict, human rights violations, or mass atrocities. We understand transitional justice as a resource for 'making whole what has been smashed'[4] by prosecuting and punishing perpetrators, restoring the dignity of victims of atrocities, and 'repairing' the injustices and injuries suffered by them.

There are more recent developments in the field of transitional justice that make it a particularly interesting case in the context of global cooperation, the overall theme of the Centre for Global Cooperation Research. Around the turn of the century, the term 'transitional justice' and what it stood for embarked on a global track and turned the enterprise of dealing with violent pasts into a global normative goal with far-reaching effects on the politics and discourse of international and domestic affairs. In this regard, Elazar Barkan noted the 'tidal wave of apologies, truth commissions, reparations, and investigations of historical crimes',[5] and Susan Dwyer pointed out that 'there appears to be a global frenzy to balance moral ledgers. Talk of apology, forgiveness, and reconciliation is everywhere'.[6] In other words, there are remarkable global flows and transfers of transitional justice concepts, mechanisms, instruments, and experiences that suggest 'a fundamental shift in international political culture [and] an emerging consensus on the importance of confronting atrocious pasts'.[7] There are numerous examples that support these observations, ranging from the establishment of a global network of experts, international foundations, and non-governmental organizations such as the International Center for Transitional Justice (ICTJ) which formulates 'transitional justice best practices';[8] the proliferation of official apologies by heads of states for past wrongs;[9] to the recommendations and decisions by international organizations such as the World Bank and the United Nations (UN). For instance, the 2011 World Bank's annual 'World Development Report' recommended transitional justice measures as a 'core policy tool' for societies emerging from conflict and instability. In the same year, the UN Human Rights Council established a mandate for a special rapporteur for the promotion of truth, justice, reparation and guarantees of non-recurrence of serious crimes and gross violations of human rights.[10]

[3] This broader conception is already contained in the three-volume compendium edited by Neil Kritz in 1995. See Kritz, Neil (ed.) (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 vols., Washington, DC: United States Institute of Peace Press.

[4] We borrow this phrase from John Torpey. See Torpey, John (2006). *Making Whole What Has Been Smashed: On Reparations Politics*, Cambridge, MA: Harvard University Press.

[5] Barkan, Elazar (2009). 'Introduction: Historians and Historical Reconciliation. AHR Forum Truth and Reconciliation in History', *American Historical Review* 114: 899–913, here: 901.

[6] Dwyer, Susan (1999). 'Reconciliation for Realists', *Ethics and International Affairs* 13: 81–98, here: 81.

[7] Campbell, James T. (2009). 'Settling Accounts? An Americanist Perspective on Historical Reconciliation', *American Historical Review* 114: 963–77, here: 965.

[8] http://ictj.org/our-work/policy-relations, accessed 13.11.2014.

[9] Lind, Jennifer M. (2008). *Sorry States: Apologies in International Politics*, Ithaca, NY: Cornell University Press.

[10] International Center for Transitional Justice (2012). *Three Year Strategic Plan 2012-2014*, New York: ICTJ, 2, http://www.ictj.org/sites/default/files/ICTJ-Strategic-Plan-2012-2014.pdf, accessed 13.11.2014.

These latest developments in the field of transitional justice raise questions similar to queries in other fields affected by the growing global connectivity and related to cultural globalization. These questions concern the possibilities and limits for the global circulation, diffusion, and transmission of norms and values, and the (im-)possibilities that societies can succeed in restructuring themselves by importing ideas, measures, and tools provided by a global expert culture. They pertain to the tensions and conflicts that arise when practices assumed to be universal are applied to local contexts, and meet the challenge of 'translatability' of standardized concepts and tools into local 'idioms'. Arguably, transitional justice is a particularly interesting case in this context as it centers on attempts at re-establishing social and political order and rebuilding societies in the aftermath of traumatic experiences of the highest sensitive, painful, and affective order which goes to their very core – mass murder, genocide, disappearances, and other violations of fundamental human rights. This certainly poses considerable challenges for any form of cooperation, let alone global cooperation.

These topics and questions were the main focus of a workshop on 'Global Cooperation in Transitional Justice' hosted by the Centre for Global Cooperation Research in April 2014. The workshop's purpose was to advance the discussions in the field of transitional justice where the growing attention to the global dimensions of the matter is still insufficient, since the majority of contributions only rarely transcend the borders of the nation states. Furthermore, scholarly contributions and reports of transitional justice processes are most typically based on single case studies and defined by disciplinary boundaries. By bringing together scholars from a variety of disciplines and institutions who engage with global dimensions in the field of transitional justice as seen from their different perspectives, we intended to advance the debate on the possibilities and limits as well as the challenges, ambiguities and paradoxes of global cooperation in transitional justice. The outcome is this volume featuring eight articles which draw on and continue these debates.

The introduction to this volume is followed by Anne K. Krüger's article on 'The Emergence of a Transitional Justice Epistemic Community', which she understands as a precondition for global cooperation. Krüger draws our attention to one of the innovations that characterizes the new global phase of transitional justice, namely the establishment of a network of experts, international foundations, and non-governmental organizations active and quite powerful in transitional justice processes, in fact, a prime example of what Teitel has characterized as the 'shift from state-centric approaches to a far broader array of interest in non-state actors associated with globalization'.[11] By drawing on the concept of 'epistemic

[11] Teitel, Ruti (2008). 'Editorial Note: Transitional Justice Globalized', *International Journal of Transitional Justice* 2: 1–4, here: 2.

communities', Krüger traces the origins and the establishment of this global network and shows how the idea of addressing human rights violations after political transitions has evolved into the powerful and omnipresent claim it is today.

Next are two contributions that discuss one of the many challenges posed by the globalization of transitional justice, namely the tensions between the global and the local and the complexities of the global/local interface. The growing skepticism concerning the universal appropriateness of the global norm of transitional justice includes the argument by critics deploring that the complexities of the relationship between the global and the local are most frequently neglected due to an unquestioned acceptance of liberal normative concepts, in particular, the rule of law and human rights. The articles by Susanne Buckley-Zistel and Birgit Schwelling, while departing in different ways from these critical voices, seek at the same time to carry forward this debate by laying out the complexities which are all too often overlooked by a simplistic and one-dimensional picture being drawn of the relationship between the global and the local. Against the background of concepts developed in the framework of the 'spatial turn', Buckley-Zistel deconstructs 'the image of the local as being deprived of agency as well as being a mere victim of the global'. In her conceptual piece, she advises taking better account of the 'mutual constitution' of the global and the local through social interaction. Seen from this perspective, the local is not only a product of the global but appears rather as an active creator that constitutes the global. Schwelling's contribution consists of an empirical analysis of the globalization of memories of atrocities and human rights violations. By choosing the resolution on 'Holocaust remembrance' adopted by the United Nations General Assembly (GA) in 2005 as well as the 41st and 42nd plenary meetings of the GA as a case study, Schwelling highlights processes of decontextualization, recontextualization, and vernacularization. She shows that the globalization of memories is a highly ambivalent process and concludes that it comes at a cost, among it 'the conversion of the Holocaust and its memory into an empty signifier deprived of its distinct and specific meaning'.

The new global phase of transitional justice is not only characterized by the challenges of the global/local interface but furthermore by the 'move from exceptional transitional responses to a "steady-state" justice', [12] with the most significant symbol being the establishment of the first permanent International Criminal Court (ICC). Since its establishment in 2002 it has become a major concern for legal scholars in the field of international justice. The articles by Ignaz Stegmiller and Noemi Gal-Or contribute to the latest discussions in this field. Each author addresses one of two 'sticking points' which have affected the legitimacy of the ICC almost from the onset, and consequently its ability to successfully perform its role.

[12] Ibid.

Stegmiller's article discusses one of the 'triggering mechanisms' activating an ICC inquiry and eventual adjudication – the self-referral procedure. Although a legally valid procedure under the Rome Statute, Stegmiller is doubtful as to its political implications. While they imply voluntary cooperation with the ICC, when in the post-conflict stage, it is unlikely that the self-referring state would allow indicted persons sitting in government to be brought to trial. This entails the risk of negatively affecting the public perception of the ICC as an institution altogether. Gal-Or addresses the principle of complementarity which comes into play either in preempting the triggering of an ICC action or in response to one. A compromise achieved to assuage states' sovereignty concerns, it establishes that the Court's jurisdiction is complementary to the primary jurisdiction of the State, and becomes effective only when the latter is unable or unwilling to exercise it. Gal-Or examines the impediments so far undermining the operation of the principle in relation to ICC African cases, and to overcome them, she proposes expanding the application of the principle to include the jurisdiction of regional courts as well.

The ICC also serves as the focal point in the contribution by Joachim J. Savelsberg, although from a different perspective. Savelsberg studies the potential effects ICC interventions have on the collective representations of mass violence. He presents the findings of a content analysis of newspaper articles carried out in eight countries, all in reference to the case of Darfur, and complemented by in-depth interviews and conversations with Africa correspondents, representatives of NGOs, and policy makers from state departments. Among other things, these findings show that we are, in fact, facing the globalization of cultural forms. At the same time, the results remind us that the nation-state remains a powerful framework still playing a decisive role in imprinting nation-specific interpretations of global scripts.

By presenting case studies on Croatia and Syria, the two concluding articles by Nicole Renvert and Radwan Ziadeh complement the question of entanglements between the global and the nation-state already introduced by Savelsberg. Renvert analyzes the complicated and multilayered process of post-conflict reconstruction in Croatia since the mid-1990s, especially emphasizing the involvement of the international community in this process. Showing that pressure to engage in transitional justice came from outside, not from within the Croatian society or from its political leadership, she makes us aware of the risk that pressure from the international community can also slow down, or even prevent, cooperation. Ziadeh's case study on Syria is of interest for the theme of this volume in several regards. First of all, it shows that transitional justice has now become a consideration even to citizens of a country in the midst of a violent conflict. Ziadeh himself is

involved in this process, not only as an analyst but an activist in the Syrian political opposition, and as the Head of the Syrian Commission for Transitional Justice, which was established on November 14, 2013 by the Syrian Interim Government. Secondly, this article underpins the assumption of the global proliferation of transitional justice by showing that actors indeed try to learn from the experiences of often rather remote 'others', thus pointing to the influential role the global expert culture analyzed by Anne Krüger indeed plays in these processes. Finally, by concluding his analysis of the situation in Syria with recommendations for the implementation of a comprehensive transitional justice program in a future post-conflict society, Ziadeh's political call of despair urges us not to lose sight of the fact that Syria still is in the midst of a violent and brutal conflict.

Preconditions of Global Cooperation: The Emergence of a Transitional Justice Epistemic Community

Anne K. Krüger

The prosecution of human rights violations and the restitution of its victims can be traced back to the restoration of democracy in Athens around 400 B.C.[1] In modern history, the Nuremberg and Tokyo tribunals are generally referred to as key events of post-conflict initiatives dealing with human rights violations.[2] However, only since the 1990s, a distinct normative understanding has emerged positing that addressing human rights violations after (civil) war or repressive rule is a necessary precondition for a successful political transition to peace and the rule of law.[3] Since then, a 'tool kit' has been developed comprising measures ranging from criminal trials and truth commissions to lustration and reparations that have been captured by the term *transitional justice*.

Nowadays, it has become hard to imagine that in the aftermath of violent conflict or repressive rule there would be no call for any kind of transitional justice. The question that this article will examine however is: How did the idea of addressing human rights crimes after political transitions become such a powerful and omnipresent claim?

Revitalizing the concept of epistemic communities

In order to explain global diffusion, concepts such as *norm entrepreneurs*[4] and *transnational advocacy networks*[5] that

[1] Elster, Jon (2004). *Closing the Books. Transitional Justice in Historical Perspective*, Cambridge: Cambridge University Press.

[2] Teitel, Ruti (2003). 'Transitional Justice Genealogy', *Harvard Human Rights Journal* 16: 69–94.

[3] Kritz, Neil (ed.) (1995). *Transitional Justice: How Emerging Democracies Reckon With Former Regimes,* 3. vols., Washington, Washington, DC: United States Institute of Peace Press.

[4] Finnemore, Martha, and Sikkink, Kathryn (1998). 'International Norm Dynamics and Political Change', *International Organization* 52 (4): 887–917.

[5] Keck, Margaret, and Sikkink, Kathryn (1998). *Activists Beyond Borders: Advocacy Networks in International Politics*, Ithaca, NY: Cornell University Press.

highlight strategic action and networks have been developed. Another approach draws on the idea of *strategic action fields*[6] to explain collective strategic actions as leading to the institutionalization and spread of new beliefs and practices. In these approaches, the strategic actions of individual and collective actors that are linked through networks or in particular action fields are conceptualized as the key features for explaining the emergence and diffusion of new powerful ideas.

Strategic action certainly plays an important role in transitional justice processes when new governments try to keep the former elite from reacquiring power or when external actors make provision of services and aid dependent on the adoption of certain transitional justice policies. However, in order to act strategically concerning a particular issue and cooperate with others it is first necessary to share at least a minimum understanding about the underlying problem to be tackled and the general course of action to be followed. Otherwise, strategic action would be aimless. Second, in particular during the highly sensitive time of political transition, securing as wide a legitimacy as possible is indispensable. However, this also requires the precondition of a collectively shared interpretation of a problem and its solution. Lacking a widely shared definition of the current problem and its adequate solution undermines legitimacy and, accordingly, mobilization for joint actions because people neither understand their reason nor their goals. Consequently, cooperation – and in our case global cooperation – depends on an intersubjective understanding of the problem and its solution that is shared among a group of actors from different backgrounds such as human rights groups, the new political elite or international organizations. This intersubjectively shared understanding makes strategic action – also in terms of political exploitation – possible.

Yet, problems are not simply out there, nor are their solutions. In order to provide an interpretative framework that renders events, actions and practices meaningful, a 'chain of cause and effect'[7] needs to be established. Thus, the answer to the question as to how transitional justice has arisen and ongoing global cooperation in transnational justice has developed is to be found in the way an intersubjective understanding of a problem and its solution has evolved. In terms of transitional justice, human rights violations which have been committed during a dictatorship or a civil war prior to or in the course of political change have become collectively recognized as a core problem for political transitions to peace and the rule of law. Despite the fear of a still powerful former elite, addressing these human rights violations through transitional justice measures has become a widely accepted solution.

In the International Relations literature, and in particular in research done by Peter Haas, the concept of an *epistemic community* has been used to make the point that international politics is more than just the reflection of state power relations. Instead, Haas argues that a supranational epistemic community has evolved whose expertise has had an impact on political decisions. Furthermore, and even more conspicuously, Haas draws on ideas from outside his discipline, namely from the sociology of knowledge. Holzner and Marx introduced the concept of epistemic communities to denote the phenomenon of communities of people who share a particular perception of the social world and of how to make sense of it.[8] Corresponding to the idea of such epistemic communities, Knorr-Cetina has demonstrated that different *epistemic cultures* co-exist – even in the context of the Sciences – where 'different configurations of the "reality"',[9] that is, a divergent understanding even about the physical state of the world, are applied. Epistemic communities thus share an *epistemic culture* which shapes the way in which researchers come up with particular problems and their adequate solutions. Haas argues in a similar vein. He defines an epistemic community as being based on 'a shared set of normative and principled beliefs'[10] and suggests that the cooperation within the community is based on its members' 'shared belief or faith in the verity and the applicability of particular forms of knowledge or specific truths'.[11]

The concept of an epistemic community thus relates well to the idea of an intersubjectively shared understanding of problems and their solutions as the basis for cooperation. First, it draws attention to the fact that an intersubjective understanding is indispensable for jointly engaging in a common enterprise. Second, it shows that interaction processes and accounts of the social or even physical world simultaneously stabilize each other. Interactions between actors from different backgrounds take place based on a particular account about social reality which is thereby continuously reproduced in order to justify and legitimize actions. Tracing these interactions and thus the development of a transitional justice epistemic community therefore allows us to shed light on the emergence of an intersubjectively shared account of how to deal with human rights crimes after or in the course of political transitions that has become known as transitional justice.

The development of a new problem

As already mentioned, measures and instruments that are captured under the umbrella term 'transitional justice' date from a long time back. However, transitional justice as a global normative expectation addressed at countries in transition emerged only in the 1990s. The development began as actors from different national, political, societal and academic backgrounds started to reciprocally recognize a particular problem

[6] Fligstein, Neil, and McAdam, Douglas (2011). 'Toward a General Theory of Strategic Action Fields', *Sociological Theory* 29 (1): 1–26.

[7] Strang, David, and Meyer, John (1993). 'Institutional conditions for diffusion', *Theory and Society* 22 (4): 487–511, here: 492.

[8] Holzner, Burkart, and Marx, John (1979). *Knowledge Application: The Knowledge System in Society*, Boston, MA: Allyn and Bacon.

[9] Knorr-Cetina, Karin (1999). *Epistemic Cultures: How the Sciences Make Knowledge*, Cambridge, MA: Harvard University Press, 12.

[10] Haas, Peter (1992). 'Introduction: epistemic communities and international policy coordination', *International Organization* 46 (1): 1–35, here: 3.

[11] Ibid., footnote 4.

due to a multitude of political transitions ranging from regime changes following the breakdown of military rule in South America in the 1980s and the peace agreements in Central America to the collapse of communism in the former Eastern Bloc and the end of Apartheid in South Africa. In all these different countries, people recognized a similar problem: How should they deal with the former political and military elite and the human rights crimes they had committed against their own people? This problem became the starting point for several conferences that facilitated the interactions between actors from different fields of expertise and countries of origin.[12]

The problem of how to deal with human rights violations that were perpetrated during a dictatorship before a political transition had commenced became a crucial concern of South American societies in the 1980s. Countries such as Argentina and Chile experienced the dissolution of military political power. The newly elected presidents were confronted with the legacies of the preceding regimes which included gross human rights violations such as enforced disappearances. In Argentina, the newly elected president, Raúl Alfonsín, reacted immediately to the pressures from human rights activists. Shortly after assuming office, he set up a truth commission that was expected to deliver evidence to the courts in order to help the State in filing charges against members of the former military regime. However, under the imminent threat of a military *coup d'état* and in order to save the new democracy from being overthrown, Alfonsín's government enacted two laws that restricted the possibility of trials against the former military junta.[13]

This reaction sparked a debate among legal scholars centring on the question of 'punishment or pardon': Which of the two approaches would be preferable to deal with the former elite so as not to jeopardise the consolidation of democracy and the rule of law?[14] Similar discussions took place among political scientists. In the 1970s, they had already started discussing democratization processes after World War II and after the regime transitions in Greece, Portugal, and Spain and the challenges of dealing with the former elite.[15] In the 1980s and the early 1990s when further repressive regimes collapsed and political transitions took place, first in Latin America and later on also in the former Eastern Bloc, the issue of how to deal with the former elite, referred to as the 'torturer problem',[16] attracted more and more attention.[17] Both political scientists and legal scholars recognized that the question of how to deal with human rights violations committed by the previous regime posed a serious problem to political transitions. On the one hand, experts from both backgrounds regarded prosecution as a threat to democratic consolidation because of possible counteractions of the former (still powerful) elite. On the other hand, they questioned whether amnesties (namely impunity) would not similarly jeopardize the (re)establishment of the rule of law as the very foundation of democracy.

The mutually shared recognition of this problem initiated the first interactions between actors from different contexts in their search for adequate solutions. One of the first formally organized interaction processes was a conference hosted by the Aspen Institute in 1988.[18] At this conference, human rights activists from Latin America, but also from other countries as well as political scientists, legal scholars, and philosophers, discussed particular problems of specific countries (primarily Argentina) in dealing with past human rights crimes. The aim of this conference entitled 'State crimes: punishment or pardon?' was to develop an 'intellectual framework'[19] within which all the different cases could be discussed in order to develop a generalized expertise offering possible solutions to this problem. During the conference, the participants did not come to a collectively accepted agreement on how to best proceed. However, all were in agreement that it was necessary to undertake certain steps in order to address human rights violations after political conflict and repressive rule.

...and of corresponding solutions

The breakdown of the Soviet Union and its satellite states, and the collapse of the Apartheid regime in South Africa, spurred further interactions among civil society actors, academic experts, and politicians. These later events gave rise to the idea that Latin American experiences could serve as a model for other countries that similarly had experienced repressive rule and embarked on a course of political transition. Accordingly, further conferences were organized in view of bringing experts from Latin America and other participants of the Aspen conference in dialogue with people from the former Eastern Bloc. The aim was to encourage an exchange of experiences to formulate 'lessons from the past'.[20] At these conferences, the question of how to deal with human rights violations, the perpetrators, and the victims became collectively recognized by all participants as the crucial problem countries in transition were facing. In their discussions, 'acknowledgement' of the crimes and the victims, and to a certain extent also 'accountability' of the perpetrators, emerged as necessary preconditions for the consolidation of democracy.

As well as conferences, the debate on how to deal with past crimes also took place in publications. A collection of academic articles, official documents and conference reports edited by Neil Kritz from the United States Institute of Peace, who was inspired by a conference in Salzburg on 'Justice in Times of Transition' in 1992, played a seminal role in setting the collaborative transnational justice agenda. In the foreword, the

[12] For a more detailed account of this development see Krüger, Anne K. (2014). *Wahrheitskommissionen. Die globale Verbreitung eines kulturellen Modells*, Frankfurt am Main: Campus.

[13] Fuchs, Ruth (2010). *Umkämpfte Geschichte. Vergangenheitspolitik in Argentinien und Uruguay*, Berlin / Münster: Lit Verlag.

[14] Nino, Carlos (1991). 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina', in Symposium: International Law, Special Issue of *The Yale Law Journal* 100 (8): 2619–40; Orentlicher, Diane (1991). 'A Reply to Professor Nino', in Symposium: International Law, Special Issue of *The Yale Law Journal* 100 (8): 2641–3; Orentlicher, Diane (1991). 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', in Symposium: International Law, Special Issue of *The Yale Law Journal* 100 (8): 2537–615.

[15] Herz, John (1982). *From Dictatorship to Democracy: Coping With the Legacies of Authoritarianism and Totalitarianism*, Westport, CT: Greenwood Press; O'Donnell, Guillermo, Schmitter, Philippe, and Whitehead, Laurence (eds.) (1986). *Transitions from Authoritarian Rule: Southern Europe*, Baltimore, MD: Johns Hopkins University Press.

[16] Huntington, Samuel (1991). *The Third Wave: Democratization in the Late Twentieth Century*, Oklahoma: University of Oklahoma Press, 211.

[17] Elster, Jon (1992). 'On Doing What One Can. An Argument Against Post-Communist Restitution and Retribution', *East European Constitutional Review* 1 (2): 15–17; Elster, Jon (2004). *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge: Cambridge University Press; Offe, Claus (1994). *Der Tunnel am Ende des Lichts. Erkundungen der politischen Transformation im Neuen Osten*, Frankfurt am Main: Campus; Linz, Juan, and Stepan, Alfred (1996). *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe*, Baltimore, MD: Johns Hopkins University Press.

[18] Arthur, Paige (2009). 'How "Transitions" reshaped Human Rights. A Conceptual History of Human Rights', *Human Rights Quarterly* 31 (2): 321–67.

[19] Henkin, cited in ibid., 327.

[20] Albon, Mary (1992). Conference report 'Justice in Times of Transition', March 7–10, Salzburg, 1; http://www.pjtt.org/assets/pdf/project_reports_pdf/EE/SALZBURG%20Report.pdf, accessed 1.08.2014.

relevance of the problem to all countries in transition, and the need to acquire expertise in order to find adequate solutions, was emphasised. Accordingly, the purpose was identified as 'creat[ing] a set of first-rate readings on basic questions of "transitional justice", demonstrating that, despite the uniqueness of each society and its historical and political context, there are unifying themes common to nations moving from despotism to democracy and lessons that each nation might bring to others.'[21] This compendium subsequently became a staple point of reference for actors from different contexts who had started to engage with the topic. Its subtitle 'How emerging democracies reckon with former regimes' reflected the collectively recognized problem and its main title 'Transitional justice' has consequently become the umbrella term for the attendant collectively discussed solutions.

These initial achievements representing an emerging mutual understanding of a particular problem and of corresponding solutions had propelled the continuation and stabilization of interaction processes. As well as individual experts, some organizations developed that were devoted to transitional justice. One of these organizations is the 'Project on Justice in Times of Transition', a spinoff from the 1992 Salzburg conference that was recently renamed 'Beyond Conflict'. It declares that its members 'fundamentally believe that humans share a basic psychological response to conflict, violence, and repression. Acknowledgement of that profound human experience transcends borders and cultural differences and allows people from disparate countries to connect and see the possibility of peaceful change.'[22] True to its ethos, the organization has organized more than 50 conferences in a multitude of countries across the world.

The most influential transitional justice organization to date, the International Center for Transitional Justice (ICTJ), was founded in 2001, in the aftermath of the South African Truth and Reconciliation Commission. The ICTJ believes that the development of transitional justice expertise is necessary in order to provide advice to countries in transition. It defines this approach in the following terms: 'In the aftermath of mass atrocity and repression, we assist institutions and civil society groups (…) in considering measures to provide truth, accountability, and redress for past abuses'.[23] The ICTJ has been doing just this in over 30 countries so far.

These expert organizations have been cooperating with national governments and local human rights organizations in many countries. In these interactions, they offer their interpretation of a given situation to local authorities, explain why and how human rights crimes that had been committed under the former regime represent a critical threat to political transitions and justify that dealing with these crimes is inevitable for societal und political consolidation. As the record shows, this narrative is very successful. We do not only find transitional justice as an adequate interpretation of current problems and their solutions in a variety of countries across the world. Important intergovernmental organizations such as the United Nations have also integrated into their policies the idea of addressing the past as a pre-requisite for societal integration and consolidation of democracy.[24]

[21] Smith, Charles (1995). 'Introduction', in Neil Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Washington, DC: United States Institute of Peace Press, xv-xvii, here: xvi.

[22] http://www.beyondconflictint.org/methodology/, accessed 1.08.2014.

[23] http://ictj.org/about, accessed 1.08.2014.

[24] Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice, March 2010; http://www.unrol.org/files/TJ_Guiance_Note_March_2010FINAL.pdf, accessed 1.08.2014.

Conclusion

The continuing implementation of transitional justice measures and instruments across the world demonstrates that the concept has become a normative expectation directed at countries in transitions. As in a spiral movement, the mutually shared narrative about the need to overcome the past in order to construct a better future has made further intersubjective understanding possible, cementing an ongoing interaction process, fostering the legitimacy of, and justification for, corresponding actions and consequently strengthening the transnational justice epistemic community. Tracing the development of this epistemic community from the onset therefore goes beyond the focus on particular strategic actions that have been taken in order to reach certain goals and implement corresponding policies. It furthermore helps to shed light on the underlying implicit interpretation of the social world that enables an intersubjective understanding of a problem and its adequate solutions, making (global) cooperation possible.

Relating Spaces: Transitional Justice between the Global and the Local

Susanne Buckley-Zistel

Transitional justice, it is often argued, has turned into a global norm. Over the course of the past 20 years, its ideas and practices have become pervasive and today hardly a peace treaty is signed without the quest to set up an institution to deal with the legacy of violence. The demand for accountability over past human rights abuses is no longer exclusively a domain of national governments or local initiatives, but has become part of a discourse on global responsibility. Accountability for human rights abuses has become enshrined in international criminal law, international and national institutions as well as in the 'global consciousness', a process captured by what has been referred to as the 'justice cascade'.[1] By now, the norm has been internalised, its validity is no longer questioned, it continuously reproduces itself and its implementation has become a habit.[2]

This chapter focuses on the global norm of transitional justice and its local applicability as central to more recent critical contributions to the field. These criticisms have questioned the appropriateness of a global norm – arguably strongly rooted in Western, liberal thought – in societies affected by violence. As argued in the following, these contributions construct a particular image of the local as being deprived of agency as well as being a mere victim of the global. Yet is this really the case? In order to offer some first reflections on the problematique this chapter takes a spatial turn (defined later herein) to assess the relationship between local and global on a conceptual level. It marks the first attempt to think beyond the binary of local and global and to open up spaces for the local to act.

[1] Sikkink, Kathryn (2011). *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, New York, NY: Norton, 96.

[2] Finnemore, Martha, and Sikkink, Kathryn (1998). 'International Norm Dynamics and Political Change', *International Organisation* 54 (4): 887–917, here: 905.

[3] Arthur, Paige (2009). 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', *Human Rights Quarterly* 31: 321–67.

[4] Oomen, Barbara (2005). 'Donor-Driven Justice and its Discontent: The Case of Rwanda', *Development and Change* 36 (5): 887–910.

[5] McEvoy, Kiran (2007). 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice', *Journal of Law and Society* 34 (4): 411–40.

[6] Humphrey, Michael (2003). 'International Intervention, Justice and National Reconciliation: The Role of the ICTY in Bosnia and Rwanda', *Journal of Human Rights* 2 (4): 495–505.

[7] Mani, Rama (2002). *Beyond Retribution: Seeking Justice in the Shadows of War*, Cambridge: Polity Press.

[8] See e.g. Mieth, Friederike (2013). 'Bringing Justice and Enforcing Law? An Ethnographic Perspective on the Impact of the Special Court for Sierra Leone', *International Journal of Conflict and Violence* 7 (1): 10–21; Uvin, Peter, and Mironko, Charles (2003). 'Western and Local Approaches to Justice in Rwanda', *Global Governance* 9 (2): 219–31.

[9] Franzki, Hannah, and Orlate, Maria C. (2014). 'Understanding the Political Economy of Transitional Justice: A Critical Theoretical Perspective', in Susanne Buckley-Zistel et al. (eds.), *Transitional Justice Theories*, Abingdon: Routledge, 201–21.

[10] Arthur, Paige (2009). 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', *Human Rights Quarterly* 31: 321–67, here: 337.

Criticising the global from below

So how is the global project of transitional justice portrayed from the perspective of the local? To begin, it is frequently argued that the concept of transitional justice derives from human rights initiatives and networks far away from the context of violence.[3] Think tanks, transitional justice entrepreneurs and donors set the agendas of post-violence societies and lobby strongly for some form of dealing with the past, regardless of the local context and needs.[4] Many of the approaches promoted by external agents are rather legalistic in orientation,[5] even though they remain highly political and selective,[6] something of which the agents themselves are unaware. While legal responses to dealing with the past are being questioned in and of themselves, scholarship on and from the global south casts doubt on the appropriateness of this form of retributive justice in contexts where restorative justice might be more culturally suitable and where the objective of justice is less the punishment of the perpetrator than the restitution of social and community relations.[7] Tribunals in particular, it is contended, have little relevance for the people affected by the violence.[8]

The second and closely related aspect refers to the norms transported by theory and practice of transitional justice.[9] A central critique is that its objective is often to lead from violence to democracy, i.e. to a particular form of government, and not simply peaceful coexistence in absence of violence.[10] This is closely intertwined with the suggestion that the concept is deeply enshrined in liberal thought which underlies both its assumptions and its mechanisms.[11] Moreover, it has been remarked that transitional justice seeks to turn people into liberal subjects in the form of autonomous citizens imbued with freedom, equality and rights who engage in democratic juridical and political practice.[12] The privileging of individual over group rights as enshrined in a liberal approach might however not be appropriate for non-Western cultures.[13]

Lastly, regarding the application of transitional justice it is frequently argued that it has developed into a tool-box approach[14] which confuses technocratic with political engagement.[15] In countries in transition, though, the political situation is highly complex and volatile so that misrecognition of this might aggravate rather than ameliorate the situation. To use a bureaucratic approach which is moreover highly dependent on institutions carries the risk of encouraging grass-root resistance to such initiatives.[16]

Of importance for the argument in this chapter is the fact that these criticisms have been developed in reaction to the application of a *global* norm to societies affected by violence. It marks a moment of resistance against the constitutive effect of norms and suggests that they are not, or only to a limited extent, adaptable to local context and culture. This direction

is in congruence with the post-colonial critique of power and representation in north-south relations more generally, where Eurocentric models are put under scrutiny. Importantly, the criticism suggests that the local remains important for people – in the context of transitional justice and beyond.

Despite all sympathy for the arguments, a detailed reading provokes the question whether the relationship between the global and the local really is that one-dimensional and whether the local is indeed a mere product of the global (unless it resists the influence). Moreover, if so, it renders the local a victim of the global and deprives it of agency. This demands a closer look at how global and local are related.

Relating 'the local' and 'the global'

Even though the notion of the local has only recently entered into transitional justice scholarship, other disciplines such as geography, anthropology and post-colonial studies have been grappling with its role for some time. A consciousness of the local has acquired relevance when arising as a backlash to globalisation, or the spread of global norms and practices (such as in the case of transitional justice), all of which are said to simultaneously incorporate and marginalise the local. The local has thus become a critical vantage point from which to assess the contradictions of globalisation. At its most basic understanding, the local connotes life-worlds with relatively stable associations and relatively shared histories.[17] Moreover, from an anthropological perspective it signifies some measure of groundedness (even though unstable), some sense of boundaries (even though permeable) as well as sites for the construction of identities (even though contingent).[18] In this sense, in the literature on transitional justice and beyond, the local is often posited as meaningful and authentic and it is often accompanied by words such as real, grounded or lived.[19]

In current transitional justice scholarship, the local has come to signify a site of dissidence against (global) power structures.[20] It has been suggested that this kind of wariness of the global impact on local structures is often couched in post-colonial and post-structural thought, placing great emphasis on the local while voicing suspicion over grand meta-narratives accused of seeking to dominate prevailing discourses.[21] A common concern of these approaches is to acknowledge contingency and particularity, to honour if not celebrate difference and otherness and to stimulate local capacities.[22] In this reading, current discourse and practice start from the premise that global and local are mutually exclusive entities. Frequently, they either understand 'the local' as being sealed off from the global by some form of boundary, or consider it to be at the mercy of external relations.

[11] Hinton, Alexander Laban (2011). 'Introduction: Towards an Anthropology of Transitional Justice', in Alexander Laban Hinton (ed.), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence*, New Brunswick: Rutgers University Press, 1–24; Shaw, Rosaline, and Waldorf, Lars (2010). 'Introduction: Localizing Transitional Justice', in Rosaline Shaw, Lars Waldorf, and Pierre Hazan (eds.), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, Stanford: Stanford University Press, 3–26.

[12] Hinton, Alexander Laban (2011). 'Introduction: Towards an Anthropology of Transitional Justice', in Alexander Laban Hinton (ed.), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence*, New Brunswick: Rutgers University Press, 1–24, here: 8.

[13] Sriram, Chandra (2009). 'Transitional Justice and the Liberal Peace', in Edward Newman, Oliver Richmond, and Roland Paris (eds.), *New Perspectives on Liberal Peacebuilding*, New York: United Nations University Press, 112–30, here: 119.

[14] Teitel, Ruti (2008). 'Editorial Note: Transitional Justice Globalized', *International Journal of Transitional Justice* 2 (1): 1–4.

[15] Hinton, Alexander Laban (2011). 'Introduction: Towards an Anthropology of Transitional Justice', in Alexander Laban Hinton (ed.), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence*, New Brunswick: Rutgers University Press, 1–24; Nagy, Rosemary (2008). 'Transitional Justice as Global Project: Critical Reflections', *Third World Quarterly* 29 (2): 275–89.

[16] McEvoy, Kiran, and McGregor, Lorna (2008). 'Transitional Justice From Below: An Agenda for Research, Policy and Praxis', in Kiran McEvoy, and Lorna McGregor (eds.), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, Oxford: Hart Publishing, 1–13, here: 6.

[17] Appadurai, Arjun (1995). 'The Production of Locality', in Richard Fardon (ed.), *Counterworks: Managing the Diversity of Knowledge*, Basingstoke: Routledge, 204–25, here: 215.

[18] Escobar, Arturo (2001). 'Culture Sits in Places: Reflections on Globalism and Subaltern Strategies of Localization', *Political Geography* 20: 139–74, here: 140.

[19] Massey, Doreen (2007). *Place, Space and Gender*, Cambridge: Polity Press, 4.

[20] Shaw, Rosaline, and Waldorf, Lars (2010). 'Introduction: Localizing Transitional Justice', in Rosaline Shaw, Lars Waldorf, and Pierre Hazan (eds.), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*, Stanford: Stanford University Press, 3–26.

[21] Massey, Doreen (2004). 'Geographies of Responsibility', *Human Geography* 86 (1): 5–18, here: 9.

[22] Gibson-Graham, J. K. (2003). 'An Ethics of the Local', *Rethinking Marxism* 15 (1): 49–74, here: 51.

[23] Lefebvre, Henri (2009). *Dialectical Materialism*, Minneapolis, Minn.: University of Minnesota Press, 186–7.

In the following, I would like to challenge this binary perspective and ask if and how global and local constitute each other and how this can be conceptualised theoretically. To this end, I take a spatial turn. I argue that the scalar construction of global and local needs to be re-assessed and their mutual constitution through social interaction brought to the fore when analysing transitional justice. Yet what does a spatial turn signify? The term space refers to areas around, within and between objects; it marks the expanse in which objects occur. According to Henri Lefebvre, space is always social for it assigns more or less appropriate locations to social relations.[23] Importantly, though, space itself is socially produced, it is a result of interactions and can thus be described as a complex social construction composed of social norms, values and ascribed meanings.[24] From this follows that space is both a complex social construction and the condition under which individuals and groups interact. In a circular way, space provides the structures that enable and constrain agency. There is thus a dialectic relationship between physical space and the societies that inhabit it: space is shaped by social interactions and at the same time it shapes these interactions.

The term space thus points to the complex social constructions at the level of the local and global. In this sense, it does not refer to a container, a de-historicised, largely homogenous, fixed and bounded entity in which interaction occurs, but to the materialisation of social relations which have been developed over time and which are therefore contingent.[25] Central to this line of reasoning is the assumption that there is a relationship between the scales local and global, which overcomes their juxtaposition as mutually exclusive concepts. For Massey,

> '[i]f space is a product of practices, trajectories, interrelations, if I make space through interactions at all levels, from the (so-called) local to the (so-called) global, then those spatial identities such as places, regions, nations, and the local and the global, must be forged in this relational way too, as internally complex, essentially unboundable in any absolute sense, and inevitably historically changing'.[26]

In other words, if the local is only a congealing of social relations at a particular point and at a particular time, global and local are not mutually exclusive binary oppositions but rather they are related to and mutually constitutive of each other. Moreover, for Massey the spatial combination of social relations which constitute the uniqueness of any locality is not confined to this place but stretches beyond its (permeable) boundaries so that the global defines part of the local, the

outside part of the inside.[27] There is thus an intricate relationship between local and global as mutually constitutive. They are related spaces.

Consequently, the local is not simply the product – or victim – of the global, but there are also moments through which the global is constituted through the local. In other words, there is not only a global construction of the local – as argued by critics of the global influence of transitional justice at the local level – but also a local construction of the global.[28] Consequently, the local is not simply a passive victim but is at the same time an active creator because if the local is productive of the global it has some form of agency and thus transformative capacity. This implies that it is important to analyse how local action and local practices reflect back onto global structures, and vice versa.

Conclusions

To return to the criticism of transitional justice from a place-based perspective, the question has to be posed whether current scholarship paints too strong a picture of the local being a product of the global, inadvertently absolving the local of any form of agency and any potential to contribute to the transformation of (global) structures. Whether and how this occurs in the field of transitional justice requires in-depth empirical analysis. To name some examples from the field of transitional justice, Argentine victims' organisations have been central in encouraging Spanish organisations to lobby the government to deal with the past of Franco's dictatorship, while the South African Archbishop Desmond Tutu visited Northern Ireland to conduct victim-perpetrator mediation in order to contribute to reconciliation after the Good Friday Agreement.

This chapter seeks to contribute to the critical literature on transitional justice by offering an alternative understanding of how norms travel. By tracing and assessing the influence of local norms – in all their heterogeneity – it endows local transitional justice entrepreneurs with a degree of agency in the context of academic discourses which often regard them as being solely subjected to global norms. The chapter therefore has a strong emancipatory component, for it marks 'an attempt to get out from under the position of thinking one's identity as simply "subject to" globalisation'.[29] It calls for a rethinking and, in the process, a redefinition of the space in which peacebuilding occurs. In this sense, taking a spatial turn not only serves as a critique but 'as a project that is devoted to the creation and construction of new contexts for thinking about politics and the production of knowledge'.[30]

[24] Lefebvre, Henri (1991). *The Production of Space*, London / New York, 26.

[25] Massey, Doreen (2007). *Place, Space and Gender*, Cambridge: Polity Press, 154.

[26] Massey, Doreen (2004). 'Geographies of Responsibility', *Human Geography* 86 (1): 5–18, here: 5–6.

[27] Massey, Doreen (2007). *Place, Space and Gender*, Cambridge: Polity Press, 5.

[28] Massey, Doreen (2006). 'Keine Entlastung für das Lokale', in Helmuth Berking (ed.), *Die Macht des Lokalen in einer Welt ohne Grenzen*, Frankfurt am Main: Campus, 25–31, here: 30.

[29] Massey, Doreen (2004). 'Geographies of Responsibility', *Human Geography* 86 (1): 5–18, here: 12.

[30] Dirlik, Arif (1999). 'Globalisation and the Politics of Space', in Kris Olds et al. (eds.), *Globalisation and the Asia-Pacific: Contested Territories*, Houndsmill: Routledge, 36–54, here: 38.

Holocaust Remembrance from a Global Perspective

Birgit Schwelling

Introduction

On November 1st, 2005 the United Nations (UN) General Assembly (GA) adopted a resolution on 'Holocaust remembrance', resolving among other things that the UN will designate January 27 – the liberation day of Auschwitz concentration camp – as an annual 'International Day of Commemoration in memory of the victims of the Holocaust'.[1] The resolution was sponsored by 104 members of the 191-member assembly and it was adopted by consensus. Given that until quite recently processes of remembrance only rarely transcended the borders of nation-states, this resolution is quite remarkable. Even the mere number of supporters is impressive and it is interesting to note that most of them have no direct connection to the extermination of approximately six million Jews by Nazi Germany during World War II. Therefore, the UN resolution might be considered as the culmination of a long and complex process generally referred to as the globalization of Holocaust remembrance.[2] This is certainly an interesting phenomenon in its own right, but it also constitutes part of a more comprehensive process in which a basic set of norms delegitimizing human rights violations and other forms of violence and discrimination is globally discussed, diffused, and accepted. Furthermore, it can also be considered to be part of the global proliferation of ideas, measures, and instruments of transitional justice that are put into place once human rights have been violated.

In this article, the UN resolution on 'Holocaust remembrance' will serve as the focal point for a discussion of the globalization of memories of atrocities and human rights violations. Until very recently, remembrances of painful and traumatic

[1] UN General Assembly, Sixtieth Session, Agenda item 72, 60/7, Holocaust remembrance, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/60/7, accessed 18.07.2014.

[2] See, for example, Levy, Daniel, and Sznaider, Natan (2006). *The Holocaust and Memory in the Global Age*, Philadelphia, PA: Temple University Press.

experiences of particular nations were still typically confined to these nations themselves, and even in times of a growing connectivity around the globe this still tends to be the rule rather than the exception. Since the end of the Second World War, national identities have been increasingly based on 'negative' and painful memories of war and genocide, but these were typically memories of direct involvement in those events. As the UN resolution on 'Holocaust remembrance' indicates, this close linkage can no longer be taken as a given. The question that follows is then how, in the context of global attempts at remembrance, this decoupling of memories from experiences influences, and possibly changes the ways in which memories are constructed. Are there specific functional logics and characteristic features that differ from those known from similar attempts in the realm of the nation-state? How are memories of events with no or only marginal connection to the various national histories integrated into the memorial landscapes of these nations? And what challenges does this pose?

In the following, I will discuss these questions on the basis of the UN Resolution on 'Holocaust remembrance' as well as the 41st and 42nd plenary meetings of the GA. These sources will serve as an example of global cooperation in the context of processes of remembrance and, on a more general level, in the framework of cultural globalization, understood as the global circulation, diffusion, and transmission of ideas, norms, values, and related practices, as well as in relation to their appropriation or rejection.

After briefly describing the content of the UN Resolution on 'Holocaust remembrance', this article will show that the UN resolution as well as the corresponding debates in the 41st and 42nd plenary meetings of the GA provide important keys to these questions that might serve as a starting point for the analysis of related phenomena in the context of global cooperation.

The UN Resolution on Holocaust remembrance

The UN Resolution on 'Holocaust remembrance' consists of ten preambular and six operative paragraphs. In its preambular section, it recalls several key provisions from relevant human rights instruments including the 'Universal Declaration of Human Rights', the 'Convention on the Prevention and Punishment of the Crime of Genocide' and the 'International Covenant on Civil and Political Rights'. Furthermore, the preambular section states that there is an 'indelible link' between the UN and the Second World War. In addition, this section takes note of the fact that the sixtieth session of the GA was taking place during the sixtieth year of the defeat of the Nazi regime and that the GA already held a unique event in commemoration of the sixtieth anniversary of the liberation of the concentration camps. Finally, the preambular section reaffirms that the Holocaust 'will forever be a warning (…) of the dangers of hatred, bigotry, racism, and prejudice'.

In its operative part, the resolution calls on the UN to designate January 27 as an 'annual International Day of Commemoration in memory of the victims of the Holocaust'. It urges Member States to develop educational programmes to 'inculcate future generations with the lessons of the Holocaust in order to help to prevent future acts of genocide'. It further rejects any denial of the Holocaust and condemns all manifestations of intolerance or violence against persons or communities based on ethnic origin or religious belief. In addition, the resolution requests for the Secretary-General to establish a programme of outreach on the subject of the 'Holocaust and the United Nations', as well as measures to mobilize civil society for Holocaust remembrance and education.

Decontextualization / recontextualization

The first finding concerns one peculiarity of globalized remembrance in contrast to memories within the framework of the nation state, namely the decontextualization of memory. Levy and Sznaider observe the emergence of a 'global cultural memory imperative'[3] that, on one level, focuses in fact on Holocaust memories, yet at the same time and on another level, decontextualizes these memories and turns them into a universal code for human rights abuses. There are strong indicators that these processes of decontexualization in the sense of an abstraction from the specific historical event also take place in connection with UN attempts at remembrance. Particularly in the Assembly's debate there is constant mentioning of the Holocaust being 'a unifying historic warning',[4] of 'universal lessons' to be learned from the Holocaust,[5] of a 'bigger picture' that goes beyond the Jewish fate,[6] and of 'Auschwitz' being of 'global relevance'.[7]

Beyond these 'universal lessons to be learned' arguments, but in connection with them, the term 'Holocaust' is deprived of its specific and distinct meaning. Examples can be found in the statement of the representative of Venezuela who wishes to recall 'other holocausts' and 'successive holocausts'.[8] Here it becomes quite obvious that the term does not refer to the historical event of the extermination of European Jewry but is dislocated from space and time and is used as a general symbol for atrocities.

Another indicator for operations of decontextualization can be found in the fact that the specificities of the Holocaust are becoming extremely obscure. A common reference when it

[3] Levy, Daniel, and Sznaider, Natan (2010). *Human Rights and Memory*, University Park, PA: Pennsylvania State University Press, 4.

[4] UN General Assembly, Sixtieth Session, 41st plenary meeting, 31 October 2005, A/60/PV.41, The President of the GA, 17, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/590/13/PDF/N0559013.pdf?OpenElement, accessed 18.07.2014.

[5] Ibid., Mr. Gillerman, Israel, 18.

[6] Ibid., Mr. Menon, Singapore, 24.

[7] UN General Assembly, Sixtieth Session, 42st plenary meeting, 1 November 2005, A/60/PV.42, Mr. Pfanzelter, Austria, 8, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/590/19/PDF/N0559019.pdf?OpenElement, accessed 18.07.2014.

[8] Ibid., Mrs. Núñez de Odremán, Venezuela, 9f.

comes to the perpetrators is 'Nazi'. 'Nazi concentration camps' and 'Nazi forces' are also mentioned, but there are hardly any indicators that these Nazis were in fact Germans. There are hardly any attempts to address the question of what? where? when? by whom? and why?, and the few references that can be found are framed in general terms in which most of these questions are far from being answered. The following are some indicative examples: 'Genocide was committed against the Jews of Europe during the Holocaust',[9] 'It was in Europe that the Holocaust took place',[10] or 'the Holocaust occurred 60 years ago'.[11] Not even the German delegate Günther Pleuger bothers to deal with these questions. This is interesting to note because on other occasions – in particular within Germany or in the European realm – German official representatives do not hesitate to make blunt statements on questions of responsibility and guilt. So this tendency of decontextualization might in fact be specific to, and even a prerequisite for, global encounters.

Concerning the operation of decontextualization, one could furthermore argue that it is the necessary prerequisite for processes of recontextualization, meaning that the recognition of universal lessons to be learned can only take place after memories of particular atrocities have been transformed into abstract codes for violations of human rights that are void of specific references. One example can be found in the statement of the delegate of Ukraine who states that, 'as we commemorate the victims of the Holocaust, Ukraine cannot but recall the terrible damage which intolerance, violence and aggression caused it in the past'. And he continues: 'This year marks the seventy-second anniversary of one of the most tragic chapters in Ukraine's history, the Great Famine of 1932–33 – in Ukrainian, *Holodomor*.'[12]

While recontextualization in the case of Ukraine means generally accepting Holocaust remembrance, but at the same time inscribing or adding other meanings to it, recontextualization in the sources analysed here takes on a second version. It appears in the form of resistance against decontextualization and as a plea for more historical accuracy. Two examples are found in the proceedings: The delegate from Jordan demands that statements should be 'precise and accurate' when it comes to what he calls 'the invocation of history'. And he adds: 'There can be no sound discussion of this most serious issue without acknowledging the context in which it occurred.'[13] In a similar vein, Egypt's delegate claims that 'the resolution fails to address responsibilities of the society in which the Holocaust was perpetrated and its socio-political and racist causes'. He adds yet another dimension to it when questioning the establishment of an international commemoration day in memory of the victims of the Holocaust by asking why 'equal atrocities against Muslims, Christians and others' are forgotten. By stating that 'no one should have a monopoly

[9] UN General Assembly, Sixtieth Session, 41st plenary meeting, 31 October 2005, A/60/PV.41, The President of the GA, 17.

[10] Ibid., Sir Emyr Jones Parry, UK, 23.

[11] Ibid., Mr. Bolton, USA, 26.

[12] UN General Assembly, Sixtieth Session, 42st plenary meeting, 1 November 2005, A/60/PV.42, Mr. Kuchinsky, Ukraine, 6.

[13] Ibid., Prince Zeid Ra'ad Zeid Al-Hussein, Jordan, 2.

[14] Ibid., Mr. Abdelaziz, Egypt, 10.

[15] Engle Merry, Sally (2006). *Human Rights and Gender Violence: Translating International Law into Local Justice*, Chicago, IL: University of Chicago Press.

[16] UN General Assembly, Sixtieth Session, 41st plenary meeting, 31 October 2005, A/60/PV.41, Mr. Ungureanu, Romania, 21.

[17] Ibid., 19–21, quote 19.

on suffering',[14] he makes quite clear that for him, and for his country respectively, Holocaust memory does not function as an empty signifier but evokes concerns of inclusion and exclusion, and furthermore remains closely linked to specific historical, social and political processes, both past and current. This clearly indicates that there are limits to the globalization of memories.

Global / local interconnectedness

The second finding of my analysis is linked to the question of global / local interconnectedness. There can be little doubt that with the establishment of an 'International Day of Commemoration in memory of the victims of the Holocaust' the UN is driven by the aim of creating its own institutional foundational myth as well as globalizing Holocaust remembrance. By urging its members to 'develop educational programmes that will inculcate future generations with the lessons of the Holocaust', the UN seeks to imprint Holocaust remembrance in the memory landscape of its member states. This process of implementation has much to do with what Sally Engle Merry has called 'vernacularization'.[15] The successful proliferation of global norms and practices, she argues, is dependent on their local appropriation and incorporation. In the context of the processes under consideration here, there are strong indicators that – in cases where general acceptance is given – vernacularization functions via its relation to the memorial landscape of one's country. An example can be found in the statement of the delegate of Romania who notes that his country has designated not January 27 but October 9 as the National Holocaust Commemoration Day. 'That was the date in 1941 on which deportations of Romanian Jews to Transdniestria began.'[16] Other examples can be found in the statements of the delegates of France and Denmark as both recount their nation's particular 'experience of the Holocaust'. While the Danish representative points to the operation to rescue the Jewish community in Denmark in October 1943, the French delegate recounts the Vélodrome d'Hiver Roundup in Paris on July 16 and 17, 1942, which in France became the symbol not only of the Holocaust, but also of the Vichy Regime and its collaboration with the Nazi Regime.[17] Therefore, vernacularization in the realm of Holocaust remembrance confirms the well-known argument that globalization is not about homogenization but about finding ways of refilling events that were deprived of their meaning and turned into blank scripts with specific experiences.

At the same time, the global level necessarily hinges on the local. There is an incessant dialogue process whereby the global level is initially informed by experiences at the

local level. These, having aggregated and distilled at the global level, then rebound and inform the local level. Holocaust remembrance developed first in specific cultural traditions and places, in particular in Israel, Western Europe, and the US, and it embarked on its global career from there. But this precedence does not imply that the memories in these places are not affected by the challenges of globalization. They are also shaped or reshaped and transformed in correspondence with, and in response to, these challenges. The German delegate's account is a case in point. Without having context information on Pleuger's short speech, one would guess that these words had been spoken at some point during the 1950s, when accounts of the Holocaust in the German context were rather circumscribing statements as to what had been done by whom, when, and why. Therefore, Pleuger's account appears strangely outdated, and one might speculate here about the necessities imposed by speaking in a globalized context. Furthermore, one might assume that in the long run, globalization in connection with Holocaust remembrance might actually exert impacts that nullify the long and painful process of the Federal Republic's attempts at coming to terms with the legacies of National Socialism. This may be counterproductive to societal or national efforts of processing atrocities. It may ultimately lead to insincerity in the transitional justice enterprise.

Conclusion

In the light of the UN resolution on 'Holocaust remembrance', cultural globalization appears as a highly ambivalent process. While on the one hand, Holocaust remembrance might serve as a 'tool' to raise awareness of the dangers and deadly consequences of anti-Semitism, racisms, and other forms of discrimination, its globalization on the other hand comes at a cost, among it the conversion of the Holocaust and its memory into an empty signifier deprived of its distinct and specific meaning. There is a considerable risk of arbitrariness when new meanings are added or inscribed in processes of decontextualization and vernacularization. Furthermore, this brief analysis suggests that global/local interconnectedness is not only about the appropriation of the global on the local level, but it is also about the permanent interchanges across these levels. And, as the German delegate's account leads me to think, it might as well be about falling back below standards of interpretation and commemoration that had been established at the national level after long and intense discussions.

The International Criminal Court and State Cooperation: Self-referrals as Panacea?

Ignaz Stegmiller

When the International Criminal Court (ICC) was established, it was labelled a success story of State cooperation. More recently, however, the institution has been much criticized for focusing its prosecution activities on the African continent. Instead of mutual cooperation with the institution, some States have changed their attitude and now oppose the ICC's activities by questioning its legitimacy. One core aspect is the so-called trigger mechanism, the procedural tool to activate ICC intervention. The ICC evolved on the basis of State consent, achieving a procedural compromise reflected in the regulations of the Rome Statute. Yet this treaty is far from being perfect and leads to an imbalance when the Security Council is involved. In order to fairly criticize the ICC and its place in the international criminal system, which requires an identification of the actors relevant to the activation of the Court's system, an understanding of the legal framework is indispensable.

Triggering ICC intervention

The term 'trigger mechanism' was introduced during the establishment process of the ICC. Two main issue clusters had to be distinguished during the drafting process: first, the question of jurisdiction, and only as second step, the triggering of the system.[1] Articles 13, 14, and 15 of the Rome Statute[2]

[1] Stegmiller, Ignaz (2011). *The Pre-Investigation Stage of the ICC*, Berlin: Duncker & Humblot, 66.

[2] Articles without further reference are those of the Rome Statute of the ICC.

determine the mechanism for the activation of the ICC. The ICC's Office of the Prosecutor (OTP) operates on the basis of a strict procedural setting. Activity by the OTP is 'triggered' by a Security Council referral, a State referral, or *proprio motu* (on its own motion) by the Prosecutor him- or herself. State referrals were interpreted as including also 'self-referrals' by the State on the territory of which a conflict took (or continues to take) place.[3] Mutual cooperation between States and the OTP paved the way for the ICC's early practice of accepting and even encouraging self-referrals. Therefore, before addressing questions of legitimacy, the practice of self-referrals needs to be taken into account and examined more profoundly.

Self-referrals in practice

State referrals to the ICC are outlined in Articles 13 (a) and 14 of the Rome Statute. While they were considered to have little potential for use, the law-in-action has proven such expectations wrong. As a matter of fact, four out of eight situations before the ICC are based upon State referrals (Uganda, Democratic Republic of Congo, Central African Republic and Mali). As will be shown below, although self-referring a conflict is *legally* valid under the Rome Statute, from a *policy perspective*, self-referrals entail the risk of negatively affecting the public perception of the ICC as an institution.

Referrals of State Parties can be divided into two categories: third party referrals and self-referrals. Self-referrals are referrals by a State *Party* of a situation in which crimes falling within the jurisdiction of the Court appear to have been committed on that State Party's territory. The OTP even adopted a policy of inviting and encouraging such voluntary self-referrals.[4] All four referrals under article 14 are such self-referrals. In the situation of Uganda, the President of Uganda referred 'the situation concerning the LRA' [5] to the ICC in 2004. The second referral concerns the situation in the Democratic Republic of Congo (DRC).[6] A third self-referral was received by the Chief Prosecutor on behalf of the government of the Central African Republic in 2005,[7] and a fourth referral by Mali was received in 2012.[8] A fifth self-referral by the Comoros 'with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip […]'[9] is under scrutiny by the Office of the Prosecutor. Currently, this referral has triggered the Prosecutor's action, but the situation is under preliminary investigation, meaning that the OTP has not initiated investigations under article 53 (1) of the Rome Statute, nor has the situation reached the subsequent status of a pre-trial situation. It should also be noted that in the situation of Kenya, the OTP initially favored a self-referral.[10] This is in line with the OTP's approach to actively encourage States to self-refer conflict situations.

[3] For a terminological clarification see Müller, Andreas Th., and Stegmiller, Ignaz (2010). 'Self-referrals on Trial', *Journal of International Criminal Justice* 8: 1267–94, here: 1271.

[4] Paper on Some Policy Issue before the Office of the Prosecutor, September 2003, www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf, accessed 15.07.2014.

[5] ICC – President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, 29.01.2004 (ICC-20040129-44), www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc.asp, accessed 15.07.2014.

[6] Prosecutor receives referral of the situation in the Democratic Republic of Congo, 19.04.2004 (ICC-OTP-20040419-50), www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx, accessed 15.07.2014.

[7] ICC – Prosecutor receives referral concerning Central African Republic, 07.01.2005 (ICC-OTP-20050107-86), www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2005/Pages/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic.aspx, accessed 15.07.2014.

[8] Referral letter by the Government of Mali, 13.07.2012, www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf, accessed 15.07.2014.

[9] Referral under Articles 14 and 12 (2) (a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation, 14.05.2013, www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf, accessed 15.07.2014.

[10] Agreed Minutes of the Meeting between Prosecutor Moreno-Ocampo and the delegation of the Kenyan government, 03.07.2009, www.icc-cpi.int/NR/rdonlyres/1CEB4FAD-DFA7-4DC5-B22D-E828322D9764/280560/20090703AgreedMinutesofMeetingProsecutorKenyanDele.pdf, accessed 15.07.2014.

[11] Prosecutor v. Lubanga (Case No. ICC-01/04-01/06-8-US-Corr), ICC PT. Ch. I, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, 10 February 2006, para. 35, www.icc-cpi.int/iccdocs/doc/doc236260.PDF, accessed 15.07.2014). See further Prosecutor v. Katanga and Chui (Case No. ICC-01/04-01/07-1213), ICC T. Ch. II, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, paras. 79-80, www.icc-cpi.int/iccdocs/doc/doc711214.pdf, accessed 15.07.2014.

[12] Prosecutor v. Katanga and Chui, ICC A. Ch., Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 85, www.icc-cpi.int/iccdocs/doc/doc746819.pdf, accessed 15.07.2014.

In terms of cooperation, one might query to which extent the 'encouragement' is welcome, and what kind of (political) pressure is put on self-referring States. The practice of self-referral as such does not face legality concerns within the framework of the ICC. Despite the unclear drafting history, the terminology 'referral' and 'refer' rather than 'complaint' is neutral and allows for action by any State Party, whether or not the State on whose territory the conflict took place is a Party to the Rome Statute or not. In the Lubanga case, Pre-Trial Chamber I held that '[…] the self-referral of the DRC appears consistent with the ultimate purpose of the complementarity regime […]'.[11] The possibility of self-referrals was further re-affirmed by the Appeals Chamber in Katanga and Chui stating that 'the Statute does not prevent a State from relinquishing its jurisdiction in favour of the Court'.[12]

A different matter is whether, considered from a policy perspective, self-referrals *should* be encouraged. Scholars evaluate the practice critically for fear that the ICC's credibility as well as independence might be affected negatively.[13] One-sided referrals are likely to lead to allegations of biased investigations against one party to the conflict, no matter how hard the OTP tries to stress that both sides are subject to the judicial process. On the ground, the impression prevails that the Court has been instrumentalized. Even if the Prosecutor pursues a re-interpretation, such as in Uganda where the former Chief Prosecutor highlighted that not only crimes of the Lord Resistance Army but also those of the Government would be investigated, the ICC risks the impression of taking sides when accepting a one-sided referral. Therefore, the *proprio motu* tool under article 15 of the Rome Statute might be the better choice in situations where the ICC has to demonstrate the application of equal standards against multiple parties. This however entails the enormous disadvantage of endangering cooperation by the State in question. Situations such as Darfur (Sudan) and Kenya are notorious examples of how ICC action can lead to a deadlock resulting in no further (procedural) progress. In both countries, the OTP is targeting sitting Heads of State and cannot rely on any support whatsoever on the ground. However, the pertinent question then arises to what extent the Security Council and other States would actively cooperate with the ICC and assist it in strengthening the international criminal law system. In any event, it appears that self-referrals, although legally possible, remain a political sensitive tool to trigger ICC intervention.

Legitimacy aspects

Growing skepticism of the ICC leads to the legitimacy of its operations being questioned. In this respect, I suggest differentiating

the legal from the political sphere of legitimacy. The inner legitimacy of the Court's (legal) operations functions well, but the outer (political) legitimacy of the ICC is presently endangered. Regarding the latter, a core argument brought forward by critics relates to the encouragement of self-referrals as panacea hoped for by the former Chief Prosecutor; other reasons for the tenuous political legitimacy are found within the structure and limited competencies of the ICC. In my view, some arguments are both unfounded and motivated by political campaigns against the ICC. The Kenyan side is trying to avoid prosecutions and delay proceedings, entering in a political plea bargaining with the prosecution.[14]

Be that as it may, three different layers of legitimacy have to be carefully separated and require constructive discussions: (i) inner legitimacy and legal operations by the ICC, (ii) outer legitimacy and political support as well as State cooperation for the ICC, and (iii) fundamental legitimacy of the international criminal law. The different spheres have to be disentangled to streamline arguments to where they belong. For instance, while some aspects of inner legitimacy concern the ICC's operation and the actors – the OTP, judges, etc. – political concerns need to be discussed by other inner and political actors, including the Court's Assembly of State Parties, the Security Council, and the states as such. Political support for the concept of international criminal law and an international criminal court are intertwined, and it is apparent that if this cannot be regained, the model 'ICC' has failed and states might leave the treaty one after the other. The disappointment of the victims whose expectations for justice have been raised should not be ignored either. Ultimately, the goal of 'ending impunity' would experience a devastating step backwards.

The negative perceptions of the ICC have been propelled especially in reaction to its engagement in the situations in Sudan and Kenya, which were initiated against *sitting* Heads of State. The attached symbolism, and of course the direct legal 'assault' on authoritarian rulers in countries with oppressed societies, led to strong opposition there. A media battle broke out, attempting to de-legitimize the institution as such. Certainly, this opposition notwithstanding, the international criminal law system is far from being perfect, and international justice has not been applied evenly, for leaders of powerful States have been less likely to be prosecuted.[15] All the same, the assumption that only Africans are being *unfairly* targeted is not supported by the facts,[16] yet all eight situations that made it to the stage of formal pre-trial proceedings are located on the African continent. The question thus remains: why and for which – legal and political – reasons has the ICC so far opened full investigations in African countries only?

This brings us back to the beginning of this paper: the picture may be altered by the fact that the majority of ICC situations

[13] Arsanjani, Mahnoush, and Reismann, Michael (2005). 'Developments at the International Criminal Court: The law-in-action of the ICC', *American Journal of International Law* 99: 385–403, here: 385 et seq.; Schabas, William (2010). *Article 14: The International Criminal Court. A Commentary on the Rome Statute*, Oxford: Oxford University Press, 305 et seq.; Apuuli, Kasaija (2006). 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects in Northern Uganda', *Journal of International Criminal Justice* 4: 179–87, here: 179 et seq.

[14] Kersten, Mark (2013). *What a mess: ICC Prosecutor seeks delay in Kenyatta trial*, 19 December, http://justiceinconflict.org/2013/12/19/what-a-mess-icc-prosecutor-seeks-delay-in-kenyatta-trial/#more-5014, accessed 15.07.2014.

[15] Keppler, Elise (2012). 'Managing Setbacks for the International Criminal Court in Africa', *Journal of African Law* 56: 1–14, here: 7.

[16] Ibid., 6.

were self-referred by African States, thus putting the claim of a 'neo-imperialist' court into a different perspective.[17] Moreover, not *all* African governments and African civil society attack the ICC, and some have continued their support by actively participating in the Review Conference in Kampala.[18] Through the Assembly of State Parties, a dialogue and equal participation remains possible. Amendments can be initiated by State Parties in accordance with Articles 121 to 123 of the Rome Statute. Certainly, a constructive interaction is preferable to withdrawal from the Statute under Article 127 of Rome Statute.

At the present stage, the ICC has seemingly lost credibility with regard to the Kenyan situation. Should it fail in Kenya, the ICC, which has raised high expectations for victims,[19] runs a great risk of losing public confidence there and elsewhere. Specifically, a reason for the limited success in Kenya might be attributed to the failure of outreach and failure to maintain a communication plan.[20] It is astonishing to note that due to budget limitations there is no outreach office in Kenya nor in neighboring Tanzania, and ICC proceedings are not easily accessible to people in Kenya.[21] Empirical data are urgently needed to substantiate this assumption and, in a second step, based on the findings, find solutions for regaining legitimacy.

Final observations

Practice has led to a factual hierarchy with regard to the triggering mechanism. The State referral tool was used frequently in the first few years of the ICC as the Court became operational. By comparison, *proprio motu* action was handled reluctantly by the former Chief Prosecutor. In contrast to the State referrals and Security Council referrals, *proprio motu* initiation risks losing State voluntary cooperation as well as Security Council direct support, nor did third actors show interest in supporting the OTP where the Prosecutor acted against the will of a State. Thus, Security Council referrals appear to potentially be the strongest from the viewpoint of State compliance.

Notwithstanding the strong mandate by the Security Council, this mode of referral also proves problematic, albeit for other reasons. The Security Council is, after all, a political organ. In the matter of Sudan, where there was no reaction to non-compliance, the African Union (AU) and African States also assisted in shielding the indicted Head of State. In Syria, no referral was ever achieved. The Security Council referral under Article 13 (b) of the Rome Statute enables the Security Council to use the ICC according to its own agenda. While State referrals, which are encouraged, are more State-driven and imply voluntary cooperation with the ICC, they reflect a one-sided approach to justice, especially where one of the former conflict parties is representing the State in the post-

[17] Sing'Oei, Abraham Korir (2010). 'The ICC as Arbiter in Kenya's Postelectoral Violence', *Minnesota Journal of International Law Online* 19: 5–20, here: 18; Weldehaimanot, Simon M. (2011). 'Arresting Al-Bashir: The African Union's Opposition and the Legalities', *African Journal of International and Comparative Law* 19: 208–35, here: 229.

[18] Keppler, Elise (2012). 'Managing Setbacks for the International Criminal Court in Africa', *Journal of African Law* 56: 1–14, here: 7–8.

[19] Sing'Oei, Abraham Korir (2010). 'The ICC as Arbiter in Kenya's Postelectoral Violence', *Minnesota Journal of International Law Online* 19: 5–20, here: 19.

[20] On the lack of outreach see Tillier, Justine (2013). 'The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?', *International Criminal Law Review* 13: 507–91, here: 546 et seq.

[21] Sriram, Chandra Lekha, and Brown, Stephen (2012). 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact', *International Criminal Law Review* 12: 219–44, here: 241–2.

conflict stage. It is hardly likely that indicted persons sitting in government after regime change would be brought to trial.

Seen from such a perspective, *proprio motu* powers appear to ensure impartiality in the process when compared with the other two triggering mechanisms. Yet, as long as the ICC has no supportive police force and limited investigation teams, lack of State support remains a debilitating disadvantage.

In sum, the preference of one or the other triggering tools depends on both practical realities of the given conflict situation and international politics. It also reflects the personality of the Chief Prosecutor and policy choices that are made by the OTP. The ultimate question concerning the ICC's legitimacy is whether the legal framework of the ICC should be adjusted. A constructive approach to deciding this matter and guiding the way forward will make it necessary to give the actors a hearing, on the one hand, but on the other hand they will also have to clearly articulate what it is that they are criticizing and for which reasons.

The ICC Principle of Complementarity: A Challenge for Global Cooperation in Transitional Justice

Noemi Gal-Or

Introduction

As this is being written, a ray of light is brightening the lives of the people in the eastern Congo. The biggest Armed non-State actor (ANSA)[1] in the region, the Democratic Forces for the Liberation of Rwanda (DFLR) Hutu rebel group, which supported the Kinshasa government in its fight against other rebels, including the notorious M23 movement, seems ready 'after 20 years of preying on the civilian population'[2] to enter a politically negotiated settlement. Since more often than not, the activities of ANSAs – rebels, insurgents, warlords, mercenaries, or terrorists, to name but a few – have amounted to the crimes enumerated in the 1998 Rome Statute Establishing the International Criminal Court (ICC),[3] the process of reintegrating the DFLR fighters within society, if it materialises at all, will be a bumpy one. Amongst other things, it may involve the ICC, which to this date has directed its investigations and prosecution exclusively against African heads of state and African (largely politically) recognised rebel groups, consequently 'gaining' the African reputation of the 'African Criminal Court'.[4]

Much of the questionable level of compliance by African states with their ICC obligations, and the legitimacy deficit of the Court, is attributable to the compromise reached in the

[1] Gal-Or, Noemi (2010). 'Observations on the Desirability of an Enhanced International Legal Status of the Non-State Actor', in Math Noortmann and Cedric Ryngaert (eds.), *Non-State Actor Dynamics in International Law: From Law Taking to Law Making?* Aldershot: Ashgate, 125–49, and this anthology in general; Non State Actors in International Law: Aims Approaches and Scope of Project and Legal Issues. First Report of the ILA Committee on Non-State Actors, The Hague Conference (2010), http://www.ila-hq.org/en/committees/index.cfm/cid/1023, accessed 11.07.2014; Non State Actors, Second Report of the ILA Committee on Non State Actors, Sofia Conference (2012), *id.*; Non State Actors, Draft Third Report of the ILA Committee on Non State Actors, Washington Conference (2014), *id.*

current formula of the Principle of Complementarity (PoC), the central jurisdictional provision in the Rome Statute establishing the Court's jurisdiction, as complementary to the primary jurisdiction of the State, to become effective only when the latter is unable or unwilling to exercise it. Indeed, the latter are typical of the sub-Saharan African legal situation, resulting in a half-hearted welcome to ICC justice 'from outside' or no justice at all. In this paper, I make a proposal designed to overcome this impediment by expanding the application of the PoC to also include the jurisdiction of regional courts. Here, the African Court on Human and Peoples' Rights[5] (African Court) serves as an example to elucidate the proposal.[6]

A similar idea proposed by Alexandra Huneeus considers the role the Inter-American Court for Human Rights could play in partnership with the ICC.[7] While Huneeus' argument centres on the practical legal aspects of mutual exchange of expertise and assistance, my argument requires back-tracking since it advances a legal doctrinal reasoning: Because the ICC and the extant regional human rights courts are constitutionally grounded in identical legal principles, they make 'natural' partners for the ICC. On this basis, I can criticise the apparent exclusivity introduced and maintained by the PoC, namely that it is wedded to the dual relationship of ICC and nation-state. Once this point is acknowledged, the numerous legal and political hurdles facing the transformation of the PoC into a three-pronged relationship can and must be addressed.

Against this background, my submission should be understood as constructive criticism. While the PoC represents the consensus possible at the time of drafting of the Rome Statute, and symbolises a step forward in the evolutionary process of international criminal law,[8] the Principle has, perhaps expectedly, proven incomplete. It is fallible not only when tested in practice, but rather already suffers from gaps in design prior to its application. The paper seeks to advance the logic sustaining the PoC by narrowing this chasm in support of the goals of the ICC. A study of the structure and processes and jurisprudential history of the African Court, as well as the role of the African Union (AU), serves to assess whether and under what conditions an expanded PoC might be applicable to Africa.

The Principle of Complementarity Verbatim, in the *Travaux*, and Interpreted

A discussion of the PoC verbatim, as displayed in the *travaux préparatoires*,[9] and subsequently as interpreted, is a good place to begin. The Rome Statute establishes the PoC in Paragraph 10 of the Preamble and in Article 1, and further elaborates on it mainly in Articles 17, 18, and 19 on admissibility. Paragraph 10 of the Preamble '[e]mphasiz[es] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'. Article 1 reiterates this language. Accordingly, the State maintains primary jurisdiction over a case. Pending certain conditions – State's unwillingness or inability to exercise its jurisdiction – only then does the jurisdiction of the Court become admissible. Note however, although the State has primary jurisdiction, it is the Court that determines admissibility in the first place. Article 17, 'Issues of admissibility', lists the substantive elements required for a determination of admissibility.

A review of the *travaux* portrays the PoC as both a Pandora's Box and a treasure trove. Its lack of clarity and determinacy invites inconsistent applications and judicial determinations, potentially perceived as discriminatory practice of the Court and therefore source of adverse political fallout. For the same reason, however, its ambiguities stimulate debate, hence concretisation and, in turn, legal development. Among the issues to flesh out is, for instance, the relationship between Court and national criminal jurisdiction. A matter which arose frequently throughout the drafting process, this fell short in addressing important relevant issues. One cardinal reason for these gaps is the fact that the drafters of the Statute lacked the time to thoroughly consider the proposed procedural system in its entirety. There is now more time to address the PoC's inherent exclusivity, limiting the choice of jurisdiction as between two actors only – the State and the Court.[10]

Scholars and legal professionals have drawn attention to the Statute's various shortcomings as well as criticized the Court's performance. The centrality of complementarity in the only permanent international criminal court has figured prominently in the debates raising a host of interpretive challenges. One problem concerns the triggering procedure activating the ICC's potential jurisdiction. Because it is an extremely complex procedure, it is fraught with uncertainty likely to produce inconsistencies in the application of the law. In rivalling interpretations the ICC jurisdiction is posited as subsidiary rather than complementary to the jurisdiction of the national court, or rather in contrast – as Hector Olásolo maintains – '"a watchdog court" that will take over when it considers that the national courts are not up to their job [...]'.[11]

Interpretative approaches also vary concerning the PoC directly. While the 'negative' approach considers the ICC's jurisdiction as decidedly limited to situations where the State refuses or is unable to exercise its jurisdiction, the 'positive' interpretation views the condition of unwillingness or inability as applicable only where there is conflict between the ICC and national criminal jurisdictions.[12] Another important difficulty pertains to the PoC's internal logic regarding the role of the Security Council (UNSC) in this attendant procedure.[13]

[2] McCormick, Ty (2014). 'Will Congo's Rebels Finally Come in From the Cold?', *Foreign Policy*, 10 July, http://www.foreignpolicy.com/articles/2014/07/10/will_congo_rebels_finally_come_in, accessed 5.08.2014.

[3] Rome Statute, A/CONF.183/9, United Nations Treaty Series, Vol. 2187, No. 38544, adopted 17 July 1998, entered into force 1 July 2002, http://treaties.un.org, accessed 11.07.2014.

[4] Abiew, Francis K., and Gal-Or, Noemi (2015). 'International responsibility of the NSA in International Law: Is there a Case for an African Approach?', in Noemi Gal-Or, Math Noortmann, and Cedric Ryngaert (eds.), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings*, Leiden: Koninklijke Brill NV., forthcoming.

[5] The successor African Court of Justice and Human Rights has yet to be established.

[6] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ('Protocol for Establishment of an African Court'), CAB/LEG/665, adopted 9 June 1998 and entered into force 1 January 2004, http://www.achpr.org/instruments/court-establishment/, accessed 11.07.2014.

[7] Huneeus, Alexandra (2013). 'International Criminal Law by Others: The Quasi-criminal Jurisdiction of the Human Rights Courts', *American Journal of International Law* 107 (1): 1–44.

[8] Schabas, William A. (2009–2010). 'Victor's Justice: Selecting "Situations" at the International Criminal Court', *The John Marshall Law Review* 43: 535–52.

[9] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998, Official Records, Volume II; Summary records of the plenary meetings and of the meetings of the Committee of the Whole & Volume III, Reports and other documents, 2002, http://legal.un.org/icc/rome/proceedings/contents.htm, accessed 11.07.2014.

[10] Cassese, Antonio (2004). *The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality*, Oxford: Oxford University Press.

[11] Olásolo, Hector (2005). 'The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of the Office of the Prosecutor', *International Criminal Law Review* 5: 121–46.

[12] Akhavan, Payam (2005). 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court', *American Journal of International Law* 99 (2): 403–21; Hansen, Thomas Obel (2012). 'A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity', *Melbourne Journal of International Law* 13: 187–217.

[13] Schabas, William A. (2009–2010). 'Victor's Justice: Selecting "Situations" at the International Criminal Court', *The John Marshall Law Review* 43: 535–52.

The implementation of the complementarity regime was addressed by an informal expert paper commissioned by the ICC and released soon after the Court's establishment. It identified two guiding principles – partnership and vigilance – which, to be sure, are extremely important, as they open up the complementarity regime to opportunities likely to exceed those which were foreseen and intended by the drafters of the Rome Statute. As we will see later, partnership is not unequivocal. The Office of the Prosecutor (OTP) itself noted that while the ICC was a *criminal* court, 'human rights standards may still be of relevance and utility in assessing whether the [national] proceedings are carried out genuinely'.[14] Regional *human rights* courts, notably the African Court, may thus consider their jurisdiction to be 'less' circumscribed in matters of international criminal law (ICL).

[14] ICC-OTP (2003). *The Principle of Complementarity in Practice*, Informal Expert Paper, 8–9, http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf, accessed 11.07.2014.

The Substantive Foundations of the Principle of Complementarity

It must be noted that the term 'complementarity' does not appear, and is not defined, in the Rome Statute, which gave birth to it, and to which the term so far is *sui generis*.[15] Arguably, the drafters have been wise to refrain from limiting the yet-to-mature idea underlying 'complementarity', thus inviting further development. Certainly, the idea of legal substitution which lies at the foundation of the notion of complementarity is not new to ICL.[16] It is well-established in the principle of *aut dedere aut judicare* – either extradite or prosecute, stipulating a State's duty to extradite when choosing not to prosecute and is common to treaties on extradition and mutual assistance in criminal matters and multilateral conventions addressing international crimes. Furthermore, *aut dedere aut judicare* is reenforced in the notion of universal jurisdiction, the latter captured most conspicuously in the ICC's raison d'être. In fact, the PoC takes these ideas one step further and stipulates 'either national prosecution or admissibility', leaving the choice to the custodial State. My argument adds another dimension to this reasoning, namely, that the PoC can be expanded, under certain conditions, to also include regional and sub-regional courts' jurisdiction as an *intermediary* level of adjudication; Africa may offer the first, and most appropriate, test case, and here is why.

[15] Newton, Michael A. (2010). 'The Complementarity Conundrum: Are We Watching Evolution or Evisceration?', *Santa Clara Journal of International Law* 8 (1): 115–64.

[16] Kress, Claus (2009). 'Reflections on the *Iudicare* Limb of the Grave Breaches Regime', *Journal of International Criminal Justice* 7: 944–48; Bentekas, Ilias (2010). *International Criminal Law*, 4th ed., Oxford: Hart.

The African Shift in Attitude towards the ICC: Issues of Compliance and ICC Effectiveness

The attitudes of African governments, the elites in various African states that have attracted the ICC's attention, and of the AU are critical to my argument due to the salience of Africa in the ICC's work. The quickest to sign and ratify the Rome Statute, African states represent a majority group among both the ICC member states and African states joining the court. They also represent the states against which the ICC has issued almost all of its indictments to date, and the first and only case for which a conviction has been rendered (currently under appeal). Against this background, a wide chasm has been opening where early African support for both ICL and specifically the ICC has mutated into a direct anti-ICC assault. In practice, the ICC's work has met with resistance, even obstruction, as well as attack by academics associated with Africa. African malcontent has been gaining steam, aimed to a large extent at the OTP but also at the UN Security Council. In 2010, concerned about the Court's political impartiality, the AU brought a proposal for political guidance to the OTP intended to increase transparency and accountability in its office, and ensure the widest political support possible. It sought to amend a certain Statute provision so as to empower the UN General Assembly, next to the Security Council, in the judicial process.[17] However, it falls short of addressing a cardinal condition for the successful implementation of the PoC, which is the domestication of the Statute of Rome Regime, to which I now turn.

[17] African Union: Amendment to Rome Statute of International Criminal Court Sought, Law Library of Congress, http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401816_text, accessed 11.07.2014.

Issues Concerning the Domestication of the Statute of Rome Regime

The domestication of the PoC suffers from tension inherent in the *dualist* PoC deriving from several key problems. These revolve around the 'impunity gap' and proposed mechanisms to close it contrasting international *ad hoc* and internationalized courts with other solutions. The 'impunity gap', which according to the first ICC Chief Prosecutor[18] is represented in the unwelcome scenario wherein prosecution efforts centre on offenders bearing the greatest responsibility for the crimes while leaving other perpetrators out of justice's reach. Ironically, quite the opposite has been happening as precisely those bearing the heaviest responsibility have managed to escape justice. This widened the impunity gap beyond all anticipation, attracting considerable attention to the human rights aspects of ICL, in particular the universality of human rights, which human rights treaties as well as the Rome Statute are designed to protect. Scholars united in the aspiration of seeing these values universally embraced and resilient against short-term political interests of the State may have been divided concerning the road leading to this outcome. Yet their State-oriented focus has failed to distinguish itself from that underlying the logic of the Rome Statute, the chief difference being their emphasis on the practical grounds justifying the

[18] ICC-OTP (2003). Paper on Some Policy Issues before the Office of the Prosecutor, http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf, accessed 11.07.2014.

primacy of national criminal jurisdiction rather than legal formal, and sovereignty, reasons.

The proposed solutions to close the impunity gap have varied, ranging along several continua including international universal to local-global mechanisms, Western to non-Western and traditional, formal institutionalized to informal, and so on. Almost intuitively, experts have chosen to compare the ICC with internationalized (hybrid) courts and *ad hoc* international courts.[19] Although the establishment of the ICC was to render these courts superfluous (they have been diagnosed with many weaknesses), where the national criminal jurisdiction is either unwilling or unable to perform its Rome Statute duty, and the ICC is prevented from exercising its jurisdiction, an internationalized (hybrid) criminal court may prove a fallback solution. Note that State cooperation with internationalized adjudication does not contradict the goal of the Rome Statute which encourages the joining of forces by the ICC, national judicial authorities, and victims where the circumstances warrant the establishment of ICC jurisdiction. Indeed, the ICC has been seeking State cooperation by emphasizing the importance of partnership among the various stakeholders.

[19] Benzig, Markus, and Bergsmo, Morten (2004). 'Some Tentative Remarks on the Relationship Between Internationalized Criminal Jurisdictions and the International Criminal Court', in Cesare P.R. Romano, Andre Nollkaemper, and Jann A. Kleffner (eds.), *Internationalized Criminal Courts and Tribunals*, Oxford: Oxford University Press, 407–16; Pellet, Alain (2004). 'Internationalized Courts: Better Than Nothing…', in Cesare P.R. Romano, Andre Nollkaemper, and Jann A. Kleffner (eds.), *Internationalized Criminal Courts and Tribunals*, Oxford: Oxford University Press, 437–44.

Other Mechanisms

But besides the judicial system, there are other, non-judicial mechanisms available to ascertain the individual's international criminal responsibility, and determine its consequences such as 'non-criminal' or non-retributive forms of justice. These feature as potential critical rings in the noose tightening around the neck of perpetrators of grave international crimes; they are also designed to diminish, even eliminate, the impunity gap both domestically and world-wide. To be sure, it is already established that these forms of socio-political engagement with international crimes must inform ICL, as can be seen from the mere fact that a relevant discourse has already been taking place for a considerable period of time. The question is thus whether they can be incorporated within the PoC, and if so how? If so, they may consequently contribute to the concurrent authenticity and global nature of international law. I turn next to this question which lies at the heart of my argument.

The Expanded Application of the Principle of Complementarity

I started this paper by positing that the PoC may benefit from an extension from a dualist to a three-pronged complementarity architecture. An important attribute of the regional and intermediary jurisdiction is its capacity to also assimilate non-judicial mechanisms within a *prima facie* judicial body. This

has been one of the growing attractions of regional justice institutions, among them the African Court, the latest court to be established next to the two other major regional human rights courts – the European Court of Human Rights and the Inter-American Court of Human Rights. On paper, the African Court is the most progressive, for its constitution is set in the most recent state of the art of international human rights law. While this re-routing of justice has its limits, regional courts may become increasingly appealing as 'mediating agents' also for ICL by offering to bridge over the multifaceted distance separating national courts and the ICC when seeking to implement the law. Their potential depends on the interpretation of the idea of partnership introduced in the Rome Statute itself, in Article 87 Requests for cooperation: general provision. Paragraph 6 reads: 'The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate'.

The cardinal question concerns the circumstances under which a regional court may be considered as better placed than either a national court or the ICC to hear a Rome Statute case or situation. In other words, are there instances where a regional court should have de facto jurisdictional primacy over that of the national court and ICC? This is primarily a non-legal question. The response will lie in the cultural, social, political, institutional (including capacity), and other conditions at hand. It will have to satisfy many of the legitimacy and effectiveness concerns raised in connection with internationalized and international courts including the ICC. Regional courts reflect regional norms and are oriented to serving a specific public. Whilst reaffirming international norms, they also carve out a regional legal niche.

Bringing the regional courts into the PoC also raises the controversial and important question whether, in the absence of regional *criminal* courts *per se*, regional human rights courts legally qualify *ratione materiae* as judicial instances to handle ICL offenses, which in the ICC case are the most heinous ones.

Another facet of the regional court's role pertains to the relationship between international organisations, here the regional court and the ICC. How will the ICC's and a regional court's architectures and legal practices interface? The regional court could be considered as a local interpreter for the ICC. It may enhance ICL's, and possibly also the ICC's, regional and local legitimacy, thereby diffusing political tensions associated with a 'foreign' court's operations. The ICC's administration and jurisprudence may consequently be enriched by the Court's interaction with the regional court.[20] By shouldering some of the ICC's workload, the regional court may contribute to the eventual reduction in the ICC's dockets. Furthermore,

[20] Huneeus, Alexandra (2013). 'International Criminal Law by Others: The Quasi-criminal Jurisdiction of the Human Rights Courts', *American Journal of International Law* 107 (1): 1–44.

regional courts may mediate not only as adjudicative competences assisting in ending the impunity gap but also as trainers in national law reform and builders of national legal capacity, ultimately cultivating the very important relationship between the regional court and its member states.

Global Justice Institutions and National Cultures: Representing and Remembering Mass Atrocities[1]

Joachim J. Savelsberg

[1] This essay draws on data collection funded by the National Science Foundation of the United States (Grant No. SES-0957946). For details see Savelsberg, Joachim J. (forthcoming). *Repräsentation von Massengewalt: Internationales Strafrecht, Humanitarismus, und Diplomatie zu Darfur*, Frankfurt: Vittorio Klostermann Verlag. [English version forthcoming with University of California Press]. It summarizes a lecture prepared during my fellowship at the Käte Hamburger Center for Advanced Studies 'Law as Culture', Bonn, during the 2013-14 academic year. I thank Werner Gephart, its director, for his generous support, and also for his encouragement of my contribution to discussions at the 'sister center' in Duisburg. I thank the organizers, Noemi Gal-Or and Birgit Schwelling, for the invitation to contribute.

Introduction: Global Cooperation, the ICC and Human Rights

In 1998, cooperation across a large number of countries produced the Rome Statute, the foundation of the International Criminal Court (ICC) in The Hague. By 2002, enough countries had ratified the Statute for the ICC to be established. Their number has since increased to above 110. The ICC is the first permanent international criminal court in human history.

The ICC joins foreign and domestic courts to contribute to the 'justice cascade'[2], a new and growing trend toward attribution of individual criminal liability to perpetrators of grave human rights violations. Importantly, domestic courts now operate under the shadow of the ICC. Its mere existence is likely to encourage domestic enforcement as most countries prefer cases to be handled locally. What is crucial here is the ICC doctrine of complementarity – it can only take up cases if domestic courts are unable or unwilling to do so.

Due to the novelty of institutions such as the ICC, we know little about the consequences of global cooperation in the context of criminal justice. Here I am concerned with potential effects of ICC interventions on the collective representation of mass violence. By collective representations (or memory) I mean notions of current (or past) events that are shared, mutually acknowledged and reinforced by a collectivity, through rituals and symbols, which Emile Durkheim or Maurice Halbwachs

emphasised, or documents, on which Karl Mannheim focused. Specifically, I ask: What forms and degree of violence are acknowledged and reported? How is violence framed: as civil war, as a humanitarian catastrophe, or as state crime? What bridging strategies to past atrocities are applied to shed light on current violence? Does ICC intervention affect acknowledgement and framing, as earlier work on human rights trials and representations suggests?[3] To what degree does such a global institution impress a global script or representation on civil societies around the globe? World polity theorists in the mould of Stanford's John Meyer would be optimistic, while neo-Weberian scholars might suggest caution in light of nation-specific institutions, carrier groups and cultural sensitivities. Let us consider the case of the mass violence in the Darfur region of Sudan and patterns of representation after ICC intervention.

The Case of Darfur and Interventions

The first decade of the 21st century witnessed a massive wave of violence in Darfur. In February 2003, two major rebel groups attacked Sudanese government forces. The Khartoum government, in collaboration with militias (Janjawid) whom it equipped and mobilized, retaliated with massive force – not just against the rebels, but also against the civilian population of three predominantly pastoralist groups, the Fur, Zaghawa and Masalit, from which the rebels were recruited. On September 18, 2004, UN Resolution 1564 established an International Commission of Inquiry on Darfur; and in January 2005, this commission delivered its report to General Secretary Kofi Annan, concluding that the Sudanese government had committed serious offences against human rights and humanitarian law but not genocide. Two months later, the United Nations Security Council (UNSC) referred the Darfur case to the ICC. After investigation, the ICC Prosecutor applied for an arrest warrant against two mid-level actors (February 2007) and the ICC issued a warrant three months later. The Prosecutor further applied for an arrest warrant against Sudanese President Omar al-Bashir for crimes against humanity, war crimes, and genocide (July 2008); the court initially issued an arrest warrant for crimes against humanity and war crimes (March 2009) and later also for genocide.

An Empirical Exploration: Media Analysis and Interviews

To explore the effect of interventions, I collaborated with a group of research assistants to establish a media data set. Newspaper articles from fourteen prominent liberal and

[2] Sikkink, Kathryn (2011). *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, New York, NY: Norton.

[3] E.g., Alexander, Jeffrey C. (2004). 'On the Social Construction of Moral Universals: The "Holocaust" from War Crime to Trauma Drama', in Jeffrey C. Alexander et al. (eds.), *Cultural Trauma and Collective Identity*, Berkeley, CA: University of California Press, 196–263; Pendas, Devin O. (2006). *The Frankfurt Auschwitz Trial, 1963–65: Genocide, History, and the Limits of Law*, Cambridge: Cambridge University Press; Savelsberg, Joachim J., and King, Ryan D. (2011). *American Memories: Atrocities and the Law*, New York, NY: Russell Sage Foundation.

conservative papers were selected using a stratified random sampling strategy. We conducted content analysis of the total sample of 3,387 articles. Dependent variables are constituted by indicators that measure degrees and types of acknowledgment of victimization and suffering; causes; responsible actors; frames (insurgency, civil war, humanitarian emergency, aggressive state and criminal state) through which the violence is interpreted; and references to past atrocities. Each value was associated with a quantitative code, and a statistical data set was established.

In addition, more than fifty in-depth interviews and conversations with Africa correspondents, representatives of NGOs, and policy makers from state departments yielded information on the social fields in which knowledge was generated and the dispositions of actors in these fields. Interviews followed the same thematic structure as the content analysis scheme.

Countries included in the analysis are the United States, Canada, the United Kingdom, Ireland, France, Germany, Austria, and Switzerland.

Representations of Darfur between the Global and the National

Both scholars who stress globalization of cultural forms and those who focus on nation-specific filtering of global messages find support in our data. Findings go further though, as they illuminate specific mechanisms that enhance global narratives and cause nation-specific departures from global scripts.

Globalizing Forces 1: Micro-mechanisms

One globalizing force in media depictions of the violence in Darfur can be found at the micro-level of analysis. It takes the shape of cosmopolitan local media networks in which Africa correspondents are interconnected. Note that most Western Africa correspondents are located in a few places such as Nairobi or Johannesburg from where they cover the entire continent. It is thus easy (and necessary) for journalists to exchange information with colleagues, as the following quotation from an interview illustrates:

> 'In Nairobi … you sit down with colleagues to learn from others who have just been to an area what things look like out there. There is quite a lively exchange of experiences and information – and that certainly also leads to some kind of opinion formation … Often that is not possible in Africa in any other way. As a single person one cannot … charter a plane … The trip to North

East Congo included journalists from the US, the UK, Switzerland and Germany.'

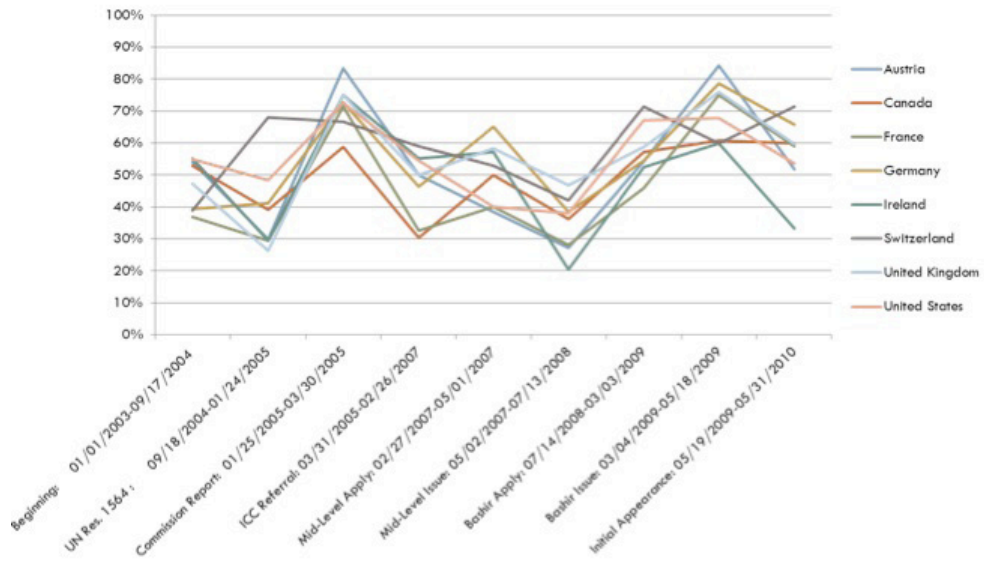
The same interviewee later refers to a foreign correspondents' club where he encountered journalists from a diversity of countries. But exchanges also take place in homes, restaurants and bars. Journalistic networks further extend to representatives of international NGOs. Note that INGOs are distributed much more densely across the continent. Their representatives in places such as Nairobi thus have direct access to information in a diversity of African countries. Importantly, such cosmopolitan local media networks are likely to have a homogenizing effect on representations of mass violence across Western countries.

Globalizing Forces 2: Macro-mechanisms

All Africa correspondents, when asked about crucial sources of information, cited reports by major INGOs (e.g., Human Rights Watch, International Crisis Group, Amnesty, Médecins sans Frontières) and by those news media that have many more resources on the ground in Africa than they themselves do, especially the BBC, CNN, and the New York Times. Journalists further make use of reports by the United Nations and its sub-organizations, and they take note of actions taken on the conflict in Darfur by international organizations, including the ICC.

The latter point is reflected in Figure 1, which depicts the likelihood that articles cite the crime frame (versus competing frames) when they address the Darfur conflict. The likelihood is shown for eight time periods that are separated by the points of intervention. We find peaks of uses of the crime frame at specific points, including the submission of the report by the International Commission of Inquiry, the application for an arrest warrant for two mid-level actors and the application for and issuing of an arrest warrant against President Omar al-Bashir. Importantly, some variation notwithstanding, the graphs for different countries develop mostly along parallel paths. Multivariate, two-level (country and article) hierarchical analyses confirm the causal force of these interventions on the criminalizing framing of the violence and on the application of the term genocide.

Figure 1: Percentage of media articles citing the crime frame in reporting about Darfur



And yet, while graphs of different countries show similar upturns and downturns, they move at different levels. Some countries' media are more likely to cite the crime frame than those of others. Three brief case studies highlight potential conditions for country-specific patterns.

Country-specific patterns 1: United States

In cross-national comparison, the United States stands out as a strong promoter of a criminalizing definition of the violence in Darfur (76 per cent of opinion pieces versus 58 per cent average; 54 per cent of reports versus 49 per cent average). Yet more drastic is the difference regarding uses of the term genocide (62 per cent in US opinion pieces versus 34 per cent; 31 per cent in articles versus 19 per cent). American media contributions also most often reference the Holocaust (21 per cent of all instances of bridging efforts). Consider, for example, op-ed pieces by Nicholas Kristof, when he writes about 'Sudan's Final Solution'[4] or when he entitles another piece 'Africa's Brutal Lebensraum'[5] and writes: 'As in Rwanda and even during the Holocaust, racist ideologies sometimes disguise greed, insecurity and other pathologies. Indeed, one of the genocide's aims is to drive away African tribes to achieve what Hitler called Lebensraum: "living space" for nomadic Arabs and their camels.'

Several structural and cultural particularities are candidates for an explanation for this American exceptionalism.

[4] *New York Times*, 19 June 2004, Sec A, 17.

[5] *New York Times*, 14 March 2006, Sec A, 27.

The first is its strong civil society. While not always mobilized in cases of mass atrocities abroad, its potential is high when carrier groups are affected. In the Darfur case the African-American caucus on Capitol Hill became mobilized (as victims were perceived as 'black' Africans); also conservative evangelical Christians, an important constituency for President George W. Bush at the time, due to their missionary work in Sudan (albeit Southern Sudan); and liberal Jewish groups after the United States Holocaust Memorial Museum (USHMM) had issued a 'genocide alert'. They co-initiated the Save Darfur movement, a coalition of some 200 civil society organizations. Media reporting, social movement activities and subsequent statements by President Bush and his Secretary of State Colin Powell who defined the violence as genocidal early on converged – not surprising in light of the relatively porous boundaries between state and society in the United States.

Country-specific Patterns 2: German Reluctances Regarding 'Genocide'

German media reports, while also favouring the crime frame, are substantially more reluctant to applying the term 'genocide' to the violence of Darfur (for opinion pieces 24 per cent versus 34 per cent on average). Interviewees suggested cognitive and normative prohibitions. German journalists are also much more cautious in the use of analogical bridging to the Holocaust. Only nine percent of all such references to other mass atrocities refer to the Holocaust. This includes bridging challenges like that in the *Süddeutsche Zeitung* where Alex Ruehle quotes Robert Stockhammer's critique of comparisons between the Rwandan genocide and the Shoah: 'Here something is compared with that which is synonymous with the incomparable'.[6]

Interviewees highlight culturally rooted restrictions regarding the use of the term genocide of a cognitive and a normative nature. One Africa correspondent reported that after placing the Holocaust under the category of genocide, he had a hard time fitting a case like Darfur under that same category. Further, the director of a Holocaust-related memorial museum, son of an Auschwitz survivor, responded in this way to my question why German memorial sites do not do what the USHMM does: raise warning signs when mass atrocities are about to happen, and I paraphrase: 'The Americans can do that. As Germans we would be accused of relativizing the Holocaust.'

Country-specific Patterns 3: Irish Reluctances

Ireland's representation of the violence in Darfur contrasts with the American pattern. Here both the crime frame and the genocide label are used more sparingly than in the other countries. I found similar caution in interviews in Dublin's Department of Foreign Affairs (DFA). Instead, interviewees highlight the aid focus of Irish foreign policy: 'We always point to the history of our aid program … We got a little bit more weight in Sudan when we say we come particularly for the delivery of humanitarian aid.' Such policy orientation, which according to interviewees is rooted in Irish collective memory of extreme poverty and famine, has consequences for positions toward criminal justice responses to the violence, as illustrated by the following statement from a DFA interview:

> 'Ours is an impact lens rather than a causality lens … It has always troubled me with regards to the likes of the ICC and how one attributes responsibility … It wasn't a clear cut situation, because nothing in Sudan is … [Since ICC interventions] certainly the situation on the ground has deteriorated … Sudan would certainly not be alone if the impunity road was taken.'

Respondents also report about a working group within the DFA on lessons from the Northern Ireland conflict. Amnesty, according to one of the conclusions, has proven more helpful in putting an end to the bloodshed than criminal prosecution and imprisonment. In the Irish case, collective memory thus appears to promote a foreign policy that is focused on foreign aid, thus dependent on the cooperation of repressive governments, and consequently adverse to dramatizing and criminalizing definitions of mass violence. Again, multivariate, multilevel (country and article) analyses confirm this relationship between humanitarian aid focus and such reluctance.[7]

Conclusions: From global judicial interventions to collective representations

What do we learn from this nutshell summary of a much larger research agenda?

First, global judicial messages affect representations globally, as the universal increase in uses of criminalizing frames after certain ICC interventions indicates. Durkheimian notions and World Polity school arguments about the power of global scripts find support.

Yet, second, different countries' media apply the criminalizing frame and the genocide label at different levels. Interviews and statistical analyses indicate how nation-specific cultural sensitivities, policy preferences, carrier groups and civil society-state linkages may account for such variation, in support of neo-Weberian arguments.

[6] *Süddeutsche Zeitung*, 10 May 2005, 16.

[7] Savelsberg, Joachim J., and Nyseth Brehm, Hollie (forthcoming 2015). 'Representing Human Rights Violations in Darfur: Global Justice, National Distinctions', *American Journal of Sociology* 121 (2).

Finally, the optimism that scholars and practitioners such as Kathryn Sikkink (2011) invest in the justice cascade finds confirmation in the neo-Durkheimian patterns identified above. Yet skeptics will highlight the weight of competing fields and global-local interactions within fields. It is yet an open question whether such filtering of the flow from global to local levels weakens the role of global justice institutions or if it provides them with the flexibility needed to maintain legitimacy across countries.

Compromise Justice? Transitional Justice, Reconciliation, and the Role of the International Community in Croatia

Nicole Renvert

On August 28th 2014, the German Government stated at a conference in Berlin that the Western Balkan States, among them European Union (EU) members Slovenia and Croatia, but also Serbia, Bosnia Herzegovina, Montenegro and Albania, have made impressive progress with respect to stability, modernization and reform.[1] But one of the most challenging issues is still the question of transitional justice and how to come to terms with the past in these post-conflict societies. This theme affects the overall development of the region and its healing from within. This paper explores how Croatia has dealt with transitional justice and reconciliation. It also discusses whether global cooperation contributed to a 'compromise justice'.

'Transitional justice' refers to 'the establishment of tribunals, truth commissions, lustration of state administrations, settlement on reparations, and also political and societal initiatives devoted to fact finding, reconciliation and cultures of remembrance'.[2] Its core elements are criminal prosecution, reparations, institutional reform of state institutions, such as armed forces, police and courts, and the setting up of 'Truth Commissions' or 'Reconciliation Commissions'. Transitional justice here does not refer to legal measures only but has a broader meaning. It includes the recognition of victims,

[1] Press release *Abschlusserklärung des Vorsitzes zur Konferenz zum Westlichen Balkan*, 28 August 2014, Berlin, http://www.bundesregierung.de/Content/DE/Pressemitteilungen/BPA/2014/08/2014-08-28-erklaerung-westbalkankonferenz.html, accessed 31.08.2014.

[2] Fischer, Martina, and Petrovic-Ziemer, Ljubinka (eds.) (2013). *Dealing with the Past in the Western Balkans: Initiatives for Peacebuildung in Bosnia-Herzegovina, Serbia and Croatia*, Berghof Report No. 18, Berlin: Berghof Foundation, 20.

promotion of civic trust and the strengthening of the democratic rule of law.

In 1991, Yugoslavia broke into different parts and was at war until 1995. What made it unique became its biggest challenge in the 1990s: its multinational identity and the peaceful coexistence of Croats, Serbs, Bosnians, Christians, Orthodox and Muslims. The notion of 'ethnicity' would be turned half-circle to be used as a weapon for segregation, territorial dispute and socio-political divide.[3] The break-up of Yugoslavia resulted in one of the most tragic civil wars of the 20th century. Numbers vary significantly: it is estimated that between 25,000 to 329,000 people lost their lives, and over two million were displaced.[4] In 1995, the Dayton Peace Agreement had brought an end to the fighting, but new challenges lay ahead: How could peace and security be maintained? How could victims of war be compensated? How could justice be done? How could policy makers satisfy demands for justice, both at home but also at an international level?

With the Dayton Peace Agreement ending the war, the many different groups with their particular cultural heritage and religious beliefs had to continue to live within the boundaries of the former Yugoslavia, but in newly created states, with new borders cutting across ethnic and religious lines, and individuals acquiring new citizenships. Certain groups became a minority, often deprived of their previous legal rights. Others became the majority, privileged and with a new claim to power. The ensuing territorial disputes still remain a source of conflict today. Bad governance, inefficient bureaucracy, corruption and a difficult economic situation plagued by high unemployment were and still are obstacles to the peaceful development of the Balkan region. The issue of justice affects the social cohesion in the region as a whole.[5]

Overall, European integration and EU membership were and still are seen as a way out of this dead-lock situation.[6] This view is widely shared by the EU[7] and its international partners, but also by members of the governments of the Western Balkans[8] and the population at large[9]. But first, the political leadership in the newly created countries had to fulfil an extensive list of obligations and comply with rules set by international institutions, such as the International Criminal Court for the former Yugoslavia (ICTY), the Organisation for Security and Cooperation in Europe (OSCE) or the Office of the High Representative (OHR) in Bosnia and Herzegovina and the so-called 'Bonn Powers'.[10] From the onset, the United Nations (UN), OSCE and various non-governmental organisations (NGOs) took part in this complicated process of post-conflict reconstruction in the Balkan states. The results and the success of these endeavours vary.

This article takes a look at how Croatia dealt with justice, re-building its society, reconstruction and reconciliation. The

[3] Kaplan, Robert D. (2005). *Balkan Ghosts: A Journey through History*, New York, NY: St. Martins Press.

[4] For recent numbers see ICTY, http://www.icty.org/, accessed 31.08.2014.

[5] Kosic, Ankica, and Tauber, Charles (2010). 'The Perspective of Reconciliation and Healing among young people in Vukovar (Croatia)', *International Journal of Peace Studies* 15 (1): 45–70; Ristic, Katarina (2012). 'Silencing War: War Crime Trials and the society in former Yugoslavia', *Südosteuropa-Mitteilungen* 52: 32–42.

[6] Rome Declaration of the Balkan Commission, http://www.bosch-stiftung.de/content/language1/downloads/Erklaerung_Balkan_Kommission.pdf, accessed 9.09.2014.

[7] Even though the speed of integration might vary, there is advocacy for EU membership. See e.g. Lippert, Barbara (2011). *EU-Erweiterung Vorschläge für die außenpolitische Flankierung einer Beitrittspause*, SWP-Studie, Berlin: Stiftung Wissenschaft und Politik,12–14, here: 7.

[8] Samun, Hajrudin (2013). 'Is the future of the Balkan with the European Union?', *Today's Zaman*, 28 March, http://www.todayszaman.com/news-316771-is-the-future-of-the-balkans-within-the-european-unionby-hajrudin-somun-.html, accessed 9.09.2014.

[9] *Perception of the EU in the Western Balkans*, Gallup Poll 2009, http://www.balkan-monitor.eu/files/Gallup_Balkan_Monitor-Focus_On_EU_Perceptions.pdf, accessed 9.09.2014.

country was chosen for three reasons: First, it seemed to have made a far-reaching transition from being an integral part of Yugoslavia to an active player in the Yugoslav War (1991–1995) to a new member of the EU in 2013. One could argue that Croatia is thus a success story of international cooperation. Second, Croatia has, unlike other countries in the region, a rather small percentage of minorities, which should have made it easier to satisfy justice requirements and effect reconciliation. Third, Croatia, unlike other war-affected areas, received substantial funding, resources, international attention and practical support for transitional justice and reconciliation. From 1990 to 1999, under the government of Franjo Tudjman, it enjoyed relative independence from external actors in its political decision-making processes. Bosnia, on the other hand, was a quasi-protectorate subject to the governance of the OHR. The latter had powers, for instance, to dissolve the parliament or overrule domestic institutions.[11]

Transitional Justice in Croatia as part of a framework for the Former Yugoslavia

Basic elements of the Dayton Peace Agreement were proposed in international talks as early as 1992, and further negotiations were initiated following the unsuccessful previous peace efforts and arrangements. The August 1995 Croatian military 'Operation Storm' and its aftermath, the government military offensive against the Republika Srpska, were conducted in parallel with NATO's (North Atlantic Treaty Organisation) Operation Deliberate Force. Efforts to end the war began in early fall 1995 and resulted in several agreements: The Erdut Agreement was signed on 12 November 1995 between the authorities of the Republic of Croatia and the local Serb authorities of the Eastern Slavonia, Baranja and Western Sirmium and aimed at the peaceful resolution of the war. The agreement was acknowledged in UN Security Council Resolution 1023, and paved the way to the establishment of the UN Transitional Authority for Eastern Slavonia, Baranja and Western Sirmium. This was followed by the Dayton Agreement signed in Paris on 14 December 1995 which was immediately followed by UN, OSCE and local human rights activists stressing the need for a legal process to address war crimes and gross human rights violations. In comparison with other post-conflict societies, the countries of the former Yugoslavia received significant funding from the international community to cope with the past. Efforts to facilitate a process of justice and reconciliation started early and from 1999 onwards, the 'Stability Pact for South Eastern Europe', accompanied efforts to foster security, peace, and economic development through various initiatives.[12]

[10] The term 'Bonn powers' refers to the Bonn conference in 1997, which outlined the exact mandate and the rights of the OHR such as the removal of politicians from power if they violated the Dayton Agreement.

[11] Szewczyk, Bart M.J. (2010). *The EU in Bosnia and Herzegovina: Powers, Decisions and Legitimacy*, Occasional Papers Nr. 83, Paris: European Union Institute for Security Studies, 35–7.

[12] For more information about the Stability Pact, see http://www.stabilitypact.org/, accessed 9.09.2014.

War crimes were mainly dealt with by the ICTY and in local war crimes prosecutions. In accordance with UN Resolutions 808 (1993) and 827 (1993), the Court was already established in The Hague in 1993 while the war in Bosnia-Herzegovina was still being fought. It gained greater relevance later on, following the EU insistence on the implementation of the Dayton Peace Agreement. Cooperation with The Hague Tribunal was a precondition for Balkan countries' accession to the EU. With support from the ICTY, the UN and the EU, war crimes tribunals were established in Bosnia, Croatia and Serbia. International experts monitored the return of refugees and displaced persons and called for property restitution, security sector reforms and the establishment of the rule of law. In addition, international organizations, donor countries and NGOs promoted measures to encourage a societal process of dealing with the past. But, as will be shown in more detail below, the Croatian case illustrates how important timing is and that pressure from outside can also slow down or even prevent cooperation. It also illustrates that without a 'carrot and stick' approach from outside, very little would have been done by the country itself to face its past.

In addition, the OSCE Mission to Croatia provided yet another venue to deal particularly with war crimes. After the signing of the Dayton Peace Agreement, parts of the country were governed under a UN mandate until 1998, to guarantee the safety of the Serb minority on the territory of Croatia. The mandate was taken over by the OSCE Mission to Croatia with a field presence of almost 1000 international and national observers. The Mission, which aimed 'to assist, advise and monitor' the situation in the country,[13] identified its main task as promoting reconciliation, the rule of law, and conformity with the internationally recognized standards.[14] It ended its job 15 years later, on 15 December 2011, with a small field presence remaining in Zagreb to support progress with the prosecution of war crimes. In pursuing its mandate, the OSCE Mission had to rely on the Croatian Government's willingness to cooperate. The latter, who had signed the 'OSCE Memorandum of Understanding' in 1996,[15] and committed itself to work on transitional justice by establishing local reconciliation commissions, however effectively failed to deliver on the promise. Efforts to implement these were regarded in Croatia as punishment of the Croatian people by the 'international community'. When, for example, a group of Croatian war widows were asked by international OSCE observers to stop blackmailing a local Serb politician and encouraged to seek a dialogue in their hometown instead, they answered: 'Where were you in 1991, when they dragged our sons and husbands out of the house? Did you come to protect us? And now you are asking us to sit down with murderers? Why do you force us to live with these people?'[16] Members of the local administration referred

[13] OSCE (2008). *Implementation of Police-Related Programs: Lessons Learned in South-Eastern Europe*, SPMU Publication Series Vol. 7, Vienna: OSCE, 10, http://www.osce.org/secretariat/35659?download=true, accessed 31.08.2014.

[14] Renvert, Nicole (2000). 'Encounter with Croatia', in Institute for Peace Research and Security Policy at the University of Hamburg / IFSH (ed.), *OSCE Yearbook 1999*, Baden-Baden: Nomos, 289–99.

[15] OSCE (2008). *Implementation of Police-Related Programs: Lessons Learned in South-Eastern Europe*, SPMU Publication Series Vol. 7, Vienna: OSCE, 10, http://www.osce.org/secretariat/35659?download=true, accessed 31.08.2014.

[16] Between December 1996 and July 2000, the author worked as Political Advisor and International Monitor to the OSCE Mission to Croatia and at the Kosovo Verification Mission. In this capacity, the author conducted more than 200 interviews with public officials and representatives from the Croatian civil society but also with victim organisations such as the War Widows of Lipik in Western Slavonia and in Vukovar. While Serb citizens of Croatia and individual Croats understood the importance of opening a dialogue about the war and its aftermath, the then-ruling elites hampered any efforts to institutionalize such a process, with few exceptions such as the Police Chief of the war-affected Pakrac-Lipik Police Force in Western Slavonia.

to the refusal of the population to enter any kind of dialogue with the Serb returnees when explaining why they did not see the point in forcing reconciliation assemblies on them.

Other initiatives that accompanied these efforts, such as local fact-finding centres, also proved of limited success after the war. Here, timing was crucial. While international actors supported reconciliation, provided funding and expertise, and pressed for the prosecution of war criminals, the government as well as local authorities in the war-affected regions of the country undermined the process for a long time, despite having signed international cooperation agreements (e.g. with the OSCE). Pressure to engage in transitional justice came from outside, not from within the Croatian society or from its political leadership.

Consequently, global cooperation in transitional justice was widely seen as undesired interference with domestic affairs. Three arguments were put forward: First, it was argued that timing was not right and pressure to reconcile came too early. Second, any incidents during the war were claimed to be the result of external aggression. Third, the war had allegedly shown that the 'international community' was unable to put an end to the fighting in due time and hence forfeited any right to demand cooperation after the war. However eventually, in 2003, Croatia set up new local war chambers to deal specifically with war crimes cases within the County Courts in Zagreb, Osijek, Rijeka and Split.

Croatia and Transitional Justice

Three phases characterize Croatia's global cooperation efforts: Resistance and victimization (1996–1999), de-politicization and restrained compliance (2000–2003), and political pragmatism (2003–2011).

Phase 1: Resistance and victimization (1996–1999)

In the first phase, under the Tudjman Government, cooperation with institutions such as the ICTY or the OSCE was rejected by the political elites and the majority of the Croatian population. Discrimination of minorities was a common pattern. For example, the Croatian Government refused to repeal legislation that was enacted during the war and which had allowed Bosnian refugees to take over houses left behind by fleeing Croat Serbs. Under President Tudjman, these Bosnians became Croat citizens and an important electorate for his ruling party, the Croatian Democratic Union (HDZ). After the war, the original Serb owners were left without remedy; they had no instance available before which to reclaim their property or obtaining compensation for their loss by the state. The

OSCE which brought this issue forward was unable to change the policy or effect progress with reconciliation. The Tudjman Government followed a contradictory policy: It invited international observers to monitor the peaceful transformation of Croatia but undermined any efforts to restore justice to its minority population. The 'Resolution on the Co-operation with the International Criminal Tribunal in The Hague' adopted by the parliament on 5 March 1999[17] illustrates this attitude: ICTY was accused of not prosecuting crimes committed against Croats and of taking a political stance against Croatia. According to the resolution, cooperation with ICTY was only accepted if it did not infringe Croatian national interests.

[17] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (1999). 'Sixth Annual report', in Joahn G. Lammers (ed.), *Hague Yearbook of International Law* 12, The Hague, 227–78, here: 254.

Phase 2: De-politicization and restrained compliance (2000–2003)

In the second phase, after the death of Franjo Tudjman in 1999, a coalition of six opposition parties won the elections. During the first months, there was some progress with respect to global cooperation, especially vis-à-vis ICTY. A number of state officials stated that Croatia would not oppose ICTY's investigations. Consequently, the Prosecutor's Office of the ICTY declared that it would withdraw its notification to the UN of a lack of co-operation which would have further harmed Croatia's reputation. But this phase did not last long, also because of negative reactions by the War Veterans, a group which was a strong political force in Croatia.[18]

Under Ivica Racan, the Social Democratic Prime Minister, cooperation with international institutions was still considered as an act of betrayal. Between 2000 and 2003, more than 65 per cent of parliaments were unwilling to support cooperation with The Hague.[19] Racan was thus in a difficult situation: On the one hand, from a domestic point of view, the extradition of General Ante Gotovina, accused of a number of very serious war crimes, but revered by many Croatian citizens as a war hero, was risky. On the other hand, in order to facilitate Croatia's access to the EU, something had to be done. Racan consequently initiated the 'Creation of the Croatian Republic and Homeland War Research Project', which was widely covered by Croatian and international media.[20] With this project, Racan could demonstrate that Croatia faced its past, but at the same time keep the topic out of politics. Croatia was seen to be facing its past while at the same time depoliticizing the issue of justice and reconciliation.

[18] Erözden, Ozan (2003). 'Croatia &/vs. ICTY: A Difficult Year of Co-operation', in: Yıldızhan Yayla'ya Armağan (Festschrift for Yıldızhan Yayla), Istanbul: Galatasaray Universitesi Yayınları, 293–306.

[19] Grodzky, Brian (2009). 'International Prosecutions and Domestic Politics: The Use of Truth Commissions as Compromise Justice in Serbia and Croatia', *International Studies Review* 11: 687–709, here: 698.

[20] Ibid., 699.

Phase 3: Political pragmatism (2003–2011)

The third phase was marked by Croatia's efforts to become a member of NATO and the EU. To achieve these objectives, the country had to show progress in cooperating with the ICTY. Thus, in compliance with the 2001 war crimes indictment of Ante Gotovina, Racan's successor, Ivo Sanader (2003–2008) called publicly for Gotovina's capture and provided intelligence to find him. Gotovina was arrested in December 2005 and, in 2011, was found guilty on eight out of the nine counts of the indictment. He and General Mladen Markač were sentenced to 24 years in prison. The responses of the Croatian population varied highly. There were signs of solidarity, because Gotovina was seen as a national hero. Croatian Prime Minister Jadranka Kosor said her government would 'use all legal means' to fight this ruling.[21] Under Kosor, (2008–2011) Croatia became a member of NATO in 2009, and signed the EU accession treaty in December 2011.

[21] 'War crimes court jails ex-Croatian general Ante Gotovina for 24 years', *The Independent*, 15 April 2011, http://www.independent.co.uk/news/world/europe/war-crimes-court-jails-excroatian-general-ante-gotovina-for-24-yrs-2268461.html?printService=print, accessed 9.09.2014.

'Compromise Justice'?

On 16 November 2012, the ICTY appeals panel found Gotovina not guilty on all charges. He was immediately set free and taken to Croatia on a Croatian government airplane. Croatia became a full member of the EU in July 2013.

The Croatian case shows that it took time and political leadership to comply with international obligations and to secure popular support for these decisions. It also shows that pressure from outside was necessary to make the country cooperate. It requires striking compromises internally to achieve goals externally. After Slovenia, Bulgaria and Rumania were accepted as new EU member states, Croatia faced a serious political crisis as it was negatively reviewed in the OSCE progress reports. As a result, Croatia went from denial of social and national responsibility, where it blocked any progress in transitional justice, through limited compliance, to political pragmatism. Croatia aimed at European membership and realized that it had to seek compromise with the EU and the OSCE, as well as working with the ICTY. The question however remains: Did this help to change the country from within? Cooperation with the ICTY is still seen by large parts of the population as a national defeat.[22] Since ethno-political conflicts now play almost no role in Croatia anymore as the Serb minority has decreased to an estimated 5 per cent,[23] Croatia could afford to reach out to its Serb citizens, not only for social cohesion in the country but also as an example for the region as a whole. Trust has to be carefully established and this can only be accomplished if justice is implemented. Reconciliation is an important part and it needs ongoing support by the political leadership in Croatia, not by civil society alone.

The international community should also learn a lesson on global cooperation from the Croatian example: First, transitional justice takes time and requires the cooperation of

[22] Despot, Andrea, Reljić, Dusan, and Seufert, Günter (2012). *Zehn Jahre Einsamkeit: Zur Überbrückung der Pause im Erweiterungsprozess der Europäischen Union sollten dem Westbalkan und der Türkei praktische Integrationsschritte angeboten werden*, SWP-Aktuell 23, Berlin: Stiftung Wissenschaft und Politik, 4.

[23] Osterberg-Kaufmann, Norma (2011). *Erfolg und Scheitern von Demokratisierungsprozessen, Fallstudien Albanien und Kroatien*, Wiesbaden: VS Verlag für Sozialwissenschaften, 69. Numbers vary but the number of Serbs in Croatia is substantially lower than before the war. The German Foreign Office used 4.4 per cent as a reference number. http://www.auswaertiges-amt.de/DE/Aussenpolitik/Laender/Laenderinfos/Kroatien/Innenpolitik_node.html, accessed 9.09.2014.

various actors. Second, too much pressure from outside might produce the opposite effect and deter a country away from taking responsibility on its own. Third, as among the community of Balkan states, the responsibility of each of them has to be admitted and owned. For too long, the Balkan states would blame each other for their lack of progress. While without 'compromise' it is difficult to attain justice, 'compromise justice' can only be a first step towards justice.

Time for a Transitional Justice Process in Syria

Radwan Ziadeh

Introduction

As Syria enters its fourth year of armed conflict, it is clear that violence propagated by the Syrian government, irregular militias, and the armed opposition has stretched the country to the breaking point, tearing to shreds the very fabric of Syrian society.

If one compares the conflict in Syria with other conflicts that have occurred throughout the world and have been labelled 'civil wars', it is clear that the term 'civil war' is far from the reality of the situation in Syria. In fact, Syria is in the midst of a popular revolution against an authoritarian regime. If we conduct a simple comparison of the number of victims in Syria with the number of victims in countries in which a civil war has actually occurred, in Peru, for example we can see that the conflict in Peru, which lasted for twenty years, from 1980 to 2000, and claimed more than 70,000 victims according to the final report of the Truth and Reconciliation Commission,[1] is nearly incomparable in its death toll to the 191,000 victims in Syria according to the UN during only the past four years.[2] The number of victims has risen from 1,000 per month at the start of the revolution to 5,000 per month today.[3] If Assad is allowed to continue his war against the Syrian people, and with the rise of Al-Qaida in Syria which has committed many war crimes and crimes against humanity against the Syrian citizens, the number of victims can be expected to exceed 250,000 at the end of this year.

It will not be possible to start a genuine process of transitional justice in Syria without a complete cessation of violence. As transitional justice experiences across the world have taught us, reconciliation is closely linked to the path of political transition, and it depends mainly on the political will and

[1] TRC, *Final Report*, http://www.cverdad.org.pe/ingles/ifinal/index.php, accessed 2.10.2014.

[2] UN News Centre (2014). 'More than 191,000 people killed in Syria with "no end in sight" – UN', 22 August, http://www.un.org/apps/news/story.asp?NewsID=48535#.VCw0c_ldUQM, accessed 2.10.2014.

[3] Tomlinson, Simon (2013). 'Syria death toll stands at 93,000, with 5,000 being killed every month, says the UN', *Daily Mail*, 13 June, http://www.dailymail.co.uk/news/article-2341000/Syria-death-toll-stands-93-000-5-000-people-dying-month-says-UN.html, accessed 2.10.2014.

vision of all the actors and the political forces on the ground. The launching of transitional justice processes can let victims feel that those responsible for committing crimes against them will be brought to justice and that the time of impunity is over. With the implementation of a transitional justice program, all Syrians, without exception, will feel that there is a path toward national reconciliation.

Many societies, particularly in Africa and Latin America, have experienced what Syria experienced in the 1980s and what Syria is experiencing today. But these societies were able to transcend the dark periods in their history by opening a new page based on truth, accountability, justice, and then reconciliation – so-called transitional justice. Transitional justice refers to a field of activity or investigation focusing on communities that have a legacy of human rights violations, genocide, crimes against humanity and war crimes designed to build a more democratic society for a secure future. The concept of transitional justice can be understood through a number of terms: social reconstruction, national reconciliation, establishment of fact-finding commissions, compensation of victims, and reform of the general institutions of the state often associated or suspected of association with those responsible for the commission of the crimes, e.g. the police, security forces, and the armed forces.

Transitional justice links two concepts: justice and transition. But the semantically accurate meaning of the concept is achieving justice during a transitional period experienced by a state.[4] This process occurred in Chile (1990), Guatemala (1994), South Africa (1994), Poland (1997), Sierra Leone (1999), East Timor (2001), and Morocco (2004). During the political transition following a period of violence or oppression in society, the community often finds itself burdened with the difficult task of addressing human rights violations. Therefore, it is the state that is called upon to deal with the crimes of the past in order to promote justice, peace, and reconciliation.[5] Government officials and nongovernmental organization (NGO) activists have preferred judicial and non-judicial avenues to address human rights crimes that use several approaches to achieve a sense of justice that is more comprehensive and far-reaching. These have included lawsuits for violations of individuals, as in Kosovo,[6] the establishment of fact-finding initiatives to address past abuses, as in Sierra Leone,[7] or a process of reconciliation specific to particular circumstances of divided societies, as in East Timor.[8]

The establishment of a culture of accountability, instead of impunity, gives a sense of security to the victims and sends a warning to those who are thinking of committing violations in the future. It also gives a measure of fairness with regard to the suffering of the victims, and helps to curb the tendency to practice vigilante justice or retribution. And it provides an important opportunity to strengthen the credibility of judicial systems by transforming those institutions suffering from corruption and destruction and that did not function properly in the past.

[4] Kritz, Neil (ed.) (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 vols., Washington, DC: United States Institute of Peace Press.

[5] Boraine, Alex, Levy, Janet, and Scheffer, Ronel (eds.) (1997). *Dealing with the Past*, Cape Town: Institute for Democracy in South Africa; Crocker, D.A. (1999). 'Reckoning with Past Wrongs: Normative Framework', *Ethics & International Affairs* 13: 43–61.

[6] The Timor-Leste Commission for Reception, Truth and Reconciliation, *Chega! The CAVR Report*, http://www.cavr-timorleste.org/en/chegaReport.htm, accessed 2.10.2014.

[7] Hayner, Priscilla (2002). *Unspeakable Truths: Facing the Challenge of Truth Commissions* New York, NY: Routledge; Zalaquett, José (1993). 'Introduction to the English Edition', in Chilean National Commission on Truth and Reconciliation (ed.), *Report of the Chilean National Commission on Truth and Reconciliation*, South Bend, Ind.: University of Notre Dame Press.

[8] For more on this, see Bassiouni, M. Cherif (ed.) (2000). *Post-Conflict Justice*, Ardsley, NY: Transnational Publishers.

Transitional Justice in the Middle of Conflict

Launching the transitional justice process in Syria is predicated on the regime's fall; it will be one of the most difficult and complicated processes that the Syrian community will then face. Taking into account the sectarian, religious, and political divisions in Syrian society today, it will be impossible for the Syrian judicial system to be ready to launch a domestic accountability process. However, there is the option of resorting to international justice. The crimes against humanity that have occurred in Syria since March 2011 certainly fall within the scope of work of the International Criminal Court. Such efforts may falter if Russia, with its position in the UN Security Council, prevents the referral of Syrian criminals to the Court. Nevertheless, should the Assad regime fall, it behoves on any future government to ratify the Rome Statute, which will enable the Office of the Prosecutor to open an investigation into these crimes.

The path of international justice is certainly not the ideal choice for Syria. It is too slow, and the process could be undermined through political compromises. Therefore, hybrid courts seem the best option for Syria and the Syrians. Hybrid tribunals held on Syrian territory and involving the direct participation of Syrian judges supported by international expertise, perhaps under the supervision of the United Nations, are superior to any other options because they grant ownership of the judicial process to Syrians while still ensuring that all international standards are upheld. Revenge will not be the goal of this process; the toughest standards of justice and international transparency must be guaranteed. The goal is not to target any specific religious or sectarian group and hold it accountable, but to establish a course of justice that can set solid foundations for the future of a just Syria. At the same time, hybrid tribunals will secure confidence of the international community in the new system and its commitment to justice and reconciliation, and the promise that there is no place for policies of revenge or retaliation within its program.

Transition and Transitional Justice

As mentioned above, transitional justice links two concepts: justice and transition, which put together mean achieving justice during a transitional period experienced by a state. Any

future transitional justice program in Syria should work to establish fact-finding and commissions of inquiry, allow the filing of lawsuits, establish a framework for compensating victims, and invest in institution building for the future. Commissions of inquiry will conduct investigations regarding extrajudicial killings, torture cases, prisoners of conscience, and enforced disappearances. However, the commissions should not be equated with, or considered substitutes for, trials. The commissions are non-judicial organizations; therefore, their terms of reference and powers are lesser than the powers of the courts. Also, commissions of inquiry have no authority related to prisons, or any capability to enforce or execute their recommendations, and will likely lack the power to compel any person to provide testimony to them.

The establishment of criminal justice is an essential element of addressing the massive violations of human rights in Syria. Lawsuits must be brought against individual perpetrators, and prosecutions should seek to restore the dignity of the victims and restore Syrian citizens' confidence in the rule of law. These must include criminal investigations and legal proceedings against the suspected perpetrators of war crimes and crimes against humanity that took place in Syria during the revolution. Legal suits should specifically seek to target the upper ranks of the Assad regime: those responsible for both giving orders to commit violations, and those who oversaw the orders carried out. Members of the armed opposition must also be held accountable, and their trials should be conducted according to international standards to avoid any challenges to these trials' legitimacy. One of the most important challenges, however, is ensuring that the legal suits against individuals are unbiased in order to assure the Syrian public of the independence of the court and that it is not selective or vengeful. Syrians must feel that the age of impunity is over and that a new era of transitional justice and accountability is paving the road for a new, just Syria.

In light of widespread violations of human rights, it has become incumbent upon governments, in this case the future Syrian government, not only to address the perpetrators of these abuses but also to guarantee the rights of victims. Governments can create the appropriate conditions to preserve the dignity of the victims and ensure justice by using methods of compensation for the damage and the suffering experienced by the victims. The concept of compensation has several meanings, including direct compensation (for damage or loss of opportunity), restitution (moral and mental support for victims in their daily lives), and recovery (restoring what has been lost as much as possible). Compensations can be distinguished by type (physical or moral) and target (individuals or the collective). Material compensation usually involves the distribution of money or goods. It can also include the provision of free or preferential services, such as health, education, and housing. Moral compensation can be made by issuing a formal apology, by dedicating a public memorial place (e.g., a museum, park, or monument), or by declaring a national day of remembrance.

Assuming Syria embarks on transformation to a democracy, Syria will need to make comprehensive reforms – including institutional, legal, and in policies – in order to achieve its long-term social, economic, and political objectives designed to avoid any collapse of the civil or democratic rule of law in the future.[9] The general objective of these reforms will be to remove the conditions that gave rise to the current conflict and repression. In preparation for this moment, the Syrian Expert House was founded. It is a group of some 300 human rights activists, comprising academics, judges, lawyers, doctors, opposition politicians, defected government officials, defected military officers, members of local revolutionary councils, and commanders of the armed opposition who are committed to periodical meetings aimed at articulating a final vision for the transitional period to follow the end of the Assad regime.[10] Therefore, the Syrian Expert House recommends restructuring state institutions that were complicit in acts of violence or abuse; removing any long-standing racial, ethnic, or sectarian discrimination, which some feel was perpetrated by the Ba'ath Party across state institutions, especially within the armed forces and security establishment; and preventing the former perpetrators of human rights violations from continuing to benefit from holding public positions.[11]

It must be stressed that unless reforms are carried out in certain areas such as the judicial system, Parliament, and the state security services, any accountability process is deemed to remain incomplete, and thus fail to gain credibility in the eyes of the general public. Even as things are, it will be difficult for citizens who have learned to look at the police, army, and government with suspicion to believe in the usefulness of any proceedings, including the accountability of those institutions. If they are expected to change their perception, they must be confident that the institutional cultures that allowed or fuelled violations of human rights have been examined and evaluated, and corrected once and for all.

[9] See International Center for Transitional Justice (2004). *Annual Report of the International Center for Transitional Justice, 2003/2004,* New York, NY: International Center for Transitional Justice.

[10] Syrian Expert House, *About*, http://syrianexperthouse.org/about, accessed 2.10.2014.

[11] Syrian Expert House, *Final Report*, http://syrianexperthouse.org/archives/775, accessed 2.10.2014.

Recommendations

To implement a comprehensive and successful transitional justice and national reconciliation program in post-conflict Syria, any future government will have to do the following:

- Establish a documentation and auditing committee whose main purpose will be to collect and verify the names of the victims and their families.

- Train documentation staff to gain knowledge about similar experiences from other countries, such as the Truth and Reconciliation Committee in South Africa, the Equity and Reconciliation Committee in Morocco, and similar entities in Chile and Peru.

- Achieve a community dialogue in Syria regarding general human rights issues by focusing on areas such as accountability, justice, enforced disappearances, and prisoners of conscience.

- Reveal the truth about human rights violations committed in the past, seeking to expose the truth to the public, and compensate the victims of enforced disappearances and their families both morally and financially.

- Adopt and support political, social, and cultural development programs based on need.

- Seek to adopt constitutional and legislative reforms in human rights, security, and justice and endorse a national strategy against impunity to hold those who committed human rights violations accountable, while promoting the principle of separation of powers and protection of the independence of the judicial authority from any interference from the executive authority.

- Prohibit enforced disappearance, arbitrary detention, genocide, any other crimes against humanity, torture, and any other forms of cruel and unusual punishment, racism, insult, or prohibited discrimination, and any incitement of racism, hatred, and violence.

- Clarify and disseminate the legal framework and regulatory texts regarding the authority and organization of security forces, limits of intrusion during operations, surveillance systems, and evaluation of the performance of security forces, as well as the administrative authorities assigned to maintain order and those who have the authority to use force.

- Urge civil society to file lawsuits against the perpetrators who committed extra-judicial killings, torture, or enforced disappearances against civilians, while maintaining the privacy of the victims. Such a process should adhere to the new penal law code. In addition, the government should encourage civil society organizations and NGOs to report the cases of missing individuals to human rights committees and the Committee on Enforced Disappearances of the United Nations. Furthermore, families

should realize how essential it is to file these cases despite limited resources to close missing persons' files.

- File discrimination lawsuits on behalf of victims of torture, prisoners of conscience, and those who were subject to enforced disappearance – especially those who suffered in the past thirty years and during the Syrian uprising. Such lawsuits must be based on Syrian law and the international human rights standards that the Syrian government has ratified.

- Work on acquiring the necessary experience to qualify certain individuals and organizations to assist victims of torture, prisoners of conscience, and the families of those having suffered enforced disappearance. This process should be based on similar experiences of other countries along with the assistance of the expertise of international organizations.

- Emphasize the humanitarian side and the suffering endured by the families of the missing individuals during the process. For example, instead of completely focusing on the documentation process and legal procedures, a Web site can be developed to honour Syria's victims. Moreover, the families of the victims can connect with other individuals who have had the same experience, whether in Syria or in other post-conflict countries.

- Acknowledge and address the suffering endured by the families of the victims. This includes the issuing of an apology by the transitional government, providing victims with compensation, and establishing a national institution specialized in the field of the psychological and social rehabilitation of victims of torture, prisoners of conscience, and the enforcedly disappeared.

- Find out and expose the locations of detention facilities and secret prisons so they can be subject to legal observation and control. Also, prohibit detentions from being conducted by the security intelligence agencies, which are unaccountable and difficult to subject to any form of control. In addition, the security agencies must be held accountable if proven to have been involved in enforced disappearances.

In lieu of Conclusion

The Syrian revolution began as a call to realize a dream of freedom, and dignity. We thought that systems such as the Khmer

Rouge in Cambodia, the Nazi regime in Germany, the fascist regime in Italy, and Pinochet in Chile had become extinct. We thought, perhaps mistakenly, that the international community had developed to the extent that it would never allow a system similar to those from the past to re-emerge in our time.

With ever-increasing destruction and bloodshed in Syria, how can we expect to rebuild the country? Clearly, it will not be possible to fully begin the transition to a pluralistic and democratic society without a complete cessation of violence. And yet, even before this process begins, we can begin to consider the first steps to heal the deep wounds that have left Syrian society in tatters. The Syrian society will not be able to heal the rifts created by a half-century of brutal Assad family rule without truth and justice procedures. The victims have the right to truth and to know the fate of their loved ones, as well as see punishment meted out to those responsible. A transitional justice and reconciliation process will help Syrians foster confidence in themselves and their community, and help the restoration of the structure of society, rocked by grudges of injustice and suffering.

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