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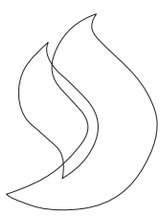
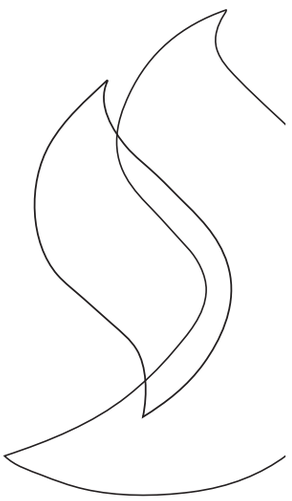




Presentation

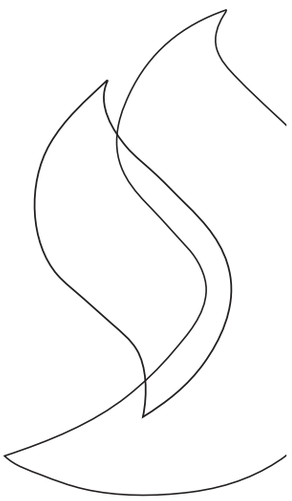
Mr. Joseba Azkarraga Rodero
Minister of Justice, Employment and Social Security of the Basque Country

The push for promoting human rights as the core of social organisation is not merely a one-time commitment. Ongoing efforts and sustained strategy are needed for values, attitudes and messages to permeate among the population. The United Nations and the European Council constantly urge the promotion of forums for reflection, discussion, debate and exchange of experiences to bring the culture of human rights to the forefront. But no community in the world can expect to carry out the job of promoting and extending human rights without being in contact with the vast network of activists, NGOs, scholars and international organisations that work on a daily basis to defend inalienable, indivisible and universal rights. Those who have developed successful experiences and have given the matter much thought can contribute their knowledge, warn us of the difficulties that lie ahead, prepare us, suggest strategies, help prevent mistakes ....

Therefore, the Second International Congress on the Human Right to Peace is the best way to present citizens with discussion, contrast and evaluation on the state of the struggle for liberty, equality and solidarity laid down in the Universal Declaration of Human Rights.

On this occasion we have decided to concentrate our efforts on conflict resolution, based on the conviction that no right can be invoked at the expense of another. We feel that beyond all doubt non-violent conflict resolution is the only way to work for a constructive peace. It is the path that leads to the protection and respect of human rights of all people. I am not referring exclusively to the absence of violence; it is also a matter of justice.

Repressive measures cannot be used to solve a conflict that causes suffering. Wherever we look –and unfortunately we can cast our eyes on any corner of the globe– the only thing we achieve by using repression as a means of tackling conflict is to decrease the level of protection needed to guarantee human rights. Conflicts have democratic solutions. The only thing that is unacceptable is to use force to impose one's position outside the bounds of human rights or ignoring the freely expressed will of the people. I trust that this book of the thoughts and ideas generated at the Second Congress on the Human Right to Peace will serve as a new tool to promote strategies for action based on respect. There can be neither democracy nor coexistence without respect; no change can come about through imposition or totalitarian mentalities.



The ruling related to peace announced by the Constitutional Court of Costa Rica

Mr. Luís Paulino Mora Mora
President of the Supreme Court of Justice. Costa Rica

Curriculum

Luis Paulino Mora Mora was born in San José, Costa Rica in 1944. He studied at primary and secondary level in Puriscal and attended the University of Costa Rica, where he graduated as a Lawyer. At a very young age, he began work as a Judge in the Judiciary Department of Costa Rica, where his performance won him a grant to further his studies in this specialisation, resulting in a Doctorate at the Complutense University of Madrid.

On his return to Costa Rica, over a period of almost twenty years, he combined his work at the Judicature as a Criminal Judge, High Court Judge and Magistrate of the Chamber of Criminal Cassation of the Supreme Court of Justice, with his extensive work in teaching at the University of Costa Rica and the Escuela Libre de Derecho.
This is a brief explanation on the ruling by the

From 1986 to 1989, he was appointed Minister of Justice in Costa Rica and later became part of the newly created Constitutional Court, of which he is still a member to date, even though he was President of the Judiciary Department of Costa Rica from 1999. Since this last post, he has promoted a movement for the modernisation of the Judiciary Department, which is currently in full development.

He has written abundant literary works, particularly articles specialising in the areas of Criminal and Constitutional Law, and recently, he has tackled matters concerning the administration of justice and its role within a democracy.

Summary

Constitutional Court that was issued in Costa Rica as a result of government actions by the country with regard to the armed conflict in Iraq and which analyses and evaluates a series of questions related to peace.

The theme is relevant from the point of view of the law of human rights, for the way in which, throughout the ruling, that the peace value is presented as an integral element of any democratic regime and secondly the existence of a right to peace as a component of rights as a whole that may be demanded by persons from their government.

Even though, and as could not be otherwise, the ruling is consistent with Costa Rican historic development and with the sensitivity of the Costa Rican people in these matters, consequences can be derived from its conclusions that go beyond the law: an undeniable right of the so-called third generation, and in this case one of the most politically sensitive, flourishes and acquires citizenship papers, to be accepted and respected by those holding power.

For Costa Rica it is without doubt one more marker on the route embarked upon since the abolition of the army, the submission to international mechanisms of resolving conflicts and the proclamation of neutrality which as a country we have offered the international community.

The ruling related to peace announced by the Constitutional Court of Costa Rica

Introduction

I wish to express my thanks to the organisers of this event and to you as participants, for this opportunity to share the efforts which are being made in this small American country towards the development of a more just and democratic society. We Costa Ricans have striven to be resolute in matters related to human rights. Our experience in this area, consisting of ups and downs, is an apt portrayal of the good enjoyed by current societies, of the bad which afflicts them and of the efforts being made by both government and civil society towards a fair development of individuals.

In particular, I will concentrate on a specific and particular aspect of these efforts in a brief comment on the ruling of the Constitutional Court issued in my country, as a result of the actions of our government concerning the armed conflict in Iraq; a ruling which also offered an analysis and evaluation of a series of questions related to peace.

I take this opportunity to present an analysis of the juridical-constitutional aspects surrounding, and which serve as the basis of, the aforementioned ruling with the aim of broadening its perspective with this particular point of view.

Brief summary of the facts

I must admit that after thirty-four years on the bench, I could not attempt anything other than a juridical outline for an analysis and study of some questions. So I will begin with a brief summary of the important facts form a constitutional perspective.

As a result of the armed conflict between a group of countries led by the United States and the Iraqi government, some people in our country considered that the role and action of the Costa Rican Executive Power was contrary to the Political Constitution of Costa Rica and so for this reason, from different perspectives, presented a claim of unconstitutionality before the Constitutional Court in order to correct such acts by the Executive.

Among the various aspects which they considered had been violated, the Court had to deal with one particularly interesting aspect, given its implications from the perspective of Constitutional law and from the particular situation of our country in this matter: I refer here to the claim for the supposed disregard for what the Court was later to identify as “the peace value” which, according to the claimants, formed part of the Costa Rican Constitution, even though there was no textual mention of it, and that said value had been infringed upon by the actions of the Executive, estranged from the law.

Juridical questions

Described in this way, from the juridical point of view, it was clear from the beginning that the true relevance of the case did not revolve around what was decided on by the Executive Power, but on two closely related points: on the one hand the significance of the notion of "peace" within the juridical-constitutional structure given that, as already said, it was not expressly mentioned in the law; and on the other hand, the basis for its "detection" within Costa Rican law, in that an acceptable hermeneutic exercise was necessary in order for it to be included. Below, I will attempt to summarise the argument presented in the ruling on these two points.

a) The character of the notion of "peace" in our juridical code

For anyone reading the ruling, the use of precise terminology to refer to peace becomes clearly obvious: it is referred to as "the peace value". The reason for mentioning this is that it claims a reference to the specific role of peace in a juridical system, and specifically within a constitutional code. To put it more simply, it involves recognising the existence of values immersed in the Political Constitution. On this point, I find the words of Gregorio Peces Barba in his article "higher Values in the Spanish Constitution" to be particularly appropriate. Referring to that constitutional text he talks about the ownership of the concept of values as opposed to other less esteemed values, such as the notion of "principle". In the case of Spain, comments Peces Barba, the values were made clear in article 1 of the Constitution, so a choice was made between positivism, closed to values, and the "iusnaturalsimo" (natural law) which works in the reverse, giving positive law a secondary value. The author further adds that the notion of value:

> Implies a basic agreement of rationality which is the democratic juridical culture itself, based on appropriate historic agreement. Man may be aware of these meanings which culture implies through reasoning and experience, and legislators have tried to shape into these superior values the ideals of this historic culture peculiar to the modern world.

Later on he adds:

> […] The inclusion of the concept of higher values is a solemn argument to advocate that the Law is made up of norms of conduct and also by norms that regulate the use of force, without the need to choose as if it were a case of two alternatives. In any case, the norms that regulate the use of force are instrumental as regards those that establish material criteria, among which are to be found in the first place higher values for the organisation of conviviality. They regulate the distinction of goods, guarantee rights and liberties; in short, they make dignified human life in society possible.

I conclude these quotations from Peces Barba, summarising his hypothesis that values have a vital function for the life of a Constitution. Firstly, they express specific historic consensus with regard to ideas of justice, in other words, what might be called objectified justice which acts as the infrastructure which maintains the rest of the constitutional structure. Secondly, they have the effect of providing juridical safety, understood as the serenity and certainty that there does exist a guide that moulds and orientates (and also effectively constrains) the exercise of power by those who have been chosen as deforciants of this power. Finally, values have a legitimating function in the Constitution in that they serve for society to identify itself and with its juridical legal code, so that it acknowledges it as something worthy of being fulfilled and respected.

Under these concepts, the ruling I comment on makes this aspect clear: first the establishment, or to be more precise, the declaration of acknowledgement and certain existence in the Costa Rican constitutional text, of various specific values that might be qualified as fundamental to our system, which (similarly, for example, to that in German constitutional juridical code) do not appear to be pronounced in the sense that they have been expressly mentioned, but yet they can be inferred from the text as indeed has been done by the constitutional tribunal of the recently named country; and second, that such values in the Costa Rican Constitution would have the purpose of outlining the orientation of the constitution itself, in that it regulates social life through the Law.

b) Elements for the basis of the declaration of the existence of peace value in our legal code

As the next logical step, the ruling seeks to demonstrate that precisely the so-called "peace value" is in effect an integral part of this list of founding values of the Costa Rican constitutional code. This is a more difficult task in that it involves overcoming various obstacles:

Concerning *the first* of them, the ruling (followed by a long firmly-established trend since its creation on the part of the Constitutional Court) leaves out a strictly "normativist" concept of the Constitution to align itself decidedly with modern trends of new constitutionalism which has firmly settled in the international juridical arena since the last post-war period, and which has been accurately described by Manuel Aragon Reyes, current member of the Spanish Constitutional Tribunal, in these words:

> The Constitution, product of the French revolution and the independence of the North American English colonies, will therefore have formal and material characteristics. […] As can be appreciated, the double and ancient pretension of ensuring stability of political form and freedom are intermingled. The Constitution will limit power in order to maintain it with a certain structure and to keep it from invading individual autonomy. Furthermore, both objectives are indissociable given that the structure itself is not an end but a means.

And later he also makes the following comments:

> The material limitation of power, in other words, fundamental rights, have appeared like this since the very birth of the constitutional State, like the nucleus of the concept of Constitution. The distinction between constituent power and constituted power, political representation, temporal and functional limitations of power are, without doubt, characteristic remarks on the constitutional State, but the most definitive is the attribution of sovereignty to the people. The only way of "guaranteeing" this sovereignty (inwardly of course, as we are speaking of sovereignty in constitutional law, not in international law) is by "ensuring" fundamental rights as limits in the face of the power of those governing and in short, in face of the regulating capacity of the legislator.

And finally I include this conclusive affirmation:

> What today is common place in more solvent juridical and "political" thought is that the Constitution is the supreme juridical code, jurisdictionally applicable which guarantees the limits to power so as to ensure that power, insofar as it derives from the people, is not inexorably imposed on the free condition of the citizens themselves. In other words, the Constitution is no other than the 'juridification' of democracy, and this is how it should be understood.

To recapitulate therefore, the ruling summarises the newest and most embracing tradition with regard to the protection of man and the concept of limits to power that are inherent in the very concept of Constitution; limits that are no longer simply formal but also primarily material. The Constitution is not, therefore, a simple compendium of juridical rules with determined characteristics, as asserted by formalist concepts, but also primarily a declaration of ends and not just any ends but very specific ones drawn up by reason and history. In the words of the newest of doctrines these ends form a "restricted reserve" for Power which cannot alter them, act against the search for them or their perfection.

A second obstacle that the ruling faces, and seeks to resolve, revolves around the problem of the limited support which the more acerbic traditions of constitutionalism can contribute to the thesis of the existence of peace as a founding value; from the historically correct fact that the respectable doctrines of constitutionalism at the end of the 18th century do not include peace at all, either as an individual right or as something worth protecting constitutionally.

In other words, when we declare ourselves the proud heirs of the tradition of constitutionalism we do so to give the necessary relevance and support to the principles of liberty and equality as well as to the need to control Power by submitting it to the law: principles that have been thoroughly analysed in terms of their current manifestations and their venerable antiquity, that I do not need to expand on these aspects here. However, equally indisputable is that we cannot include peace as part of these historic values because the period in which these noble ideas of liberty, equality and fraternity were sown was not a time when you could establish peace as a social asset with equivalent weight, indeed it might even have been risky for the life of the country to do so. We will recall that the so-called "international society" was traditionally the typical example of a leonine system where the rule of division of "each to his own strength" dominated; that the development of mankind historically did not award peace but rather that it has been bellicose, plagued with conflicts and much suffering.

It was necessary therefore to demonstrate abstractly the viability of peace as an historically "new", but at the same time essential, social end for which it was necessary to resort to clear and convincing external signs which, despite some isolated facts to the contrary, make it possible to deduce the existence of a universally historic conscience that currently understands peace as an asset of prime importance. Such signs are essentially the fact that it was peace, together with human dignity, that has consolidated countries for the reconstruction of the international political order, working around the United Nations Organisation which has been so prolific, at least in terms of declarations and principles, with regard to the essentialness for peace. Through this Organisation, to which practically all the countries in the world currently belong, different countries have clearly expressed the need to include peace and human development as its challenge and as a primary social asset to which people would have the right, just as their freedom or right to equal opportunities are guaranteed.

From such a perspective then, this second obstacle could be surmounted by demonstrating that even though peace did not form part of the list of principles on which constitutionalism was structured, this does not prevent it from having become, through historic development, a value and a social asset of the same high rank as those that were the driving force of the constitutionalist movement in its day. And as is understood in the ruling, these principles do not constitute a closed list, but an open one. As was pointed out by Aragon, constitutionalism is nothing more or less than the juridification of democracy, a concept that is always perfectible.

This brings us directly to the *third* obstacle to be overcome, in that, as any Law student will appreciate, the political arena where the previous arguments are in play serves as a base but does not substitute or act as the juridical order. The foregoing argument called for an attempt at inserting peace as part of the list of social goods protected by our juridical code, the constitutional code being of course the most appropriate to serve as receptor and entry into the Costa Rican juridical code.

As you may suppose, from the formal-juridical perspective the question was not so difficult in that we have long recognised that the Constitution contains a series of essential values which are consubstantial to it, that such values are those of the democratic system and that within these values of democracy it is perfectly acceptable to include peace, considering the protagonism that historically it has acquired universally in the recent past. In any case, perhaps the greatest obstacle towards the validation or legitimacy of this reasoning can be found in the reaction and social sensitivity to the matter; however, this is precisely where our country offered its greatest strength.

Indeed, there can be no doubt of the steps which through history we Costa Ricans have taken in building a tradition which makes peace a valued and influential asset in the social evolution. With these steps, to a certain extent, the ruling is scrutinised, but basically the function of the Court is important in that it refers to the last few decades in the history of this country where we have managed to differentiate ourselves from our surroundings, precisely in our steadfastness in pacific conviviality, internal and external. Among the various relevant signs, three are outstanding, undoubtedly a clear indication of the determination of our society to embrace peace as an indispensable value.

I refer firstly to the abolition of the army, precisely by the group that had triumphed because of weaponry in the last armed conflict in the country. Even today, more than fifty years later, the rest of the world has not even become aware of the importance of a decision like this as a necessary and unpostponable step for peace to prevail. Unfortunately we continue to be the rare bird in the world scenario in this aspect.

Secondly, the univocal policy of our country in relation to its participation and acceptance of international organs as a means of keeping peace among nations, and particularly its adhesion to organs and instruments of the United Nations. With this affinity and approach we have demonstrated for years our faith in the international system as an ideal means for channelling possible international disputes; a faith that even fate tried to put to the test in 1955 at the last intent of aggression and destabilisation of our society from abroad.

Thirdly, another sign of our dedication to peace exists in the proclamation of active and perpetual neutrality which the government and people of Costa Rica issued to the world and which turned out to be the natural follow-up to the dissolution of the army. This fact constitutes a declaration of peace to the world. I believe these actions have been the particular product of an environment such as ours where, for generations, we have benefited from the absence of war and called for its repudiation as a means of solving controversy. And I would draw attention to this point, because there exists no contradiction in our system of values and principles: as has been expressed on innumerable occasions. The neutrality, which we declared at the time, is not ideological neutrality. On the contrary, our country has firm beliefs and we feel the need for more countries to embark on the road to freedom, peace and democracy which we have done.

In conclusion, the step towards the "juridification" of peace within our legal code was founded on the three aspects mentioned above: the abolition of the army, our integration in the system of the United Nations and the declaration of our Proclamation of Neutrality.

It is justifiable therefore to deduce the existence and relevance of a value such as peace, and its edifying role, in the constitutional code of Costa Rica and for this reason a necessary reference in any decision by the public organs, including of course the Constitutional Court.

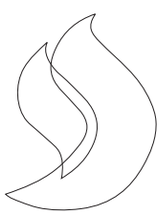
Application of the foregoing to the case in hand

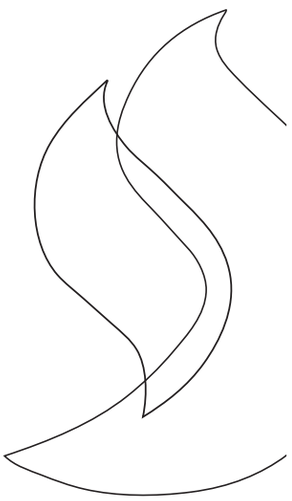
This correlation which I have just mentioned was precisely what, in the terrain of the specific juridical discourse, made it possible to judge the legal proceeding against which the complaint was brought, and of which it was considered did not correspond to what a respectful consideration of the peace value would have required as it turned out to be, from the facts, a contradiction both in the obligations and the consequences of belonging to the United Nations' system of resolving controversy, and in the disregard for the obligations and consequences of the Proclamation of Neutrality; converting both into a particular parameter of constitutionality insofar as they were considered specific manifestations, with juridical form, of the peace value which shapes our constitutional system.

Conclusions

I conclude this brief intervention going back a little in time so you can appreciate what our country has undergone in defending and promoting the highest values which our culture and history offer us. Both on the subject of peace in particular and on the question of the rights of persons and countries in general, Costa Rica has had the good fortune of having people and groups with sufficient sensitivity to capture and shape these rights for the enjoyment of all our co-nationals.

I sincerely believe that this doctrine expressed by the Court in the ruling I have described, and which we have seen is in reality the result of numerous efforts of a great number of people, marks a step that is possible to emulate in other legal codes towards peace and its most effective realisation and respect, not only in our country but in the world.





Conflict resolution: the South African experience

Mr. Roelf Meyer

Former Minister of Defence and Minister of Constitutional Affairs in South Africa and the chief negotiator for the National Party during the negotiations to end apatheid in South Africa.

Curriculum

Roelof Petrus (Roelf) Meyer was born on 16 July 1947 in the Eastern Cape, South Africa. He matriculated in 1964 and completed his B Comm (1968) and LL B (1971) degrees at the University of the Free State. He practiced as a lawyer in Pretoria and Johannesburg before permanently entering politics as Member of Parliament in 1979. He resigned from active politics after 21 years at the end of January 2000. During this period he served as Deputy Minister of Law and Order and subsequently of Constitutional Development (1968-1991) and Cabinet Minister of Defence and subsequently of Constitutional Affairs (1991-1996).

Roelf Meyer was intimately involved in the negotiations on the settlement of the South African conflict as Chief Negotiator for the National Party Government. It was in this capacity that he negotiated the end of Apartheid together with Cyril Ramaphosa who was Chief Negotiator for the African National Congress (ANC). These negotiations resulted in the first democratic elections in South Africa at the end of April 1994. After the election Meyer continued in the portfolio of Constitutional Affairs in the Cabinet of former President Nelson Mandela.

Meyer is currently a business person and serves as a consultant on peace processes. In this capacity he became involved in various countries around the globe i.e. Northern Ireland, Sri Lanka, the Middle East, Rwanda, Burundi, Kosovo, the Basque Region, Bolivia. He also serves on the Strategy Committee of the Project on Justice in Times of Transition in New York and was holder of the Tip O'Neill Chair in peace studies at the University of Ulster, Northern Ireland in 2001.

Summary

The South African conflict ended before full-scale civil war erupted. The fact that the leaders on both sides of the conflict realized that the only solution was a negotiated settlement prevented disaster. The negotiations helped to calm tensions and enabled South Africans from across the divide to make peace with themselves. After a period of four years of intense bargaining the negotiations resulted in a new constitution that became an act of settlement and the beacon of democracy.

Many factors contributed to the successful conclusion of the negotiating process but in my experience the following ten elements were key to the resolution of the conflict:

The fact that the opposing sides did not set any conditions before the start of the process;

The participation of all relevant stakeholders made the process inclusive and acceptable to all;

South Africans themselves took ownership of the process and did not rely on outsiders to facilitate for them;

The leaders and those who participated in the negotiations developed mutual trust and respect in each other;

The leadership on both sides provided guidance and direction to their followers to accept the need to negotiate a peaceful settlement;

Conditions for a win/win-result were created which enhanced a settlement;

The need for tolerance and understanding of each others positions were respected from the beginning;

Throughout the process the parties conducted broad based consultations with their supporters to inform and to secure mandates;

The process was completely transparent and open to the public;

The foundation for the settlement was the recognition and safeguarding of individual rights on an equal basis for all.

Conflict Resolution: the South African experience

Racial segregation in South Africa had been the order of the day for more than 300 years. Through Apartheid Black and White people were seperated politically, economically and socially. This led to continuous tension and conflict. Eventually the country was heading towards full-scale civil war. Fortunately a disaster of such nature was prevented and South Africa has morphed into a modern, liberal democracy.

Today still the question remains how this seemingly insurmountable racial strife was resolved in such a peaceful manner and within such a short period of time. The answer lies in the fact that the leaders on both sides of the divide realized that their country would end up in smoke and ashes, should the conflict continue regardless. They chose to rather lead the nation on embarking on a process of a negotiated settlement.

Reaching this settlement was a continuous and arduous process that lasted more than six years. The outcome was a new constitution that defines South Africa as one undivided nation with equal rights for all and which has become the benchmark of our democracy.

Many factors were significant regarding the successful conclusion of the constitution making process. The following ten elements were crucial to the resolution of the South African conflict and I believe it will be appropriate to considered these in the resolution of other conflicts too.

Unconditionality

The process in South Africa was started without terms and conditions, although each of the two sides (the liberation movements on the one hand and the government of the time on the other) had their own objectives and goals. The absence of requisites enabled the parties to engage in dialogue despite the distrust and hostility that initially prevailed.

When the process started the time was ripe for the parties to engage in talks with each other and importantly both sides were serious about the intention to find a negotiated settlement. A window of opportunity appeared when there was a change of leadership on the side of the government and FW de Klerk became the President of the country. He released Nelson Mandela from prison and both sides immediately started to utilize the opportunity to make peace. There was never a turn around thereafter despite obstacles that occurred during the process .

Inclusivity

It was realized from the beginning of the process that all parties that were relevant to a peaceful settlement had to be part of the negotiations. Therefore all parties that were represented in Parliament at the time as well as non-parliamentary parties participated in the design of the process and the actual negotiations that followed. This inclusive approach ensured that all political persuasions and all sectors of the political community were offered the opportunity to form part of the solution. It also enabled the building of alliances for a coherent negotiating process.

Ownership

South Africans were proudly in charge of their own destiny. No external initiative was needed to prompt the process and the different parties designed and conducted the process during all its stages. This approach obliged the parties to directly seek solutions between them instead of relying on outsiders to govern the negotiations.

Through all the stages of the negotiations it also became clear that the process is as important as the product. On several occasions major differences between the parties could only be resolved through adjustments of the process. This resulted in a spirit of problem solving that assisted parties in overcoming serious obstacles and even a complete breakdown of the negotiations at one stage. Also, joint decision making and the setting of time frames avoided deadlocks and helped to move the process forward when serious pressure was exercised by extremists on both sides.

Mutual respect and trust

The distrust that has evolved over a long period of racial conflict was one of the most complicated issues to address. Fortunately the leaders showed public respect towards each other from the start, initiating the development of a basis of trust throughout the negotiations.

Building trust was further enhanced through mutual insight into each other's positions, departure points and backgrounds. This helped to develop personal relations which eventually became one of the most crucial elements in the entire process. We never had to negotiate through messengers. Even at the time of a complete breakdown in the negotiations we could resume talks through direct communication between us as leaders of the negotiations.

Leadership

The respective leadership roles of Messrs. Mandela and De Klerk in terms of initiating the process are well known. Of even greater importance, however, is the manner in which both of these leaders could persuade their own supporters to realize the need for a negotiated settlement and to maintain that support throughout the process up to the final adoption of the new constitution. Without this support base the process could easily have been derailed at various occasions. Similarly, other leaders prior to and together with Mandela and De Klerk played comprehensive roles in initiating and steering the process.

Creating a win/win result

In the South African scenario it would have been highly possible to justify victory for the liberation movements. Instead, through the leadership of Nelson Mandela and others a win/win model was developed, resulting in the victor being a democracy with safeguards for all individuals. This ensured a peaceful transition to the first democratically elected government without a backlash or significant rightwing resistance.

In order to move the process forward it was more than once necessary to establish victories for the one or the other side. This sometimes helped the momentum going towards a settlement and in other instances helped to justify participation by a party that had difficulty with its own support base.

Tolerance and understanding

Prior to the start of negotiations the situation in South Africa was particularly volatile. Individuals and political groups across the racial divide had little if any knowledge of and respect for each other. In order for a successful process to evolve the opposing sides needed to gain understanding of one another and to grow tolerant of each other's differences. Again, Nelson Mandela showed the way by reaching out to the white community. That paved the way for compromises on difficult issues and a general approach towards reconciliation.

Broad based consultation

Although the negotiations were merely conducted by the party leaders and structures provision was made for consultations at the widest possible level.

The parties engaged their own supporters in briefings and caucus meetings. These communications with the own constituencies enabled them to understand the need and nature of the negotiations and prevented suspicion about the outcome of the negotiations.

During the final stages of constitution making the general public was invited to make submissions and to attend hearings where all opinions were taken on board. The result was a national consensus in favour of the new constitution.

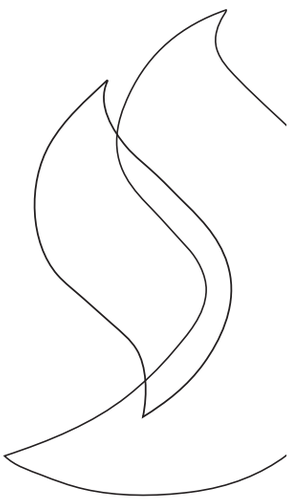
Transparency

Despite high levels of tension throughout it was decided at an early stage that the entire process would be open to the media. The media became a constructive partner and the public remained informed about all obstacles and their solutions that underpinned the process. Through transparency and with the assistance of the media South Africans supported the outcome of the negotiations with their almost 100% participation in the first democratic election in 1994.

Individual rights and equality

The cornerstone of the South African settlement is the recognition and safeguarding of and respect for individual rights on an equal basis for all. Agreement on this foundation was however not possible at the onset of the negotiations since the white minority in particular kept looking for ways in which to protect their interest on the basis of group rights.

This gave way to major differences during the talks and even resulted in a breakdown of the process at one stage. Only once a paradigm shift regarding individual rights had been achieved, could agreement on the mutual objective be reached and negotiations on the detail for a new constitution for the country initiated. This has resulted in the South African Constitution boasting a very modern and liberal set of individual rights, safeguarded by the Constitutional Court.



Human rights and conflict resolution

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Curriculum

Since the end of 2000 Harry Barnes has been working primarily on questions affecting South Asia and to some extent Northeast Asia, as well as the Basque question.

From 1993 until 2000 he was at the Carter Center directing programs in human rights and conflict resolution that had Asian, Middle Eastern, European and African aspects.

From 1990 to 1993 he was a visiting professor at Mount Holyoke, Hamilton and Simmons Colleges and taught seminars in human rights and US foreign policy and in science and US foreign policy.

He retired from the career Foreign Service at the end of 1988, having served as ambassador to Chile (1985-88), India (1981-85), Director General of the Foreign Service and Director of Personnel of the Department of State (1977-81) and ambassador to Romania (1974-77).

He has been chair of the board of directors of the Romanian-American Enterprise Fund since 1997.

He is also a fellow of the American Association for the Advancement of Science. Currently he serves as a senior advisor to the Asia Society and is on the boards of the Project for Ethnic Relations, and The Institute for Sustainable Communities as well as on the Advisory Committee for Human Rights Watch Asia.

Summary

Diplomats, as part of their professional training, are accustomed to looking at all sides of an issue and to saying "on the one hand", and "on the other" That is necessary when one is analyzing a problem, but not enough when deciding whether and how to act. I suggest that there is a partial parallel when it comes to situations which have both a human rights and a conflict resolution character. The analysis has to serve as a basis for action or a decision not to act. A human rights approach and a conflict resolution approach are both valid in their own right. But each is not sufficient in itself. There needs to be a factor of human rights focus in conflict restitution activities and an awareness of conflict resolution perspectives in human rights advocacy efforts. It is also worth bearing in mind that conflicts are not necessarily violent and also that they can and do occur not only between governments but within governments. They are still conflicts.

To illustrate these general propositions, I take three situations in which I was involved. The first deals with the conflicting views within the US government over whether there should be changes in the US policy toward authoritarian regimes. The question arose in the context of deciding whether to increase the priority that should be given to human rights and democracy and therefore to be more critical of authoritarian regimes. The issue came up early in the second Reagan administration. The conflict was particularly intense in the case of traditionally democratic Chile where General Pinochet had come to power through a coup. The second example comes from the time when I was director of the human rights and conflict resolution programs at the Carter Center and deals an episode connected with the civil war in Sudan. Thirdly, I take up the case of North Korea, which happens to have a Carter connection and suggest a possible current approach that has both human rights and conflict resolution aspects.

Human rights and conflict resolution

At the beginning I should note that I come from a diplomatic background. That means I had to do a lot of listening, most often to people with rather differing, sometimes vastly differing-beliefs. Not surprisingly I got accustomed to there being different sides to many questions. There is an old saying that diplomats cannot work with one hand tied behind their backs, because they are so accustomed to thinking and saying "on the one hand-but on the other hand". You'll probably hear some of that feature in my remarks.

I tend to think of those working on the resolution of conflicts as well as those working to promote respect for human rights as people with an honorable and essential function in life. What I will argue today is that when it comes to promoting human rights and seeking to resolve conflicts there has to be some of both vocations represented in those efforts. Or to put it slightly differently, there has to be a place for human rights in the resolution of conflicts. And in promoting human rights there will inevitably be a conflict to resolve.

The problem often comes in the form of reconciling the demands of each: which to have priority and in what time frame when to give more importance to resolving the conflict or when to give more importance to stopping the abuses of human rights. A further complication enters with the injection of violence. For example, does violence always call for a violent response? If so, when and how? Or is violence rarely a necessary response to violations of rights? Those in the field of conflict resolution focus on the need do settle the conflict in a way that promotes continuing peaceful resolution of disputes; those working to protect and promote human rights are most concerned to see existing rights safeguarded and violations of rights punished. But there is often no agreement as to which comes first and for how long. What is clear to me in any case is that the more the practitioners of one or the other vocation can understand the skills and insights brought by the other, the more likely that their efforts will reinforce and not complicate the solution.

Sometimes there is a feeling that conflict resolution practitioners are so dedicated to ending the conflict that they are less concerned about the continuing prevalence of human rights abuses. A truce does not necessarily mean that human rights are safer. Human rights defenders for their part sometimes seem so concerned that justice be done that they pay less attention to the factors producing conflict and could surface again.

So I am very pleased to be able to take part in a conference which looks at both the promotion of human rights and the resolution of conflicts.

Let me take from my own experience three examples of the application of conflict resolution approaches and of human rights considerations. Two come from my past and one from my present activities. Bear in mind that not all conflicts are violent and not all violent conflicts are always violent… Equally it is important to remember that preventing violent conflicts is as important as resolving those which have erupted into violence. So much of the time these appear I called earlier "on the one hand and one the other hand situations".

Chile

I start with a non-violent conflict. It was however one of strong differences in views, even in philosophy, within the US government in the 1980s. When President Reagan came into office in 1981 people in his government believed that the previous administration of President Jimmy Carter had paid too much attention to human rights. That administration had also been too critical of many of the US's traditional allies because they had tolerated or actually committed violations of human rights. These individuals in the new government believed that US interests would be better served by supporting governments that were anti-communist and pro-American. The most well known example of this approach was that offered several years earlier by Jeane Kirkpatrick who became the new administration's ambassador to the UN. She had written about the differences between authoritarian and totalitarian regimes, the former having no pretensions to subdue other countries, the latter committed to toppling foreign democratic governments. So there was a rather dramatic shift from Carter to Reagan in that first term and non-communist dictatorships were welcomed as facts of life and often useful ones. Their deficiencies were tolerated and often condoned.

I was US ambassador to Chile from 1985 to 1988. Chile was then ruled by the dictator General Augusto Pinochet, who despite Chile's very long democratic tradition had been able to come to power in 1973 through a coup. When I arrived, the country was relatively prosperous and pursuing liberal economic policies which were welcomed in the US The media were controlled. Political parties existed but were subjected to many restrictions. General Pinochet and the armed forces enjoyed a monopoly of power. There was a very small communist armed insurgency which made an occasional foray, but the country was essentially calm.

But in Washington in contrast to the situation in the first term, by the time 1985 arrived there were increasing doubts within the administration as to the wisdom of the Kirkpatrick thesis. Because of the relative prominence of Chile as a country with a long democratic tradition and more generally because of growing sentiment in the Congress about the importance of democracy, a conflict arose within the US government over whether to revise US policies toward Chile. If in the first Reagan administration the emphasis had been on being understanding and supporting Pinochet as a bulwark against communism, during the second Reagan administration things changed human rights considerations outweighed "understanding". The new logic was that human rights abuses undermined stability and that therefore greater respect for human rights would promote reduction of tensions in a society and would add to stability. It so happened that promoting human rights also corresponded to a renewed and long held belief that human rights were an essential part of the US character. Prior to leaving Washington for Santiago, I was able to get agreement within the US government that there would be three pillars of US policy toward Chile: first strong support for an early return to democracy; second, respect for human rights and third promotion of a free market economy. It was only the last point which had been stressed during the first term.

The overall policy change was not welcomed by the Pinochet government and even in the US administration came under attack from time to time. The most visible assault was from the then powerful Senator Jesse Helms who came to Santiago to offer his very visible support to Pinochet. Somewhat less obvious was the role played by retired general Vernon Walters, a longtime friend of Pinochet's, who had succeeded Jeane Kirkpatrick as US ambassador to the UN. In connection with US votes in the international financial institutions

on loans to Chile, Walters would always support such loans and sometimes his voice would carry the day and the US would vote in favor or it would abstain. But overall the image that the US projected in the late 80s was clearly one that favored democracy. That was because the conflict within the administration was usually resolved in favor of clear support for human rights. That support was made all the more sustainable because of the reemergence of a strong popular sentiment in favor of a return to democracy in Chile. That same support resulted in Pinochet's sound defeat in the plebiscite that had been designed to let him rule almost indefinitely.

Sudan

I take my second example from the decade of the 90s. Sudan.

From 1993 to 2000 I was responsible for the human rights and conflict resolution programs at the Carter Center. President and Mrs. Carter had established the Center in the 1980s as a vehicle for non-governmental activities that spanned the areas of technical assistance in health and agriculture to promotion of human rights and amelioration of conflicts. Much of the Center's activities and those of the Carters' themselves were focused on Africa.

In the case of the Sudan in the 1990s, the Center had been active despite the long raging civil war between the government in Khartoum and the SPLA (Southern People's Liberation Army) in the south headed by John Garang. In particular it had been working in the area of disease prevention and had been able to carry on activities designed to reduce the impact of diseases such as guinea worm. President Carter also felt that such humanitarian efforts should be carried out both in government controlled areas in the north and in those controlled by the SPLA. At one point in the early 90s he was able to persuade both sides to agree to a truce which lasted for a year and a half. Despite the breakdown of the truce, his hope was that this sort of humanitarian activity would continue to help a reconciliation process to take place.

In 1998 he was asked by Sudanese President Bashir to come to Khartoum to discuss a plan for settling the conflict with the SPLA. At that point, aside from promoting the health programs, President Carter actually had been trying to facilitate a cease fire agreement between the government in Khartoum and the SPLA. Relations between the US and Sudan were badly strained. The most recent incident, shortly before Bashir's message came to Carter, had involved US bombing a factory suspected of making equipment for terrorists. I went to Washington to get a briefing on the situation in the Sudan and particularly the civil war. I found that the officials in the State Department were not enthusiastic about a Carter mission. In fact they made clear they preferred he not go, but they left the decision up to him. He decided to go because he had information from Garang that seemed positive regarding the prospects for a new cease fire. So when the Carters met Bashir in Khartoum, President Carter told Bashir that he also planned to stop in the south to meet Garang. Bashir objected strongly, but Carter answered that he could not be of help in mitigating the conflict if he didn't see Garang. Bashir was not moved.

The next morning we flew south to a Kenyan airport to change planes. We needed a smaller plane in order to be able to land at an airport in the south of the Sudan which was controlled by the SPLA. We had been offered one by the UN to take us there. But when we landed in Kenya we learned from the pilot of the UN plane that the airport where we were heading had been bombed an hour earlier by Sudanese aircraft. That meant of course

we couldn't meet Garang, President Carter was able to contact him later and he continued his efforts from a distance. Probably some of the credit for the eventual peace agreement between Khartoum and the SPLA goes to Carter's work over the years. Sadly though Garang died in an air crash soon after that agreement was reached.

It's hard to characterize President Carter's focus on the Sudan as being either on the resolution of the internal conflicts or on the human rights effects of those conflicts. From his standpoint it was probably not an "either or" type situation but rather an intertwined set of problems with both conflict reduction (if not conflict resolution) aspects as well as humanitarian and human rights features.

Whatever the exact proportions of one aspect or the other, there are certain elements of President Carter's approach to both human rights and conflict resolution challenges that are worth noting. He has been willing to talk with questionable and even reprehensible people in power. Those were the situations in which such intervention might lend weight toward the avoidance of further violent conflict and somewhat later to improvement in human rights conditions. The balance is not an arbitrary one. Rather it reflects a commitment to use his access and his persuasive skills to achieve good short terms results and hopefully good longer term ones as well. He is not afraid of failure nor is he hesitant to persist in his efforts to be of assistance.

He does insist on dealing with the people in control of a conflictual situation, the people who can take the decisions that he feels need to be taken. He is not afraid to be blunt in telling his interlocutors what he thinks and why he thinks it. At the same time, he believes strongly that he has to show respect for the persons with whom he is dealing even if he objects to their actions. He seeks to establish a rapport of candor and of a shared need to search for solutions acceptable to the parties in conflict.

You will note that I keep coming back to situations with human rights and conflict resolution aspects which are not "ether-or" but "both-and".

My third example has a Carter angle and a very current aspect as well.

North Korea

My own experience with North Korea is limited. At President Carter's request I accompanied his agricultural advisor, to North Korea in 1996 to look at possible collaboration between the Center and the Academy of Agricultural Sciences. Then I went back in 2000 as part of an NGO delegation which the State Department had asked to negotiate a food assistance program.

Our group negotiated for four days on such matters as the status of NGO representatives in the DPRK, their ability to monitor the distribution of food, the length of time they could remain in North Korea, whether they could get new visas whether they could be Korean speakers or not. Our effort was to get the best operational conditions for the food distribution monitors. The North Korean negotiators were under instructors to agree to only an extremely narrow mandate. The negotiations were protracted; the goals of the two sides seemed almost entirely incompatible. We made little progress.

Then the afternoon of our last day in Pyongyang, the head of the North Korean delegation suddenly rose from his place and told us that his group saw no possibility whatsoever of reconciling the two sides' proposals. He and his delegation then walked out.

Our delegation was due to leave very early the next morning. We kept discussing among ourselves what if anything we could due in the short time remaining

About midnight we decided to make one last attempt. Fortunately both delegations were staying in the same hotel, so it was not hard to find the North Korean group. We asked the North Korean negotiators to meet with us once more and at least try to reach some understanding. They agreed to meet and after several early morning hours of discussion we reached an agreement just in time to catch our flight.

I have not been back to North Korea since then. But for the last year or so have been working on seeking areas in the agricultural sciences where there might be common US and North Korean scientific interest in collaborative projects. There are very few US research institutions that have links to North Korea. In addition, it is not yet clear what effect the new UN sanctions will have on non-governmental exchange arrangements. We are planning a symposium though this February at the annual meeting of the American Association for the Advancement of Science on the topic of engaging with North Korea.

Let me go back in history a decade. In the spring of 1994 North Korea threatened to expel inspectors from the International Atomic Energy Agency and to restart a reactor which could produce material for nuclear weapons. The United States was preparing to seek Security Council support for a series of sanctions. President Carter who had been trained as a nuclear engineer had been following the building crisis with a growing sense of unease. He arranged for a long standing invitation to visit North Korea to be renewed. Then much to the alarm of the Clinton administration, Carter decided he would go to North Korea to meet with the country's ruler, Kim Il Sung. Despite great misgivings as to what Carter might do that could complicate matters, the administration decided not to oppose the trip and did provide him with briefings.

Not only was Carter's visit to North Korea unprecedented in a variety of ways (like his being able to cross the DMZ, the Demilitarized Zone which ironically is one of he most heavily armed areas in the world.) More remarkably Carter was able reach an agreement with Kim IL Sung for the inspectors to remain and to lay the groundwork for negotiations between the US and North Korea. These talks in turn led to what was called the Agreed Framework. That bilateral understanding imposed limits on North Koreas nuclear programs. In exchange, though, it offered to provide the North Koreans with two light water reactors which would not present nuclear weapons dangers. Carter also in his talks with South Korean president Kim Young Sam prepared the way for a meeting between the two Kims. That meeting never took place because of Kim Il Snug's death not long afterwards. The whole story of Carter's efforts is told in fascinating detail in a book entitled "A Moment of Crisis". It has been written by a Carter Center colleague Marion Creekmore who accompanied Carter on that trip and has just been published. It is an excellent case study of surprisingly successful conflict resolution against great odds. Interestingly enough, human rights does not figure prominently in the account.

During the next several years after the negotiation of the Agreed Framework there were ups and downs in carrying it out, with each side thinking the other was being insufficiently forthcoming. But in late 2000 then Secretary of State Madeline Albright went to Pyongyang and a North Korean marshal came to Washington soon thereafter. Also there came the US presidential elections.

As you know, the Bush administration took a very different tack. Not only did the US not move ahead along lines agreed to by the previous administration. The new president made very clear to one of his early visitors, South Korean president Kim Dae Jung, that he was not interested tin carrying out the provisions of the Agreed Framework. Some months later he formalized that sentiment by designating North Korea along with Iran and Iraq as charter members of the "Axis of Evil". There were other developments which reinforced the new picture. In 2001 a US Committee for Human Rights in North Korea was founded. Its initial mission has been to conduct studies that would focus on political prison and labor camps, the denial of equal access to food and goods and the plight of refugees fleeing to China. Then in 2004 the Congress adopted the North Korea Freedom Act to undertake activities that enhance the chances of influencing the human rights situation in North Korea. The North Koreans complicated matters further by violating one of the provisions of the Agreed Framework by starting a program for enriching uranium which had nuclear weapons potential. The US did come up with a new framework for negotiations on the North Korean nuclear program, namely what are called the six party talks, involving South Korea , China, Russia and Japan as well as the US and North Korea. The obvious value of that formula was to include all the relevant countries. A further major advantage for the US was not having to have one on one negotiation with a member of the "Axis of Evil" or, to put it in other terms, the US could continue to refuse the bilateral negotiations that North Korea wanted saying there was no need for them. These six party talks produced an agreement in September of last year but almost immediately thereafter the US instituted a program of financial sanctions The North Koreans then refused to continue to participate in the six party talks. And then in recent months North Korea tested longer range missiles and most recently conducted a test of a small nuclear weapon. Strict sanctions voted unanimously by the Security Council have followed.

You're familiar with the most recent developments. Largely due to Chinese pressure North Korea has agreed to return to the six party talks and the US has agreed to talk with North Korea about the financial sanctions but in separate talks.

There is little doubt that the US and Japanese governments will seek to enforce strictly the sanctions voted by the United Nations Security Council and that China, South Korea and Russia will take more limited actions, of which the most important will be further unpublicized steps by China in such areas as the provision of heating oil where there already appear to have been significant cuts. Perhaps not surprisingly there was no reference to human rights in the Council's resolution.

Let me turn now to the question of human rights in North Korea. Ever since the installation of the communist regime in the North after the Second World War, North Korea has been known as one of the most oppressive societies in the world. Substantial US forces were stationed along the dividing line between the two Koreas. Periodic clashes occurred, though once in a while in the early 90s there were brief periods of reduction of tensions.

But following the Carter visit, especially in the last decade, contacts between the two Koreas have expanded substantially under the aegis of what is known in the South as the "sunshine policy". Human rights as such, however, have not been a prominent ingredient. The key tenet of the policy is that contacts and collaboration between North and South Korea will mitigate the hardships of North Koreans and lead also to a gradual lessening of the repressive features of the system in the North. That conviction or hope has been somewhat shaken now by the North's nuclear and missile tests.

So let me focus now in still more detail on the human rights aspect.

North Korea of course has long been considered one of the most closed and repressive societies in the world. Yet there have been times when limited openings have occurred. This has been largely in the context of relations between North and South Korea, particularly as the result of the visit by President KimDae Jung of South Korea to the North.

South Korea's "sunshine" policy has also resulted in trips by thousands and thousands of South Koreans to a sacred mountain in the North. A number of light industries have been established in the Kaesong area by South Korean firms. There have even been signs, sporadic and erratic to be sure, of some loosening of the internal economic restrictions and the appearance of farmers' markets. In general, however, human rights have not been part of the South Korean approach.

In the US in 2001 a US Committee for Human Rights in North Korea was established. Its mission has included monitoring relief efforts to be sure the aid reaches those who most need it. It also tries to monitor foreign economic assistance. Then too the Committee seeks to persuade China to allow North Korean refugees to remain in China, and not be forcibly repatriated. In addition, the Committee searches for ways to get information into North Korea so as to break down the enforced isolation in which North Koreans live and also to urge that South Korean firms operating in North Korea observe a code of conduct.

For the last several years the UN special rapporteur on human rights in North Korea has been attempting to visit North Korea but continues to be refused entry. His periodic reports set out the wide range of abuses that occur in the DPRK from holding individuals criminally responsible for the conduct of their relatives to confining mentally ill persons in concentration camps.

The most recent call for action come, just a week or two ago, from three prominent human rights figures, Vaclav Havel, Kjell Bondevik and Elie Wiesel. They urged a continuing and strong "focus on the suffering of the North Korean people" and said that it is imperative to seize the opportunity to engage once again with the North Korean government on human rights and humanitarian concerns. They urge the Security Council to adopt a non-punitive resolution seeking open access to North Korea for humanitarian relief, the release of political prisoners and acceptance of visits by the UN's special rapporteur.

To me these ideas make sense. The question, then, is how this can best be done, given the continued likelihood of dire effects from winter and recurrent shortages of food. Relevant too is the general lack of confidence in the North Korean government's ability and willingness to make food available to those in greatest need. If there were a contest to determine those governments least responsive to international human rights concerns and its own people's needs, North Korea would certainly win a prize.

That's no reason of course for not trying to devise ways to have an impact on North Korea. After all for a period of six years, North Korea did abide by most of the provisions of the Agreed Framework. So did the United States. Isolation produced worse results in the ensuing six years. That being the case, why not begin build on the existence of the September 2005 six party agreement? While that is being negotiated, a first step could be for the Security Council to keep making it very clear that the current sanctions are not directed against the North Korean people.

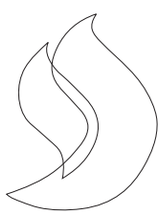
One such way would be to encourage the World Food Programme to offer to increase its planned distribution of food, even in the face of the North Korean government's decision to cut back on WFP efforts. The second is for the other five members of the six party

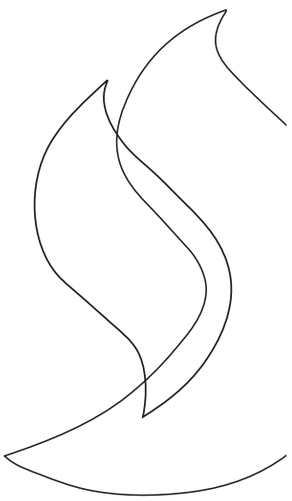
talks to go into the next round of talks with convincing evidence that they seek to reach a mutually satisfactory understanding with the DPRK not just a surrender ceremony. Unwillingness to take such an approach the last several years has meant the waste of much valuable time. Paradoxically, it is likely that if agreement can be reached on the nuclear issues, the chances for improved humanitarian and human rights conditions would be significantly greater. What's the saying? "Even people who are paranoid sometimes have enemies".

There are of course a number of both what I'd call "ponderables" and "imponderables". The North Koreans probably by now trust no other country, including China, and none of the other five really trust the North Korans. That makes it all the more important that the five make offers of food assistance in ways which are both clearly relevant to the needs in the North and as part of a larger package which somehow shows "respect" for the North. Part of showing respect, hard though it may be, lies in being willing to meet and discuss and treat each other at least as an acceptable partner. It was possible to do that in 1994. It ought to be possible to find ways to do so now.

This is a conflict with enormous potential for harm.

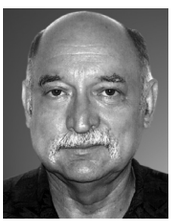
It is also one, which with imagination and persistence, indeed with dogged efforts at conflict resolution, might begin to create a real potential for promoting human rights.





Peace processes and human rights: an international glance

Mr. Javier Zúñiga
Special adviser to the Secretary General of Amnesty International



Curriculum

Mr Javier Zúñiga is currently Special Adviser for Regional Programmes in the International Secretariat of Amnesty International in London. He joined AI in 1977 and directed the organisation's programming in America until 1994, and also from 1997 to 2001. He has since then held important posts in the organisation, including the Management of Regional Strategics and General Management of Regional Programmes. During his sabbatical, from 1995 to 1997, he held the post of Director for Human Rights and also of Executive Subdirector for the Civil International Mission in Haiti for the United Nations Organisation and for the Organisation of American States. Furthermore, he worked as Head of the Human Rights Mission in Rwanda for the United Nations Human Rights High Commission. Mr Zúñiga has had to travel to various countries in the course of his work, including numerous journeys for field-work investigations in the following countries: Argentina, Brazil, United States, Mexico, Haiti, Cuba, Bolivia, Chile, Nicaragua, El Salvador, Peru, Dominican Republic, Guatemala, Colombia, Israel and the Occupied Territories, Venezuela, Afghanistan, Nepal, Yemen, Algeria, Spain, France, Morocco, Tunisia, Zimbabwe and The Republic of South Africa. He also supervised the work carried out by AI on the United Kingdom, including Northern Ireland.

Whilst working, both in Amnesty International and otherwise, he has carefully followed and directed AI's cooperation work with the different types of Commissions for the search of Truth, Justice and Reconciliation in countries such as Argentina, Chile, Guatemala, Peru, Haiti, El Salvador, and Northern Ireland, as well as the various peace processes that had previously taken place in some of these countries. During his stay in Rwanda, only two years after the Genocide had ended, he was able to verify first-hand the challenges that existed, and to contribute to the healing of the wounds that the tragedy had left, and to the efforts made in the rebuilding of the social structure of the society.

Summary

Human Rights not only are instrumental to conflict solving, but they should be an integral part of any final political agreement.

Experience has extensively shown that any political agreement that puts an end to a conflict but fails to incorporate human rights within its core framework have resulted in flawed agreements.

The search for truth has to be the initial step in providing justice and reparation to victims, with the goal to end impunity and provide guarantees of non-repetition.

Peace processes and human rights: an international glance

On behalf of the Secretary General of Amnesty International I would like to thank the Basque Government for inviting our organisation to participate in this important conference.

We believe that closely linking human rights with the resolution of conflicts in a conference was a very accurate decision because it implies the acknowledgement that human rights are not something appended to a peace process to make it more acceptable, but they constitute, or should constitute, a central theme in order to obtain a fair and long-lasting peace. This has been Amnesty International's experience throughout its 45 years of existence in providing evidence of human rights violations committed in the course of conflicts in which the use of armed force has been one of the characteristics.

The phrase "Human Rights", however, has been used and abused systematically in recent years. Indeed, as a general rule, no party to a conflict publicly acknowledges violating human rights. It is always, of course, the opposing party who does so.

Hence, I will begin by defining what we understand by Human Rights. I refer, of course, to the Universal Declaration of Human Rights and the treaties that have arisen from it. "Universal" is the key word here, meaning that we all have these rights, that they cannot be renounced and that consequently we all have the obligation to respect and defend them. One outstanding fellow countryman of mine, Benito Juárez, said, "Peace is Respect for the Rights of Others". These words are engraved in the hall of the United Nations building in New York. I would add that herein lies the secret of the solution to all conflicts.

In this context, the universality which I mention implies that the international community is interested in the conflict, that afflicts the Basque community and the rest of Spain, being resolved by fully embracing human rights. By this notion of universality, every time someone disappears in Nepal or tortured in Spain, it is not only the human rights of the victims that are violated, but those of all mankind.

It is not my intention, nor is it part of Amnesty International's way of doing things, to pass judgement on the deep-rooted reasons for the Basque conflict. What the organisation has stated, documented and denounced are the violations of human rights in the context of the conflict, or using the conflict as justification.

Amnesty International has observed that in conflicts in which armed groups operate, sheltered by the people for whom they claim to be making demands of a different nature; possibly the recognition of national, regional or ethnic rights or even the overthrow of the prevailing constitutional regime, the response of the central government often includes human rights violations.

These violations include: the disproportionate use of force, resorting to illegal and arbitrary methods, interrogation, in extreme cases torture or other cruel, inhuman or degrading treatment of those detained or their extra-judicial execution or forced disappearance.

In view of their inability to annihilate armed groups, the central state also creates legislation that affects the population that plays no part in the conflict; limits to the rights of meeting, expression and association are common. This, more than the previously mentioned repressive actions, only serves to augment the conflict. The vicious circle of provocation-repression is one of the greater obstacles on the road to resolving conflicts.

Armed groups, for their part, resort to serious abuses of human rights in order to obtain their objectives, apart from or as part of their political struggle, such as the assassination of members of the security forces and political figures, bombs in public places which frequently result in numerous civilian victims, kidnappings, extortion, or attacks on the economic infrastructure of the country.

No one could fail to come to the conclusion that the Basque conflict responds very much, if not totally, to this state of affairs which we have observed in other conflicts.

Inexorably however, political, economic and social changes, the international setting and pressure from the affected population, mean that armed conflicts slowly but surely will have to come to the conclusion of peace agreements. No peace agreement can be lasting or can truly fulfil the expectations of those who endure it, if human rights do not play a central role in the process.

It is important to remember that Amnesty International, by vocation, does not join in peace processes, either as a party or as a mediator. Their role is to remind the parties in the process, of certain principles which, if not respected, will lead to an incomplete or defective agreement.

Every armed conflict situation is different and consequently the ways to undertake the peace process also differ and Amnesty International can make no contribution in this respect. However, the organisation considers that certain measures and actions on the part of the Spanish state and ETA could contribute towards creating a climate in which the initiation of a peace process would be more favourable.

These measures are necessary, urgent and should be put into practice, even in the absence of a peace process, as they are aimed at ending the human rights violations that are occurring at the present time. Human rights cannot wait, and must not be used as a bargaining chip in a peace agreement that aspires to having credibility.

Indeed, Amnesty International has already addressed both the President of the Spanish government, Mr. Jose Luis Rodriguez Zapatero, and the governing body of ETA, urging them to carry out these measures.

What are these measures?

With regard to the Spanish nation they are the following:

Abolition of detention in solitary confinement

In our experience, systems of solitary confinement breed torture or other degrading treatment and increase the risk of other serious violations of human rights.

It is no coincidence that solitary confinement has been linked to kidnappings, torture, indefinite arrest without hope of a trial, negation of the right to defence, the aid of a lawyer of your choice, the existence of secret detention centres, air transport and secret detentions to be interrogated under torture.

This list does not, although it could well do, refer to a dictatorship in the Southern Cone of America in the 1970s. I am referring to the actions of the United States of America in their response to what their government defines as the threat of terrorism.

For this reason, Amnesty International regrets that the Spanish government has refused to introduce legal measures that serve to improve the protection of detainees with the excuse that they are not necessary. On the contrary, for our organisation, quick access to legal aid of ones choice and appearance before a judge are essential in decreasing the risk of mistreating persons suspected of terrorist activities.

Numerous international petitions and non-government human rights organisations as well as United Nations commissioners, such as the Special Commissioner on the question of torture, have requested the abolishment of detention in solitary confinement. We hope Mr. Rodriguez Zapatero's government will attend to this recommendation with the utmost urgency.

The second measure that we believe needs to be taken is to end the policy of dispersing prisoners, or those detained for terrorism, and authorise the completion of their sentences near their families

This policy affects the right of family life and amounts to a collective sanction against the prisoner's family. It is a cruel policy and violates rights recognised by the European Agreement for the Protection of Human Rights and Fundamental Freedoms. In 2003, in accordance with a report from the Special Commissioner, the average distance of a prisoner from his family was 630 km. This brings with it financial problems and dangers of accidents. Since the beginning of the policy of scattering prisoners, 16 people have lost their lives in road accidents.

The law on political parties is ambiguous and constitutes a permanent threat to the rights of freedom of thought, expression, association and participation in public life, guaranteed by international treaties including the European Agreement of Human Rights and the Constitution of Spain itself.

Article 9.2 is particularly worrying in its ambiguity which explicitly states that:

> Politically supporting or complementing the action of terrorist organisations in obtaining their objectives of disturbing constitutional order or seriously altering the public peace, by submitting public powers, certain persons or groups in society or the population in general to a climate of terror …

Article 9.3 of the law in question contains vague and imprecise expressions and terms such as "Give tacit support to terrorism", "[…] actions that promote an atmosphere of civil conflict and confrontation […]", "[…] related behaviour […]"

These provisions could be interpreted to incriminate political options which seek, through pacific and democratic means, similar political objectives to those of "terrorist" groups, such as secession or independence.

Amnesty International considers, therefore, that the law needs to be reformed so as to eliminate these ambiguities, given their potential effect on human rights. I must add that our organisation has not taken a position on the prohibition of the electoral coalition Herri Batasuna by the Spanish courts.

Concerning ETA, Amnesty International has candidly denounced the human rights abuses committed by this organisation. There is no pretext or justification for such grave abuses which include the killing of civilians, kidnappings, taking hostages and others. ETA cannot condition the cessation of these abuses to a peace process. As part of their contribution to an atmosphere, propitious of a peace process, ETA must also put an end, immediately and unconditionally, to acts of harassment, threats, economic extortion and other acts of intimidation of the civil population, such as street violence, instigated with all verisimilitude by ETA.

The right to the truth, to justice and to redress

These three concepts are inseparable from any peace process whether they are implicitly considered in the agenda of negotiations or exist in the backdrop waiting for the necessary conditions to surface. What is true is that only the truth can open the doors to justice, and without justice and redress there can be no hope for reconciliation.

The general Assembly of the United Nations passed a series of principles and basic guidelines on the rights of victims of manifest violations of international human rights norms, and serious violations of international humanitarian law to lodge an appeal and other recompense.

Amnesty International has recognised as positive the law of solidarity with the victims of terrorism.

However, if the victims of ETA have the means to seek the truth, justice and redress, in practice, victims of human rights violations committed by agents of the state do not seem to have the same level of recognition and legal protection.

Truth and justice must embrace all human rights violations committed in the past, whether by ETA or by agents of the State or with their complicity such as, for example, the claims of extra-judicial executions of persons believed to be members of ETA by members of an illegal group known as GAL (Anti-terrorist Liberation Groups); although in the latter case there have been trials that ended with clear sentences of guilt or innocence.

Even under the rule of law, many obstacles are encountered investigating abuses committed by civil servants responsible for making sure the law is carried out, in other words, the security forces: gathering evidence from public force itself is thwarted by the "law of silence" and there is often a lack of political will.

Amnesty International proclaims the need to create an independent mechanism with the necessary credibility to investigate, quickly and impartially, accusations of human rights violations committed by the police. This mechanism is essential and should exist independently of the existence or not of a peace process.

In the case of Spain, Amnesty International has insisted on a mechanism of this type. The organisation has affirmed the lack of a quick and efficient means of investigating torture and mistreatment committed by the police, for example, during the incidents in Ceuta and Melilla in August 2005.

The search for the truth

In armed conflicts, the first victim is truth. All the peace processes that have existed in Latin America, for example, have had mechanisms known worldwide as Truth Commissions because without them the peace agreements cannot be based on reality; and justice and redress are dependent on this. Each peace process has to create a truth search mechanism that responds to its particular conditions. But one condition is fundamental: total cooperation and the goodwill of the participants who know or have access to a considerable part of the truth, and the protection of witnesses.

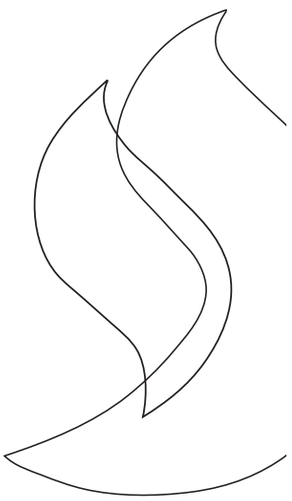
Whatever the mechanism, Amnesty International wishes to reiterate that neither truth nor justice should be used as a bargaining chip to obtain peace. Peace obtained in this way will not be long-lasting or legitimate. In particular, the organisation is against general amnesties, pardons or other measures that tend to obstruct research into the human rights violations or to ensure the impunity of those responsible. These measures are contrary to the obligations of the states under international law if they are not preceded by trials in accordance with the international rules for a fair trial.

Various arguments have been put forward in opposition to the rights of victims to seek and receive justice, especially in so-called peace processes. We are all too familiar with these arguments: that the search for justice endangers the fragile peace process, or that it jeopardizes possible reconciliation, or with affirmations such as "let's bury the past and look to the future".

But the victims could reply: How can you pardon if you are not recognised as a victim? How can you forget if the exact circumstances are unknown, if the truth of the facts are not known? How can you forget if you do not know who the person responsible is, in order to be able to pardon him, or what to forget? How can you stop history from repeating itself if the causes of past injustices and affronts have not been eradicated?

Dear participants

I repeat, Amnesty International does not participate in peace processes except insofar as the principles which, in the opinion of A.I., must govern them. However, Amnesty International will follow this process very closely and carefully and will contribute, where relevant, with its expertise to ensure that human rights occupy the central theme in order to reach what we all desire: the rule of law, respect for all the human rights of all and by all.



Rights, religion and resolutions

Rev. Harold Good Obe
Member of the Order of the British Empire. Northen Ireland

Curriculum

Harold Good was born in Londonderry (Derry) Northern Ireland on 27th April 1937.Ordained as minister of the Methodist Church in Ireland in 1962, he has served in Northern Ireland, the Republic of Ireland and the United States of America.

A period of study in the USA in the 1960's had significant impact upon his understanding of divided communities, peace making and human rights and the similarities between racism and sectarianism.

In 1968 he was appointed to the strongly "Protestant"/"Loyalist" inner-city Shankill Road in Belfast where much of his ministry was spent on the streets, calming fears, restraining violent action and re-action and helping build slender cross-community "bridges".

In 1973, he was appointed Director of the Corrymeela Centre of Reconciliation. Founded by Christians of both Catholic and Protestant traditions, Corrymeela has provided a haven for people personally affected by conflict and a "safe house" for dialogue between people of differing social, religious and political outlook and aspiration.

He has served as adviser to Government on social policy; Human Rights Commissioner; prison chaplain; Chair of the N. Ireland Association for the Care and Re-settlement of Offenders and founder member of Healing Through Remembering, where victims and others seek ways of dealing with our painful past.

In 2001, Harold Good was elected President of the Methodist Church in Ireland. In September 2005, with Father Alec Reid, he was one of the independent witnesses invited to verify the de-commissioning of the weaponry of the IRA.

In December 2005, he and Father Reid were honoured by the Basque Government in the presentation of the Rene Cassin Human Rights Award. His work has also been acknowledged by Queen Elizabeth, being awarded an MBE in 1970 and an OBE in 1985.

Married to Clodagh, they are the parents of five children and twelve grandchildren.

Summary

Within this presentation, the Rev. Harold Good will explore the negative and, at times, destructive influence which certain forms of "distorted" religious thought and practice have had upon much of our flawed understanding and practice of human rights around the world.

This, as he will explain, can be attributed to:

A distorted and subjective interpretation of Judeo-Christian texts and Islamic scriptures.
Rigid fundamentalism.
A pre-occupatiuon with an unhealthy individualism.
Censorious and unforgiving forms of pietism.
The conflicting interests of country, culture and creed.
Authoritarian structures and value systems as a means of protecting religious institutions.

As will be illustrated, we do not have to look far into the histories of the world's major religions to find examples of some of the worst abuses of human rights which have been defended as deeds done "in the name of God".

It also has to be said that, in seeking to justify its actions in such a way, the religious world is not alone ! There will be no less –perhaps even more– examples of nations which have sought to defend the indefensible as having been done "in the name of the state". The state being for some either a substitute or an agent for their own interpretation of "divine authority".

However, in rightly advocating the rejection of flawed and distorted "theologies", which may yet seek to legitimise injustice through the denial of any fundamental human right, this intervention also seeks to acknowledge and affirm the essential contribution of universally held values of rights and responsibilities which have been drawn from ancient scriptures and historic creeds.

It will be in the mutual re-discovery and sharing of these common values that the religious world will be freed to be what it is called to be, and the more secular world will be enriched by an understanding of rights which goes beyond the good ordering of society, important as that may be.

Whatever the vocabulary of each, the discovery will be in the listening.

Rights, religion and resolutions

It was during my term as a member of the Northern Ireland Human Rights Commission, which had been created as part of the *Good Friday Peace Agreement*, that I was elected to be President of my Church. At my press conference, a political journalist asked, "Now that you are to be a Church Leader, can we assume that you will resign from the Human Rights Commission ?" When I asked why he thought I should, he stated that, for him, there would now be a clear "conflict of interest." I replied that the only conflict I could see would be in my diary!

In his thinking that journalist is not alone. For many people, human rights and religion do not sit easily together. For some, because their understanding of human rights appears to be at variance with sincerely held beliefs based on the teachings of their faith in relation to personal responsibility.

Others will have based their judgement upon what they have seen to be the destructive impact which certain forms of what I consider to be highly "flawed" religious thought has had upon much of our flawed understanding and practice of human rights around the world.

In my view, this can be attributed to any one of a number of factors.

A distorted, limited and subjective interpretation of Judeo-Christian texts and Islamic scriptures.
Rigid fundamentalism.
A pre-occupation with an unhealthy individualism.
Censorious and unforgiving forms of pietism.
The conflicting interests of country, culture and creed.
Authoritarian structures and value systems as a means of protecting religious institutions.

Sadly, we do not have to look far into our respective histories for examples of some of the worst abuses of human rights which have been justified as deeds done "in the name of God."

For me, I look no further than the recent and past history of my own island of Ireland.

In South Africa, Apartheid was justified by the flawed "theology" of the Dutch Reformed Church and in the southern states of America slavery was "legitimised" by a false, Fundamentalist interpretation of the scriptures. If time permitted, we could speak of inquisitions, crusades and purges, with which others will be familiar.

Thankfully, there are other stories to be told. Recorded and unrecorded stories of the 'Ghandis', the 'Martin Luther Kings', the 'Mother Theresas' and the 'Mandelas' of this world, who refused to allow their deeply held faith-based understanding of justice and rights to be distorted by the context in which they found themselves.

As in the world of religion, so also in the secular world where other abuses have been defended as having been done "in the interests of the state". I know that we will be agreed that no violation of Human Rights, whether "in the name of God" or "in the name of the state" can ever be defended.

Rather than seeing a conflict between the religious and the secular interpretation of rights, I want us to acknowledge and affirm our common and universally held values of rights and responsibilities, whether they be founded on ancient scripture and historic creed or drawn from a secular and humanist understanding of what it is that makes for a just society.

It will be in the mutual re-discovery and sharing of these common values that the religious world will be freed to be what it is called to be, and the more secular world will be enriched by an understanding of rights which goes beyond the good ordering of society, important as that may be. Whatever the vocabulary of each, the discovery will be in the listening.

Conflict resolution requires a consensus on core principles and common values, which are rooted in a common understanding and a shared commitment to Human Rights from all parties to the conflict.

Coming from Northern Ireland, where our conflict has been perceived to be "religious", we offer in a common language the steps which, from different perspectives but sharing common values, have brought us to where we now are in our peace process.

Truth

As a first step, all parties to the conflict must move beyond denial to an acknowledgement of individual and collective responsibility for the causes and continuation of conflict. Acknowledging what we have failed to be and do as well as what we may have done. Confessing what we have done to one another.

Honest Dialogue

Which will involve painful confrontation as well as conciliation.
A willingness to make oneself vulnerable.
A preparedness to receive as well as to give in terms of altercation and verbal attack.
A willingness to return to the room as well as a readiness to walk out.
The capacity to listen as well as to talk. Initially, such dialogue needs to be facilitated by a totally independent person/s such as Senator George Mitchell in Northern Ireland.

An Empathetic Understanding Of 'The Other'

"Walking in the other's shoes", which can only happen as a result of honest dialogue. At a public event in Belfast, I observed a prominent Government official, whose own home had been bombed by the IRA, apparently enjoying a conversation with a former leader of that organisation. When I commented upon this he replied, "Had I been born into the community from which he has come, and at the same moment of time, I have no doubt that I would have taken the same road as he".

An Openess To A Truly Inclusive Concept Of Society *

Within which there will be an acceptance of healthy diversity.
An acknowledgement of the dignity and equal worth of each.
A recognition of the legitimacy of differing political ideologies and aspiration.
A commitment to the protection of the rights which I demand for myself, for all.

This "all" must include perpetrators and combatants as well as victims; people with whom I disagree as well as those with whom I agree; people I see as 'undeserving' as well as those I believe to be 'deserving'.

Shalom is the great biblical word for peace. But this peace of which it speaks means much more than the absence of violence. It speaks of a *Just* society, there can be no peace which does not include *Justice*.

Commitment To Exclusively Democratic & Peaceful Means *

Of resolving differences on political issues.
Opposition to any use of threat or force for any political purpose.
Actual quotes from the Good Friday (Belfast) Agreement.

Acceptance of responsibility for all victims & survivors *

A commitment to provide realistic practical and emotional support as
requested and as appropriate for *All* who have suffered loss and/or injury.
Avoiding the creation of "hierarchies" of victims.
Avoiding the "politicisation" of the plight of victims and survivors.

Generosity and reciprocity

Towards "enemies" as well as "allies".
This can take many forms.
It will mean one thing to one person and something quite different to another.
For some it may be about "forgiveness", which is a difficult word.

Without generosity there cannot be reconciliation and healing, however many sophisticated programmes and processes there may be ! This generosity of spirit is well exemplified in many of the stories which come from South Africa. Not only in the spirit of Nelson Mandela , but in the recent past following the death of Mr Botha, former Prime Minister and one of the most vigorous defenders of Apartheid. It was he who imprisoned Mandela and other activists for change. At his funeral, President Mbeki represented the nation and ordered the lowering of the national flag on all public buildings. This was an "act of generosity".

Generosity towards long-standing enemies and those we see as more responsible than others will never be easy. When, in Northern Ireland, we were engaged in difficult conversations about the proposed early release of politically-motivated prisoners, it was a South African lawyer (Brian Curren) who said, "…don't speak of this as justice. You cannot speak of this as 'justice' to a widow or a fatherless child. Rather, it is about giving all parties to the conflict an equal opportunity to share in a new beginning, whether you believe them to be deserving of this or not." This, I told him, is what we as preachers call 'Grace'.

"If this is your word", said he, "use it often, for you will need a great deal of it ".

"Generosity", "Grace". These will be the keys which shall release us from understandable but highly destructive responses to what we perceive has been inflicted upon us and "our" people. It will be this generosity of spirit alone which will free us to move on, individually and together.

Being prepared to do the unthinkable *

For different sides this will mean different things.
In Northern Ireland:

Irish Republicans standing for seats in a N. Ireland Assembly.
The decommissioning of their weapons.
Unionists sharing power with Republicans & former activists. And the list goes on !

I have heard F.W. de Clerk speak of his personal journey in the South African peace process. He spoke of how, with the hard-biting sanctions against the nation and the obvious possibility of economic and political ruin, he could see no alternative to making peace with his enemies, but only in the interests of survival. So, for purely pragmatic reasons he embarked on the journey towards peace.

However, he went on to tell us of the day when, suddenly, it became abundantly clear to him that what he was doing was *right in itself*.

By being prepared to do the 'unthinkable', in the first instance for purely pragmatic reasons, he found himself on a new journey which released him as a person and restored the nation. While the motivation for beginning any process of conflict resolution is less important than the journey itself, what a difference it would make to all of our timetables if we were to begin by seeking to "do justly" and the right thing at the right time.

Trust

We must be prepared to trust ourselves, only then can we begin to trust one another.

Hope

Like the Old Testament prophet Zechariah,we must be prepared to become "*Prisoners of hope*" ! "We suffer from an incurable condition … called *hope*" (a Palestinian Leader).

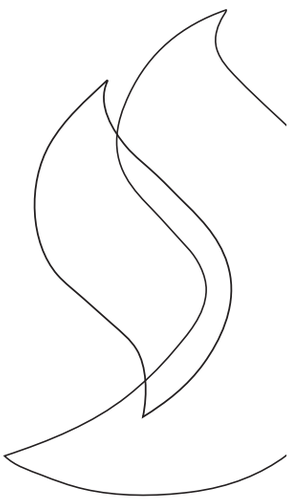
In summary "*Do justice*

Be generous in your judgements

Refrain from Arrogance"

(Paraphrasing the prophet Micah)

* In Northern Ireland, what is described in sections marked (*) and much more, has been enshrined in the "Good Friday (Belfast) Agreement", signed up to by all but one of the political parties in April 1998.



Peace processes and human rights: the role of the United Nations

Ms. Joanna Weschler
Research Director of the Security Council Report, organisation affiliated to the University of Columbia, United States of America.
Ex representative of Human Rights Watch in the United Nations

Curriculum

Joanna Weschler, a native of Poland, has lived in the U.S. since 1982. In Poland she was a reporter for the Solidarity Union press agency, in charge of covering most meetings between Union President Lech Walesa and the communist government, and meetings of the executive leadership of the union.

She is currently the director of research of the Security Council Report, a newly established organization affiliated with Columbia University's School of International and Public Affairs.

From 1994 until 2005, Ms. Weschler was the United Nations representative for Human Rights Watch. As the first person appointed by Human Rights Watch to this position, Ms. Weschler developed and articulated HRW's strategy toward the U.N. Her responsibilities included overseeing and coordinating. HRW's staff work with the U.N. bodies, its diplomatic community and the U.N. press corps; speaking to the media on U.N. and human rights related issues; and participating as a speaker in public events and regularly representing HRW at the United Nations Human Rights Commission and several U.N. meetings in New York, Geneva and other locations.

Previously, she was the Poland researcher for Helsinki Watch; Brazil researcher for Americas Watch; as well as director of HRW's Prison Project. She has conducted human rights investigations in countries on five continents and written numerous reports and articles on human rights. She has a master's degree in Spanish and Latin American Studies from the University of Warsaw and a master's in journalism from Columbia University.

Summary

For most of UN history, human rights were rarely if ever considered at the time when peace was being negotiated or peacekeeping and peacebuilding activities undertaken. Peace settlements only very rarely had human rights provisions. In addition, various peace agreements, through their amnesties, often offered impunity for sometimes very grave crimes. Bringing up human rights concerns during peace negotiations was seen by many as counterproductive and in competition with the goal to reach the settlement quickly. And making human rights part of the post-agreement and recovery period was seen as a luxury.

Yet, over the years, internal conflicts increasingly replaced international conflicts as the main concern of UN's Security Council. They tended to have human rights violations among their root causes and it became more and more evident that lasting peace could not be built without including human rights in peacekeeping and peacebuilding. Moreover, many in the international community came to realize that peace rooted in impunity was likely to be very shaky and that rebuilding a society after a conflict needed to include creating foundations for the observance of human rights. There existed, thus, very pragmatic reasons to include human rights at every stage of peace processes.

Starting at the end of the last century, the UN began including human rights components in virtually all newly established field operations. The High Commissioner for Human Rights, in addition to being actively involved in the work of these operations, frequently also lent support for a range of other human rights activities in post conflict societies. Some UN agencies and programmes operating in the peacebuilding context, and the UN development body, UNDP, have incorporated a number of human rights initiatives in its programmes. And it will be interesting to see to what extent the new body that will focus exclusively on post conflict situations, the Peace Building Commission, will make human rights an item on the menu of its concerns.

Peace processes and human rights: the role of the United Nations

With the maintenance of international peace and security as the primary goal of the United Nations under its Charter, the Organization throughout its history has been involved in more 170 peace settlements worldwide[1]. For most of this period, however, human rights were rarely if ever considered at the time when peace was being negotiated. Peace settlements only very rarely had human rights provisions. In addition, various peace agreements, through their amnesties, often offered impunity for sometimes very grave crimes, including crimes against humanity. Bringing up human rights concerns during peace negotiations was seen by many as counterproductive and in competition with the goal to reach the settlement quickly. Up until approximately the end of the cold war, most UN operations were limited to cease-fire monitoring mandates and human rights were seen as entirely outside their scope.

Yet, over the years, internal conflicts increasingly replaced international conflicts as the main concern of the United Nations Security Council, the body in charge of peace and security issues. These types of conflicts have tended to have human rights violations among their root causes and it became more and more evident that lasting peace could not be built without including human rights in peace keeping and peace building. Moreover, many in the international community came to realize that peace rooted in impunity was likely to be very shaky and that rebuilding a society after a conflict needed to include creating foundations for the observance of human rights. There existed, thus, very pragmatic reasons to include human rights at every stage of peace processes.

It is worth taking a look at a few specific cases. One of the earliest examples of human rights being part of an UN-managed peace process is El Salvador. It is also, until today, one of the most positive such examples. It is therefore worth to focus on it for a moment.

For several years in the late 1980s, through the good offices of the Secretary-General, the UN engaged in the efforts to end the bloody protracted civil war in El Salvador. As a result the two parties prior to signing the peace accord as such, signed in July 1990 in San José, Costa Rica an Agreement on Human Rights. In May 1991, the Security Council passed Resolution 693 "stressing the importance" of the San José agreement and for the first time, created a human rights component within a mission it authorized[2]. The mandate endorsed by Resolution 693, can serve as a model mandate for a human rights component up until today. It included:

a) Active monitoring of the human rights situation.
b) Investigation of specific cases of alleged violations of human rights.
c) Promotion of human rights.

d) Providing recommendations to eliminate violations of and to promote respect for human rights.
e) Reports to the Secretary-General and through him, to the Security Council and the General Assembly.

The early deployment of a sophisticated human rights mission by the Council, even prior to the signing of the accord, deterred abuses and thus helped create a climate of confidence needed by both sides to make compromises necessary for the signing of the final accords. Later on, the human rights component of the peace operation, ONUSAL, through its work on both past and ongoing human rights abuses, was instrumental in assuring a relatively peaceful and smooth transition[3].

El Salvador, however, did not set a new trend for UN peace keeping. The UN's handling of the several next conflict resolution and peace processes had at best a mixed human rights record (for example Cambodia) and at worst, quite a disastrous one (Rwanda and Bosnia).

One important factor in the approach to human rights as an aspect of peace processes was the thorny issue of amnesties and impunity. Impunity does tend to be raised in the context of peace negotiations when parties responsible for serious crimes press for amnesties before they are willing to sign a peace deal. At times such situations have raised questions about the possible need to choose between justice and peace or at least about the best way of sequencing the handling of issues relating to peace and justice[4]. History has shown, however, that amnesties rarely brought lasting peace. In Angola, for example, where the peace process took years to yield results and put an end to the 27 years long civil war, six amnesties were granted as its part, each time inviting further bloodshed and atrocities.

A painful breakthrough for the UN in terms of its own philosophy and practice vis a vis amnesties as part of peace processes came probably with its efforts in Sierra Leone. In July 1999, following a period of horrendous atrocities perpetrated by the rebel force the Revolutionary United Front (RUF) which became infamous for, among other things, chopping off limbs of little children as a means of terrorizing the civilian population, a peace agreement was signed between the government and the RUF. The accord granted the RUF an amnesty for all atrocities, and made its leader vice president of the country, among other provisions. When just before the signing the news of the upcoming settlement and its amnesty prompted a wave of protests and revulsion from the international public opinion, at the last minute the UN instructed its negotiator to insert a provision denying international recognition of this amnesty. The practical effect of this disclaimer was cosmetic. Less then a year later, the RUF, well rested and rearmed thanks to the revenues from the Sierra Leone famously rich diamond fields whose control, incidentally, it had also obtained as part of the peace accord, launched a major offensive during which, among other things, it took several hundred UN peacekeepers hostage.

The UN reestablished some stability on the ground only with the help of Crack British paratroopers, and then soon undertook steps to establish an accountability process setting up the Special Court for Sierra Leone.

Following the signing of the Sierra Leone peace agreement and the last-ditch attempt to disassociate the UN from its amnesty, the UN leadership reached a conclusion that the Organization could not be involved in settlements that glaringly violated human rights standards. This was done for both pragmatic reasons, exemplified by the developments that followed that last accord, but also for principled reasons: that the United Nations should not and could not support the disregard for the very standards and values it was supposed to be a guardian of.

As a result, the Secretariat produced an internal set of guidelines for its peace negotiators. The document stated that the overarching goal of the negotiations had to be the durability of the solutions agreed upon and that there was a need to ensure quality and consistency of agreements reached in the area of human rights. The document also stated that in any negotiations conducted under UN auspices, the UN mediator had the duty to bring human rights considerations to the parties' attention and that the UN would not condone amnesties regarding war crimes, crimes against humanity and genocide. In addition to the accountability issues, the negotiators were also instructed to address capacity and/or institution building because, as the document stated, measures undertaken in the areas of governance, public security and the judicial system, would prevent the recurrence of conflict.

In addition to issuing these internal instructions, in early 2000, the Secretary-General established the Panel on UN Peacekeeping Operations under the leadership of Lakhdar Brahimi. In a letter informing the Security Council about this move, Kofi Annan referred to the failures of Rwanda and Srebrenica and the need to make every effort to avert such failures in the future[5].

The resulting document, published in August 2000 and widely known as the Brahimi report covered the full range of UN peace and security activities –from prevention through observation, peace keeping and humanitarian operations all the way to post-conflict peace-building– and provided thoughtful and frank analysis as well as numerous, very specific, recommendations[6]. As one of the fundamental premises of the proposed change, the report highlighted: "The essential importance of the United Nations system adhering to and promoting international human rights instruments and standards and international humanitarian law in all aspects of its peace and security activities."

Among its recommendations the report stated that the UN operations needed to work "to promote human rights, to protect minority rights and to institute political arrangements in which all groups are represented. … Every group needs to become convinced that the state belongs to all people".

It also stressed that "the human rights component of a peace operation is indeed critical to effective peace-building. United Nations human rights personnel can play a leading role, for example, in helping to implement a comprehensive programme for national reconciliation".

Following its publication, the Brahimi report sparked vigorous discussions and many of its recommendations –including some of those related to human rights– were resisted mostly by member states, but also sometimes by the UN bureaucracy. Yet, the report did prompt a process of important if gradual reforms.

With regards to peace negotiations as such, in 2004, the Secretary-General reiterated his earlier words when in his report on justice and the rule of law in conflict and post-conflict situations, he recommended to the Security Council that when it considers negotiations, peace agreements and mandates that in its resolutions it should: "reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court[7]".

The Brahimi report recommended back in 2000, the strengthening of the capacity of the High Commissioner for Human Rights to play a more prominent role in planning and subsequent deployment of peace operations. While these recommendations were largely not implemented in the immediate aftermath of the report, they found their way into subsequent reports with recommendations regarding the overall UN reform in 2004-2005. In the end, the September 2005 World Summit and the different implementing decisions that followed, gave the High Commissioner a significant boost, including a considerable enlargement of the High Commissioner's New York's office many of whose functions are closely tied to peace and security issues.

As mentioned above, the UN first started making human rights a part of its peace activities as early as the beginning of the 1990s. In late 1999, the High Commissioner for Human Rights signed a memorandum of understanding with the head of the Department of Peacekeeping Operations, spelling out some of the already existing and emerging practices[8]. The document stressed the importance of the respect for human rights for the promotion of peace and security and the need of a unified approach within the UN to the fulfilment of these Charter-mandated tasks. It went on to say: "The protection and promotion of human rights are also essential elements of United Nations efforts to prevent conflicts, to maintain peace, and to assist in post-conflict reconstruction endeavours and –with due regard to the specific mandate of each peace keeping operation– due attention to their human rights aspects is instrumental to the success of United Nations work in these areas." The memorandum then covered in considerable detail issues such as pre-mission planning, institutional arrangements in the field, tasks, and reporting procedures.

Increasingly, the "human rights components" have became a rule rather than an exception as a feature of peace keeping operations and today, nearly all newly established operations have such a component built in[9]. Furthermore, some of the UN follow on political offices that take over after peace keeping operations end, also have a human rights module. In addition the Office of the High Commissioner has various stand alone offices and programmes, many of them in post conflict situations. Activities vary, depending on the needs of the local actors and UN's capability and resources, and include monitoring the situation of human rights and observance of international humanitarian law with a view to preventative or remedial action, training, capacity-building of local actors, and assistance with the creation of national institutions. The broad range of tasks has also included activities such as human rights training for school children; production of puppet theatre plays for children incorporating human rights themes; helping in the production and broadcast of television programmes on human rights; management training for local NGOs dealing with human rights; and more, depending on the local needs. The High Commissioner has also assisted in processes related to accountability, in particular in the establishment and running of the truth commissions, for example in Sierra Leone.

In addition to being part of peace keeping operations or having a free standing presence in a country, the Office of the High Commissioner often operates in conjunction with the United Nations Development Programme (UNDP) country teams. This is particularly relevant for a number of reasons. The UNDP is the part of the UN that is present on the ground in the largest number of countries worldwide and also because unlike the peace keepers, or even the follow on political offices, it stays on the ground for years and can play a critical role in peace consolidation processes[10].

For years, the UNDP stayed as far as it could from human rights, considering these matters as too sensitive and with a huge potential for complicating the agency's relations with the host country. Yet gradually, the UNDP had also arrived at the realisation that it could not effectively fulfil its mission if it ignored human rights and that respect for human rights was indispensable for sustainable and lasting development. As its website now proclaims, "Following violent conflict, it is necessary to provide closure to past events and establish the enabling environment for a safe future".

In March 1998, UNDP signed a Memorandum of Understanding with the High Commissioner for Human Rights, in which both parties undertook to "seek to increase the efficiency and effectiveness of the activities carried out within their respective mandates[11]".

Currently, UNDP's human rights activities include assisting in the design of transitional justice institutions and activities, including truth commissions, repatriations and reconciliation measures. It has programs aimed at assisting the judiciary, as well as training of the police and the military in human rights. And several of its country teams have officers with dual reporting lines, both to the UNDP and to the Office of the High Commissioner.

The process of making human rights an intrinsic element of UN peace making, peace keeping and peace building activities has been gradual and at times, painfully slow. But it received a very strong boost from the 2005/2006 UN reform activities. All key documents of that last chapter of UN reform stressed the interconnectedness of security, human rights and development and the futility of efforts to address these three separately[12]. As a result, governments decided to significantly increase the resources of the Office of the High Commissioner for Human Rights, including its New York outpost, a move necessary to realize many of the earlier recommendations pertaining to the inclusion of human rights in peace processes.

In addition to strengthening the standing of the UN human rights machinery as such, the 2005/2006 reform process resulted in the creation of a new body whose design is to provide the institutional missing link between human rights and peace processes: the Peace Building Commission (PBC). The concept of the PBC has its roots in the Brahimi report. Back in 2000, the report stated: "Peace-building […] defines activities undertaken on the far side of conflict to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war. Thus, peace-building includes but is not limited to reintegrating former combatants into civilian society, strengthening the rule of law … improving respect for human rights through the monitoring, education and investigation of past and existing abuses; providing technical assistance for democratic development (including electoral assistance and support for free media); and promoting conflict resolution and reconciliation techniques[13]". The Brahimi report saw peace-building as a function that is both preventive and post-conflict with human rights as a critical component. The report recommended the creation of a Peace-building Unit within the Department of Political Affairs that would work in close cooperation with the peace keeping department and the High Commissioner for Human Rights.

As with many other Brahimi recommendations, this one was not fully realized in the immediate aftermath of the publication of the report. It returned, however, in the report of the High-level Panel on Threats, Challenges and Change, a group of international political personalities asked by the Secretary-General Kofi Annan to provide far reaching recommendations for reform of the United Nations to fit the post-September 11 world. The Panel's December 2004 report stated: "Our analysis has identified a key institutional gap: there is no place in the United Nations system explicitly designed to avoid State collapse and the slide to war or to assist countries in their transition from war to peace. That this was not included in the Charter of the United Nations is no surprise since the work of the United Nations in largely internal conflicts is fairly recent. But today, in an era when dozens of States are under stress or recovering from conflict, there is a clear international obligation to assist States in developing their capacity to perform their sovereign functions effectively and responsibly". The report went on to recommend the creation of a Peace Building Commission along with a Peace Building Support Office in the Secretariat. It also stressed the need for the new body to work in close collaboration with the High Commissioner for Human Rights.

The Secretary-General in his own report on reform, the March 2005 report "In larger Freedom" restated these recommendations. In September, the World Summit endorsed the recommendation to create the Peace Building Commission though without an explicit reference to this body's needed links with human rights[14]. And the resolution establishing the Commission a few months later, while in its preamble recognizing "that development, peace and security and human rights are interlinked and mutually reinforcing", did not make any other specific linkages[15].

At this writing, the Peace Building Commission has only barely constituted itself and worked out its most pressing procedural arrangements. In mid-October, it conducted its first country-specific meetings, on Sierra Leone and on Burundi. It is to be seen if governments that form this new body will make human rights an item on the menu of its top concerns. As of right now, it is clear, that human rights are very much central to the concerns of the civil society on the ground. During the first ever briefing by civil society representatives for the member states, activists from Burundi and Sierra Leone put human rights, justice and accountability high on their respective lists of priorities.

Notes to the conference

[1] For information about and full text of some 330 peace agreements since 1930s, see http://peacemaker.unlb.org/.

[2] Resolution 693 (1991) authorized a human rights component for the operation, as outlined in the Secretary-General's report S/22494 para 8 a-e.

[3] "The Lost Agenda: Human Rights and UN Field Operations", Human Rights Watch 1993.

[4] Security Council Report: Update Report No. 3 Strengthening International Law 16 June 2006, www.securitycouncilreport.org.

[5] Letter of the Secretary-General to the President of the Security Council, 7 March 2000.

[6] A/55/3-5-S/2000/809.

[7] The rule of law and transitional justice in conflict and post-conflict societies S/2004/616*, 23 August 2004.

[8] http://www.unhchr.ch/html/menu2/4/mou_dpko.htm Memorandum of Understanding between the Office of the High Commissioner for Human Rights and the Department of Peacekeeping Operations, 5 November 1999.

[9] http://www.ohchr.org/english/countries/field/hrc.htm Human Rights Components of UN Peace Missions.

[10] http://www.ohchr.org/english/countries/field/index.htm field presences of the Office of the High Commissioner for Human Rights.

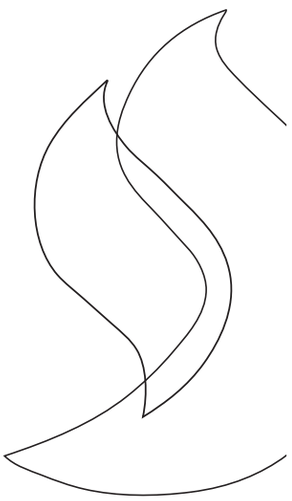
[11] http://magnet.undp.org/new/html/HRMOUfinal.htm Memorandum of Understanding between the United Nations Development Programme and the United Nations High Commissioner for Human Rights, 4 March 1998.

[12] For example, the report of the High-level Panel on Threats, Challenges and Change, titled "A more secure world: our shared Responsibility," A/59/565; Secretary-General's "In Larger Freedom" A/59/2005.

[13] S/2000/809 paragraph 13.

[14] 2005 World Summit Outcome A/RES/60/1.

[15] S/RES/1645.



International justice, peace processes and human rights

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Curriculum

Chair of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg-August-Universität Göttingen (since May 2003). Head Dept. "Foreign and International Criminal Law" Institute of Criminal Law & Justice University of Göttingen. Judge at the State Tribunal Göttingen (24 March 2006). Legal education at the Universities of Freiburg i.Br., Oxford (UK) and Munich. First State Exam, 1990. Legal Preparatory Service, 1992-94. Second State Exam, 1994. Dr. iur 1992 (Munich), Habilitation (Post-Doc) 2001 (Munich), venia legendi in Criminal Law, Criminal Procedure, Criminology, Comparative Law & Public International Law.

Former (senior) research fellow at the Max-Planck-Institute for Foreign and International Criminal Law, Freiburg im Breisgau, Germany, in charge of the sections "International Criminal Law" and "spanish-speaking Latin America" (1991-2003).

Other information

Main research areas: Criminal Law and Procedure, International and Comparative Criminal Law (enfasis on spanish speaking and angloamerican countries).

Various freelance consultancies on judicial reform in Latin American and international criminal justice (in East Timor, Cambodia, FR Yugoslavia, Bosnia Herzegovina, Mace-donia, Kosovo).

Member of the German Delegation to the Diplomatic Conference on the Establishment of an International Criminal Court (Rome, 15 June to 17 July 1998).

Member (advisor) of the German Delegation at the "ICC Preparatory Commission In-tersessional Meeting" in Siracusa, Italy (31 January to 5 February 2000).

Former Member of the Expert Committee “international humanitarian law” of the German Red Cross.

Member of the Expert working group established by the Federal Ministry of Justice for the elaboration of a “International Criminal Law Act” implementing the Rome Statute for an ICC.

Member editorial board and book review editor “Criminal Law Forum“, The Official Journal of the Society for the Reform of Criminal Law (since vol 12, no. 1, 2001).

Member editorial board “International Criminal Law Review”, Kluwer Law International.

Member “Wissenschaftlicher Beirat“ (Scientific Council) “Lateinamerika Analysen”, Institut für Iberoamerika-Kunde, Hamburg.

Member “Consejo editorial” of the Journals “Cuadernos de Doctrina y Jurisprudencia Pe-nal” (ad hoc publisher, Argentina), “Derecho Penal Contemporáneo. Revista internacional” (Legis publisher, Colombia), “Ciencias Penales” (Asociación de Ciencias Penales, Costa Rica), “Revista de Derecho Penal” (Rubinzal Culzoni publisher, Argentin-a) and “Política criminal” (Chile, www.dpenal.cl/politcrim/portada.htm).

Member “Comité Científico Internacional” of the Journal “Revista Penal” (La Ley pub-lisher, Spain).

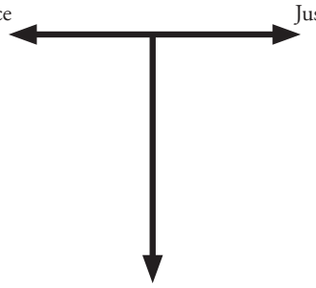
Member Scholarship Commission of the German Academic Exchange Service “Foreigners from Latin America” (2006-2009).

The International Criminal Justice System

1st level	Territory of the State/of the suspect/of the victim
2nd level	International Criminal Court (Preamble, Art. 17 ICC Statute)
3rd level	Third State based on universal jurisdiction
	(e.g. § 1 German Law on International Criminal Law,
	§ 153f Criminal Procedural Ordinance)

Value Conflict

Peace — Justice



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Rights of the victims

(Inter-American Court of Human Rights)

restitution

repair

non-repetition

Weighting system

Adequate/ideal measure

Necessary/indispensable measure

Proportionality in the strict sense

Assessment

Rome Statute of the ICC

Principal: no to impunity for international crimes

Flexibility in the face of peace processes

Art. 17 Statute	(complementarity)
Art. 16 Statute	(Security Council's role)
Art. 53 Statute	(interests of justice)

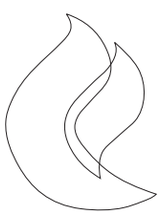
Limits:

Ratione materiae: events/facts

Ratione personae: líderes, "most reasonable"

Absolute impunity: self-amnesties

Formal procedure: democratic legitimacy



International justice, peace processes and human rights

At what stage is international criminal justice placed?

As you probably know, last Thursday was the commencement of the Pre-Trial Chamber, the preliminary chamber of the International Criminal Court (ICC), with the confirmation hearing in the case of the Congolese citizen Thomas Lubango[1]. This is a truly historic case because it is the first that has come to the confirmation hearing of charges in the Pre-Trial chamber. This is the case of a militia boss supposedly responsible for various international crimes committed in the north of the Democratic Republic of the Congo (DRC) and, in this case, accused of forcibly recruiting children. The case is also important because it illustrates the close cooperation between the ICC, the territorial State (DRC) and a peace mission of the UNO (MONUC[2]), as Lubanga was handed over to the ICC by the Congolese authorities in cooperation with MONUC[3].

On the other hand, we find ourselves in a neighbouring country to the DRC, in Uganda, in a peace process in which various agents are confronted, one of them precisely the United Nations. Here one can clearly see the dilemma in which the UNO finds itself in this type of process. In the case of Uganda we have a very special situation, in which President Museveni himself requested the criminal intervention of the ICC to investigate the activities of the Lord's Resistance Army (LRA) in the north of the country, referring to articles 13 (a) of the Statute which enables a State to refer "a situation in which one or various crimes seem to have been committed" to the authority of the ICC of the Public Prosecutor. It is worth mentioning that few of us believe, discussing this norm in Rome, that it will ever have practical importance. With this remission of the case to the Court, the Court obtained jurisdiction and has pronounced four orders of arrest against leaders of the LRA, especially against their leader, Joseph Kony. When these orders of arrest were pronounced, Kony and his people approached Museveni's government offering peace negotiations, obviously, with the minor condition that the orders of arrest be withdrawn, as one cannot negotiate safely when one can be detained. So, the dilemma is obvious: we have on the one hand these orders of arrest from an institution created in 1998 and in full operation as from the end of 2002 from The Hague[4] with a meticulous preparation of the case against Lubango with various research missions to the DRC etc. And, on the other hand, we have this rebel group which now –previously only weapons spoke– wants to negotiate "peace" but with guarantees for their safety, ultimately for the impunity of their deeds. We also have members of the communities most affected in the conflict, for example, the indigenous community of the Acholi, who publicly, on various occasions, (the latest, according to the Financial Times, on 7 November), requested the orders of arrest to be revoked to facilitate the peace negotiations[5]. We have President Museveni himself, who, like any good politician, uses these orders of arrest as a political tool in his stick and carrot strategy, saying in an interview on 28 October that the ICC should maintain these arrest orders, that it would be a "tactical

error" to comply with the rebels' conditions of revoking the orders of arrest before signing the peace agreement: "The ICC is actually very good for us (Uganda) because it makes the terrorists (rebels) come up to seek peace and end impunity[6]". In other words, what Museveni is saying is to please leave in tact the orders of arrest so that I (Museveni) can pressurise this rebel group more, in other words, he uses the arrest orders in his political manipulation of the internal conflict. The government of Uganda made a declaration at the recent Assembly of the States Parties of the ICC in The Hague on 23 November 2006, stating the following[7]:

> The LRA has terrorized people of northern Uganda, southern Sudan and eastern DRC for decades. In December 2003 the Government of Uganda has decided to refer the case not because the Government was unable or unwilling to try LRA itself, but because the ICC was established specifically to deal with crimes of this magnitude, and the Government was unable to apprehend the LRA operating outside Uganda's territory. However, even though the general whereabouts of the LRA commanders are Known, heir apprehension and release of abducted children and women is still a main challenge.
>
> I will explain why Uganda had to start peace talks. The warrants of arrest were issued a year ago, but in spite of significant efforts they were not executed. The LRA had to relocate to Garamba National Park, DRC, due to military pressure of the UPDF and the SPLA, as well as the ICC presence. LRA relocated to three States Parties where there are five military forces that may be able to assist in the arrest. But the military forces, including MONUC, UNMIS, and Ugandan, Sudanese and Congolese national armies, failed to arrest the five LRA leaders. The LRA had become a regional security threat and was threatening to the implementation of agreement between Sudanese Government and Government of Southern Sudan, therefore President Museveni offered the LRA a "soft landing".
>
> Peace talks mediated by Vice-President Machar resulted in the signing of Cessation of Hostilities Agreement this summer. The people of northern Uganda want to go home. Security has returned to northern Uganda and people have started returning to their homes, with assistance of the Government and partners.
>
> Uganda is continuously in touch with OTP to keep them abreast of the developments in the peace process. If it was not for the arrest warrants, the LRA would never have been involved in the negotiation process. The warrants remain a constant pressure on LRA leaders to stay in the peace process. Uganda tried to execute the arrest warrants. The UPDF engaged with an LRA unit allegedly lead by Raska Lukwiya, as a result he is dead, and it this was confirmed with assistance from the ICC.
>
> Uganda is committed to conclude the peace talks successfully. Recently, the LRA met in Garamba, DRC, with a team of lawyers, to explain to them the provisions of the Rome Statute. The talks are continuing, and it is speculative to determine the possible outcome. Uganda will not condone impunity.

> The UN Security Council has recognised the LRA as a regional threat. States Parties should understand that executing arrest warrants is a collective responsibility. Working Groups should not be just theoretical, not just drafting recommendations, they should be capable of rendering a practical support on any of the aspects of state co-operation, including sentence reinforcement, and witness relocation, and execution of arrest warrants.
>
> The ICC's involvement in Uganda has had an enormous impact leading to many positive developments in the region.

Apart from the apparently positive effect (deterrent) of the ICC, from the structural point of view of the problem, there is a risk of instrumentalisation of the ICC in an internal conflict by one of the parties in the conflict, not at all innocent and which has an army that also violates human rights. However, in this setting the UNO intervenes with their mediator Jan Egeland, humanitarian coordinator of the UNO and sent by Kofi Annan himself. He obviously finds himself in a dilemma, in a cul-de-sac. On the one hand he wants the parties to reach a peace agreement, but on the other, he supports the ICC and its orders of arrest. Not only for the special relation between the UNO and the ICC[8] but also for the position of the UNO in these peace processes, for example, in Central America where full reprieve was never granted for international crimes, poor Mr. Egeland is in a dilemma. So on 12 November there was a private meeting, without reporters or public, between Messrs. Kony and Egeland, virtually in a tent in the jungle. And obviously, from the very start, the rebels wanted to talk about the orders of arrest, that Egeland should pressurise the ICC to revoke them; but Egeland, in charge of the humanitarian situation and lacking authority over the ICC, wanted to talk about a humanitarian agreement. Naturally, as often happens in such conflicts, the negotiators are experts not of law but of war, and thus do not understand the technicalities involved. In this specific case, they clearly think that Egeland comes on behalf of the ICC and can personally revoke the orders of arrest, etc. So, given the situation, it is hardly surprising that the meeting dissolved without any specific results, the rebels even denying the accusations of crimes and refusing to comment on the matter. And this is a dilemma.

Indeed there is another conflict of lesser international attention but equally important in analysing the apparent conflict between justice and peace, and this is the conflict in Colombia. Although there is still no formal investigation by the ICC, Colombia is a State Party, and the Office of the director of Public Prosecutions of the Court is observing the situation in this country, particularly the peace process formalised with the so-called "Law of justice and peace[9]". This law was the object of a claim before the Constitutional Court[10] which declared it compatible with the Constitution but demanded some changes and/or clarifications which the legislator made via Regulation 3391 of 29 September 2006. Although in the Colombian case we have the same dilemma, in principle, the technical-juridical argument is much more sophisticated on the part of the government of President Uribe, but also on the part of the Colombian juridical community. Therefore, I believe the juridical solution of the Constitutional Court ruling, one of the most, if not the most, important in the world on the theme, deserves a little more explanation.

The international criminal justice system

But first, to be a bit more systematic, let us speak about the system of international criminal justice. The subject is not so much a process of peace and human rights but of international *criminal* law and peace process. Indeed, at the present time we are at another level. We have already surpassed, (intended somewhat cynically), the inefficiency of human rights with the new system of international criminal Justice, of the ICC and the *ad hoc* Courts, as it no longer only concerns only the collective responsibility of the States but individual responsibility of natural persons, of the very violators of human rights. We can distinguish, various levels. *On the first level* we have the territorial state or the state of the suspect of the victim, who has the duty, reaffirmed in the preamble of the Statue of the ICC, of persecuting and penalising those responsible for international crimes: genocide, grave crimes of humanity and war crimes (see Art. 5 to 8 of the Statue of the ICC).

To be specific: it is the duty of the Argentinean state to punish the human rights' violators of the former military dictatorship. It is the duty of the Congolese, Ugandan and Colombian state and the USA (in the case of Abu-Ghraib) of penalising those responsible for these crimes. It is not, therefore, the *primary* responsibility of the international community but of the very *state* in whose territory, by or against whose citizens these crimes were committed. It is important to remember that this duty corresponds to the states. Only if they should fail to fulfil this duty –as is unfortunately too often the case, evident in the degree of impunity– do we need another mechanism and this can be found in the *second level* referring to the ICC. Clearly the ICC can only act if it has the competence to do so, and this will only be the case, in principle, if the crime were committed in one of the 104 State parties (Art. 12 (2) (a)) or by one of their citizens (Art. 12 (2) (b))[11], or if it were committed posterior to the coming into force of the Statute for the corresponding State (Art. 11, 126) and concerns one of the crimes mentioned in Art. 5 to 8, namely, genocide, war crimes and crimes of wronged humanity. Furthermore, the Court has one important limitation in competence or in admissibility namely its so-called *complementarity* restriction which in fact is a type of subsidiary, as opposed to national, justice which for this reason belongs to the already explained first level of the system. This means that the ICC is an organ that respects the competence of the territorial state, the state of the victim and of the suspect and hence its sovereignty. Moreover it reaffirms that it is the responsibility of the states themselves to persecute these criminals. The court only intervenes when for reasons of lack of will, or capacity, of the territorial state the latter does not comply with its duty to persecute and penalise. The fact that the state itself, through its government, as has occurred in the cases of Uganda, of the Democratic Republic of the Congo and the Central African Republic, requests the Public Prosecutor to intervene could be interpreted as a lack of capacity. However, this does not mean that a state can simply invalidate its primary responsibility of criminal persecution; if we suppose the states have primary responsibility we cannot permit them to delegate this responsibility easily to the Court. If the primary responsibility of the state is taken seriously, it must primarily resolve its own problem, with its own means, with its judicial power, as it is an internal problem.

However, even with these two levels we are left with various states that do not have an efficient system of persecution of such crimes. This refers specifically to those states which, on the one hand, are not State parties of the Statute of the ICC, for example India, China, Russia, Uzbekistan, Azerbaijan and which, on the other hand, do not persecute these crimes at a national level (for the well known reasons of impunity[12]). Therefore we still need a third level or rather the famous universal jurisdiction of the third state which is not the territorial state and normally not the state of the suspect or of the victim either. Spain has

experienced this situation, close to home, with the case of the Chilean General Augusto Pinochet whose detention was provoked by an order of arrest from the famous examining magistrate Baltasar Garzón[13]. The problem with this type of competence or jurisdiction is obvious[14]: a state assumes responsibility for events beyond its own territory, thousands of kilometres away, without (easy) access to the place of the events, without knowledge of the culture, language etc. And with this expansion of its criminal law it gets involved in the internal affairs of the territorial state. Although the argument of non-intervention cannot and must not hold against the impunity of serious violations of human rights, the argument is real and is not always easy to discard. To be honest: who likes anyone else to get involved in their case without asking permission, who investigates deeds committed in a foreign land, even if the investigator is the former colonial power of the one being investigated? Indeed, in view of the diplomatic problems created by the case of Pinochet and similar cases, the creation of the ICC has always been seen by many states and experts as an alternative to the competence of a third state.

Clearly, as we can see there will always be situations in which either a third state exercises (universal) competence or there is impunity. If you heard the news yesterday (14 November) you will know that there was a conference in Berlin where a coalition of American and German lawyers, the "Center for Constitutional Rights" of Washington with the "Association of Republican Lawyers" once again presented a complaint against Donald Rumsfeld and others for the case of Abu-Ghraib[15], based on the German law of international criminal law (Völkerstrafgesetzbuch) which, in § 1, provides for a regulation of very extensive universal jurisdiction[16]. In other words, it uses the universal jurisdiction also in a case such as that of Abu-Ghraib with the argument that in this case there had never been an investigation of the top, of Rumsfeld and the people at the Pentagon who, at the very least, tolerated the abuses in Abu-Ghraib. It is obviously a complicated case because, how can Germany claim, shall we say, of the USA that justice be done against a state that is a Democracy and that has nothing to learn from a state, such as Germany, that in recent history experienced two totalitarian dictatorships?

Conflict between justice and peace?

Returning to the main theme, the dilemma between justice and peace, we will see the *conflict of values* that lies behind. We have, on the one hand, a process of peace whose aim is, obviously, if it is a process that deserves this name, to obtain peace. No one can doubt that peace is a value, above all if it means a deep and long-lasting peace. On the other hand, as a counter-value, we have justice and all that it implies: acknowledgement of responsibility, respect for victims (even recognising their status as such), restitution, indemnisation, non-repetition and finally penalisation (criminal) of those responsible. Faced with this conflict of values between peace and justice emerges the question of whether rational, transparent and democratic criteria exist to resolve this conflict: criteria that are more objective, firmer than the pure political interests normally in play in peace processes that lead us to arbitrariness, to political *discretionality*. However, it seems there are rules of law, rules of international law, of international criminal law. These rules guide us, give us a formal framework to be able to resolve the underlying conflict, to set the limits to the political peace process: *peace yes, but not at any price!* One of these rules, a fundamental rule is, for example, that there should be no amnesty for international crimes. This rule is recognised in international jurisprudence, in the writings of academics, we could say that it is a right of *law*[17]. But is this rule in the *political* practice of a peace process, also valid against an insurgent group that is armed with weapons, that has hostages, that may at any moment destabilise government?

Let's imagine an international, experienced negotiator like Mr. Egeland, in a peace process like Uganda, where the people affected ask him for peace, a peace at any price, only peace. Or a peace process as historically, economically and politically complex as that of Colombia where amnesty is not decreed through the emergency powers (as was previously done) but a process is initiated of apparently democratic discussions, in Congress and also with certain sectors of the civil society, resulting in a law that, although it entails a substantial reduction in the sentence, does not offer this reduction freely but with certain requirements which, at least literally, are ambitious[18].

Justice values, that any peace process needs to take into consideration, have been eloquently and meticulously developed by the Inter-American Court of Human Rights (ICHR), precisely in cases against Colombia, Peru and the Central American States[19]. The ICHR says, in permanent jurisprudence, that the rights of the victim consist of or have three elements, sub-elements, namely: restitution, relief and that of non repetition. How can these elements or requirements be fulfilled? There is a certain degree of flexibility. The ICHR offers many more proposals: these could be symbolic acts, recognising the violations (as the former head of the Argentinean army, Gen. Martin Balza, did, for example), economic compensation and also (given the limits of the former) symbolic. So there is a series of measures that a State could implement.

At a constitutional level the conflict between peace and justice presupposes that both values are constitutionally recognised. While this is normally the case for justice (whether as a value itself or the right to access to justice) few constitutions also grant constitutional value to peace. One of these constitutions is that of Colombia (see Ar. 2.22) by which the government of Uribe could always invoke peace as a constitutional value alleging that the government complies with its constitutional obligations if it promotes a peace process. On the other hand, we have justice that has a constitutional scope (Art. 250 no. 4) and which includes, through the constitutionality block, the law of human rights, even the jurisprudence of the ICHR on the rights of victims. To resolve the conflict between justice and peace the Constitutional Court has used the method of *Abwägung,* of weighting as this has been developed by German doctrine and jurisprudence. So we could ask, in the first place, is the measure *appropriate* or suitable for the intended aim? That is, for the case on hand, is a law of justice and peace, a negotiation process based on this law an *appropriate* measure to obtain peace? Secondly, is this measure also *necessary*, indispensable to obtain peace? Normally the insurgent group does not negotiate if it cannot obtain advantages or benefits from the negotiation, so normally a law is necessary that provides a formal framework for these benefits. Finally it could be asked whether the measure is proportional, in the strict sense? This is more complicated. Here comes into operation the rule mentioned above of the prohibition of amnesty in the following manner: a peace agreement that promises the parties in the conflict a full reprieve without considering the interests of the victims is unproportional compared to these interests and to the right to justice. Naturally, this weighting process is very evaluative and therefore can rarely be fully accepted. Furthermore, it is very difficult, if not impossible to judge from outside, for example, from Spain what must or must not be done in Colombia; or even from Madrid to decide what is good for the Basque Country. The process is a process of the people in the place and if they do not support the process it is condemned to failure. You cannot replace the perspective of the base, of the peripherals for a macro perspective or a perspective of the capital, the metropolis.

The Statute of the ICC as a flexible instrument

Although the ECPI has as its primary objective, as can be deduced from the preamble, to end the impunity of international crimes (arts. 5 to 8) and for the first time offer a clear and consensual typification of these crimes, it must be acknowledged that the Statute is not a dogmatic and inflexible *instrument*, but rather *flexible* and *open* to peace processes. This is clear not only from the preparatory works but fundamentally from three of its regulations, namely:

> Article 16, which provides for the possibility, for the United Nations Security Council, to suspend an investigation in accordance with chapter 7 of the United Nations Charter.
> Article 17, which applauds the principle of complementariness; and
> Article 53, which contains the clause of the *interests of justice*, typical in North American procedural law, of the *common law* system, which leaves the instigation of research (formal) at the discretion of the public prosecutor.

These three regulations demonstrate that the Statute is not an obstacle for a peace process. They are the result of the considerations of the rapporteurs of the Statute (diplomats, people working in law, civil servants of the ministries of Justice, among others) for whom it was very important to bear in mind the national controversies in situations of armed conflict. In particular the already mentioned principle of *complementariness* shows that the ICC does not wish to replace nor displace national criminal justice (as has been done, for example, by the *ad hoc* courts created by the United Nations Security Council). On the contrary, its aim is that *the criminal justice of the territorial state pursues the international crimes* listed. In this sense, the ICC only acts as a driving force and a means of pressure in the face of a possible collapse of the national criminal justice, whether by lack of will or of capacity of action.

Another limitation *ratione materiae* could emerge from the quality and quantity of the crimes committed in the setting of a specific conflict. The ICC is only competent for international crimes and this implies that there must have been a collective or generalised or contextual element, that is, an intention to destroy a certain group (genocide), systematic or multiple perpetration (crimes against humanity) or armed conflict (war crimes). The perpetration of "ordinary" crimes, e.g. selective assignations, kidnappings, torture, all the crimes in our criminal law but not international crimes, is not enough. With regard to the Basque Country it is very difficult to affirm that the crimes committed here constitute the conditions for international crimes that is, whether one of the crimes in arts. 5 to 8 of the Statute of the ICC has been committed[20]. It is also important to take into consideration the *methodology of the peace process itself* that is, if it is a process decreed from above or if there is ample participation of the population affected. There is at least popular participation through the formal democratic channels (Congress, regional parliament, municipal councils) or the peace agreement is decreed from above.

Beyond these aspects another more basic question emerges; what do we understand by the *obligation to investigate or punish* international crimes[21]? What is the exact content of this obligation? Clearly it is not possible to investigate and punish all the possible authors of international crimes, for example the seventeen thousand (or more) paramilitaries or the twenty or thirty thousand Colombian guerrillas. No judicial system in the world is capable of pursuing all the crimes and punishing all those guilty. Not in Nuremberg, nor in Tokyo, nor in the *ad hoc* Courts for the former Yugoslavia (ICTY) and for Rwanda (ICTR) were

all the possible authors of violations of international criminal law punished. More accurately, a policy of *selective persecution* has been established. It has always been argued, as in Nuremberg, that there ought to be a selection of individuals who should be persecuted and who have been denominated "great criminals, leaders, ringleaders of criminal organisations" etc. Well, we know that many of the people who work in these groups are really victims of demagogy, who do not form part of these organisations in the sense of their ideological conviction: today they are paramilitaries, tomorrow they are guerrillas, it depends who pays more. In 1998 the Public Prosecutor of the ICTY and ICTR decided to reevaluate their strategy of persecution in the following terms:

> Consistent with these strategies (of persecution, K.A.), which involve maintaining an investigative focus on the persons holding higher levels of responsibility or who were more personally responsible for the exceptionally brutal or otherwise extremely serious offences, I decided it was appropriate to withdraw the charges against a number of accused …[22]

The Court of Appeals accepted the decision of the Public Prosecutor, granting him in fact ample discretion to develop a strategy of persecution:

> In this context, indeed in many systems of criminal law, the organism charged with the persecutions has only limited financial and human resources, so it is not very realistic to expect the persecution of all those who committed a criminal act might fall within the strict terms of its jurisdiction. It obviously needs to decide on the nature of the crimes and on the authors who are to be pursued. Undoubtedly the public prosecutor has ample discretion in relation to the initiation of investigations and the preparation of accusations[23]

The same focus of attention has been defended by the Office of the Director of public prosecutions of the ICC in their recent declarations on the strategy of persecution. It is clear, therefore, that there is a *limit* of obligation of r*atione personae* persecution, in other words, with a view to persons whom one intends to persecute and penalise. What one really wants is to persecute those guilty of criminal organisations, the leaders. If this is correct for a national system, all the more so for international criminal justice. The ICC will never concern itself with the small guerrilla in the Colombian Cauca or the paramilitary in Antioquia. It is concerned with the top brass of these organisations, and this is nothing more than logical. This provides us with another element of flexibility in international criminal justice.

Finally, the term "interest of justice" in Art. 53 of the Statute of the ICC, mentioned above, also implies taking into consideration *other alternative or traditional forms of justice* in resolving conflicts. In the case of Uganda, President Museveni made reference to the traditional method of resolving conflicts, called Matu Put, which the Acholi community still use[24]. In Rwanda various accused were judged at a local level by the Gacaca courts[25]. In these cases it is necessary to rethink the concept of the western process whether inquisitive or opposing. All of a sudden, local reconciliation processes are more efficient than criminal processes, with a view to convivience and peace in the territories affected.

Notes to the conference

[1] The "confirmation hearing", regulated in Art. 61 of the Statute of the ICC commenced 9 November and terminated 28 November 2006. Mr. Lubanga is being prosecuted for recruiting and using minors under 15 years, which constitutes a war crime under Art. 8 of the Statute of the ICC. This could be considered –contrary to the practice of the *ad hoc* courts– as a new strategy by the ICC in having cases with specific charges and avoiding "mega trials" which obstruct the work of investigation and probatory making the processes extremely long and laborious. For more information see http://www.icc-cpi.int/pressrelease_details&id=202&l=en.html.

[2] Mission of the United Nations Organisation in the Democratic Republic of the Congo.

[3] For more details see Hamann, Internationaler Strafgerichtshof und Vereinte Nationen in der Demokratischen Republik Kongo, ZStW 118 (2006), pp. 799-822.

[4] The Statute of Rome came into force 1st July 2002 and has to date (6 December) 104 State parties, see the history of negotiations Ambos/Guerrero (comps.), *The Statue of Rome of the ICC*, Bogota (University Externado) 1999; Ambos (coord.), *The new supra-national criminal justice. Developments post-Rome*. Valencia (Tirant lo Blanch) 2002; Ambos, Internationales Strafrecht, München (Beck) 2006, § 6 additional notes (nm.) 40 ss. with later references. On this and other themes (current) of international criminal law see Ambos, *Topics of international and European criminal law*. Madrid (Marcial Pons) 2006.

[5] Financial Times, Comment & Analysis, Andrew England, Nikki Tait and Mark Turner, "Vague at The Hague? Why the UN war crimes trials may be off to a timid start," 7 November 2006.

[6] The Monitor, Solomon Muyita, Grace Natabaalo & Emmanuel Gyezaho, "Museveni Insists on Kony ICC Arrests," 28 October 2006 http://allafrica.com/stories/200610270919.html.

[7] Quote from the textual summary of the International Coalition for the ICC <www.iccnow.org>.

[8] "Relationship agreement" of 4 October 2004, on the relation with the UNO for more details see <www.iccnow.org/?mod=agreementsun>.

[9] Law 975 of 2005. See my report on previous projects in http://lehrstuhl.jura.uni-goettingen.de/kambos/Forschung/Forschung.html -> judgements.

[10] Sentence C-370 of 2006 from 13 July 2006 (publication of judgement) </www.constitucional.gov.co>.

[11] More details on the regime of competence Kaul/Kreß, in Ambos, La nueva …, supra nota, pp. 297 ss.; Ambos, Internationales Strafrecht, supra nota, § 8 nm. 6 ss.

[12] For more details see Ambos, Impunidad y derecho penal internacional, Buenos Aires (ad hoc) 1999.

[13] On the case of Pinochet see Ambos, Revista Penal (La Ley, España) No. 4 (1999), 3-20 = Nuevo Foro Penal (Medellín, Colombia) 62 (September - December 1999), 159-185.

[14] Very critical, for example, Fletcher, Journal of International Criminal Justice 1 (2003), 580 ss.; against Eser, Tulsa Law Review 39 (2004), 955 ss.; summarising the discussion Internationales Strafrecht, supra nota, § 3 nm. 93 ss.; id., Temas, supra nota, p. 93 ss.

[15] See for example Times, 16 November 2006, <http://www.time.com/time/nation/article/0,8599,1560224,00.html>.

[16] On this law and the rules of court that limit universal jurisdiction (§ 153f of the Criminal Procedural Laws) see Ambos, NStZ 2006, 434 ss., in Spanish in the publication Revista Penal no. 19 (January 2007). The text and the basis of the law can be found in Spanish at http://lehrstuhl.jura.uni-goettingen.de/kambos/Forschung/laufende_Projekte_Translation.html.

[17] See Ambos, Internationales Strafrecht, supra nota, § 7 nm. 114 with later references.

[18] Therefore, for the Colombian government this law "is fully in line with international standards" (Declaration at the Assembly of State Parties in the ICC at the Hague, 23 November 2006).

[19] See the most recent sentence in the case "Masacres de Ituango vs. Colombia", sentence of 1 July 2006, para. 345 and ss. with references to previous sentences, <www.corteidh.or.cr>.

[20] For a more detailed analysis of international crimes see Ambos, Internationales Strafrecht, supra nota 4, § 7 nm. 122 ss. and Ambos, Temas, supra nota 4, p. 271 ss.

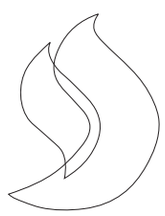
[21] On this obligation see Ambos, *Impunidad*, supra nota 12, p. 66 y ss.

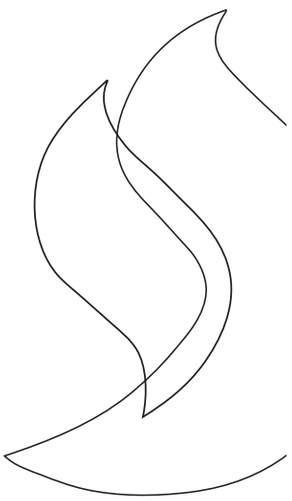
[22] The original states: "Consistent with those strategies (of prosecution, K.A.), which involve maintaining an investigative focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences, I decided that it was appropriate to withdraw the charges against a number of accused …" (Press release, pg. 1, quotation as per Prosecutor v. Delalic et al., judgement 20 February 2001, IT-96-21-A, para. 597).

[23] The original states: "In the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments." (Prosecutor v. Delalic et al., supra nota 22, para. 602; see also Prosecutor v. Akayesu, Judgement 1 June 2001 (ICTR-96-4-A), para. 94; Prosecutor v. Ntakirutimana, Judgement 21 February 2003 (ICTR-96-10 & ICTR-96-17-T), para. 870 s.

[24] The Monitor, supra nota 6, quoting Museveni saying: "In order to help these people get a soft landing, why not use a traditional system?".

[25] See S. Schilling, Gegen das Vergessen: Justiz, Wahrheitsfindung und Versöhnung nach dem Genozid in Rwanda durch Mechanismen transitionaler Justiz: Gacaca Gerichte, Bern et al. 2005.





Conflicts as traps and conflicting entrapments: human rights, intractable conflicts, and pitfalls of peace negotiations

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Curriculum

J. P. Linstroth, received his D.Phil. in Anthropology at the Institute of Social and Cultural Anthropology (ISCA) from the University of Oxford, United Kingdom. At Oxford he was awarded the Peter Lienhardt Memorial Fund, Wolfson College Travel Grants, and University Post-Graduate Grant to conduct fieldwork in the Basque region (1995-1997).

Currently he is Assistant Professor of Conflict Resolution and Anthropology at Nova Southeastern University, Fort Lauderdale, United States, where he teaches in the Masters and Doctoral level programs. He received his undergraduate education in Political Science and Spanish at the College of the Holy Cross (Phi Sigma Iota, Linguistic Hons) and an MA in Anthropology at Florida State University (Hons).

The focus of his research has provided fresh insight to studies of conflict, gender, history, locality, nationalism, performance, and ritual with far-reaching implications to social and cultural anthropology, and conflict and peacebuilding studies.

He has written extensively about the Basque region in various scholarly journals, some of his more recent articles include: 'Grounds for Contention, Modes of Protest: legal conundrums and minority dissidence among the Spanish-Basques'.

Forthcoming: 'Commentary: Basque Avenues Toward Peace: building a new road-to a new dawn, a new beginning'.

'La Tregua desde los E.E.U.U.', (Revista Ekarri, 2006, May pp. 42-46); 'An Introductory Essay: Are We in 'The Age of Resistance' in a Post-9/11 World?' (Special Issue of the Peace and Conflict Studies Journal, 2005, vol. 12, No. 2, Fall Issue, pp. 1-54).

'The Basque Conflict Globally Speaking: material culture, media, and Basque identity in the wider world' (Oxford Development Studies (ODS), 2002a, vol. 30, No. 2, June, pp. 205-222).

'History, Tradition, and Memory among the Basques' (History and Anthropology, 2002b, vol. 13, No.3, Sept, pp. 159-189); and 'Arrani, Arrain, Arrai: en torno al protovasco 'Arrani' y sus derivaciones lingüísticas' (Fontes Linguae Vasconum: studia et documenta, 1998, Año XXX, Número 79, Sept-Dic, pp. 397-406). In 2005 he was Special Editor of the Journal of Peace and Conflict Studies (PCS).

His forthcoming books include: *Marching Against Gender Practice: political imaginings in the Basqueland and The Anthropology of Conflict and Peacebuilding: meaning-making and world-views in comparative perspective* (co-author, Mark Davidheiser).

Presently, he is a co-recipient of the President's Faculty Research and Development Grant at NSU and an Alexander von Humboldt Foundation Grant for collaborative work on ethnicity and identity among immigrant groups in conjunction with George-August University of Goettingen, Germany.

In 2005 he was invited by Gernika Gogoratuz to give a paper for the Conference "The Moral Imagination-the Art and Soul of Peacebuilding, International Convention on Peace and Culture", Guernica (Gernika), Spain; and he has given various lectures and papers in Australia, Germany, the United Kingdom, and the United States.

Summary

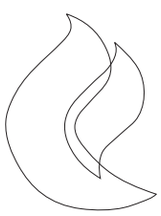
This essay examines the metaphor of traps and its applicability to conflicts and conflict resolution theory.

It is argued how political actors within political movements are often trapped in situations of intractability, especially in relation to culture, history, kinship, memory, and trauma.

Furthermore, it is emphasized why some conflict resolution theories are enticingly entrapping and why more nuanced theories are needed to understand the complexities of human violence.

Important is understanding how the notion of human rights shapes discourses of self-determination and cultural difference; why it is essential to reformulate the conceptualization of the imagination; and why it is necessary to analyze possible entanglements for complex peace negotiations.

The future of the Basque peace process is also considered and what Basques may contemplate toward goals of peacemaking and peacebuilding in the Basque region.



Conflicts as traps and conflicting entrapments: human rights, intractable conflicts, and pitfalls of peace negotiations

"Very few things happen at the right time and the rest do not happen at all. The conscientious historian will correct these defects."
Herodotus of Halicarnassus (484-425 B.C.)

"It is dangerous to be right in matters on which the established authorities are wrong."
Voltaire [François-Marie Arouet] (1694-1778)

"The past is never dead. In fact, it's not even past."
William Faulkner (1897-1962)

Introductory

The intellectual debt for the title of my presentation I owe to the anthropologist, Alfred Gell, whose powerful ideas still continually inspire me in all things anthropological. Here, rather than thinking of traps as art, or even art as traps, we may use some of Gell's (1999) notions to explain conflict, particularly intractable conflict and conflict theory. My concern is with human entrapment. I employ metaphors of traps as a means of understanding how human actors become entrapped in conflict, and moreover, how researchers have become entrapped in a language of entrapment. By this I mean to explain on the one hand, the dilemma all humans face when confronted with conflict, particularly of the protracted kind, but importantly on the other hand, why intellectuals fall prey to theorizing in abstractions which have little to do with human experience. As both an anthropologist and conflict resolutionist my critique stems in large part to an examination of a body of theory driven by researchers from the fields of political science, international relations, and conflict resolution. The dilemma here is unsnarling some theoretical propositions from these areas of study by exploring the role of culture in conflict resolution, the how-to aspects of peacebuilding, and some meanings surrounding peace-making models. For a more nuanced approach to intractable conflict I am suggesting a closer scrutiny of ethnography to provide a more humanist conceptualization of memory, suffering, and the meanings of violence. Further, I address the divergent interpretations of human rights with a special emphasis of self-determination movements but more predominantly with a mind toward the applicability of deliberative democracy theory and ideas associated with freedom and liberty. Lastly, I address the Basque conflict and what lessons can be gained from the above in moving forward with the pending peace process.

Mental mapping: the trap of culture

> Initially, a trap […] communicates a deadly absence, the absence of the man who devised and set it, and the absence of the animal who will become the victim […] Because of these marked absences, the trap, like all traps, functions as a powerful sign. Not designed to communicate or to function as a sign (in fact, designed to be hidden and escape notice), the trap nonetheless signifies far more intensely than most signs intended as such. The static violence of the tensed bow, the congealed malevolence of the arrangement of sticks and cords, are revelatory in themselves, without recourse to conventionalization. Since this is a sign that is not, officially, a sign at all, it escapes censorship. We read in it the mind of its author and the fate of its victim […] The trap is therefore both a model of its creator, the hunter, and a model of its victim, the prey animal […] the fact that animals who fall victim to traps have always brought about their downfall by their own actions, their complacent self-confidence, ensures that trapping is a far more poetic and tragic form of hunting than the simple chase (Gell 2006: 200-202).

While the notion of a trap as a metaphor for conflict or conflict theory may be a strange way to begin, I think it conveys how people get stuck, that is, how human actors cannot find solutions to overcome disputes, and moreover, why theorists find abstract theorizing so seductive for explaining real-life human drama. In beginning with a quotation from Alfred Gell, a British-anthropologist of some renown for his ideas in art theory, I wish to borrow his idea of "thought-traps", which he himself borrowed from Pascal Boyer, a cognitive anthropologist, and extend them to studying conflict (Gell 2006: 213). To expand upon "thought-traps" I wish to unravel some ideas about culture, peacebuilding, and peacemaking first and then return to the human aspects of traps in regard to intractable conflicts later on. The implication is to move beyond the theoretical cul-de-sac many theories have led us to believe and for us as practitioners and researchers to find better ways out.

As an anthropologist I find there is much room here to take some umbrage in the manner "culture" is being battered about by many in the field of conflict resolution. The usage of culture in conjunction with conflict is portrayed as a catch-all term without any real meaning. It is something out there to be discovered, an object and thing of "Otherness", which in common-conflict-resolution parlance is a descriptive and fashionable unknown. This is troublesome for a multitude of reasons, not least of which is a complete lack of understanding other cultures, other peoples, and their belief systems. First, there is the emptiness of the term's usage as much as there is for ethnicity or identity and their non-distinction. Second, aside from the nettling conflation or even stereotyping assumptions being made, there are few in the field who have pointed out the disparities of these conceptualizations with perhaps, and to some degree, the exception of Kevin Avruch (also, a quasi-anthropologist/conflict resolutionist). Even so, the trap of culture and its misuse is set and is out there and in the literature. Mostly I suspect this is due to the fact that the term "culture" is being reified from dated anthropological-definitions but somehow still being employed by political scientists and international relations specialists. Yet, as I attest to below, social and cultural anthropology has long moved onward and is more attuned to the sophisticated handling of such empty concepts. Equally, and in my view, it is important to focus on the issue of culture and how to approach a truer understanding of it, if researchers continue to use the term as a complex whole without problematizing what they are discussing in the most general of ways.

One among these generalists is David Augsburger, a theologian, whose book entitled, *Conflict Mediation Across Cultures* (1992), is popularly used in teaching students on the subject of culture and conflict. It borrows heavily from anthropological sources without sophisticated analysis and as a text provides the pretense of anthropological knowledge by purporting to speak about culture and for anthropological reason. On closer examination Augsburger's account confuses more than enlightens. He (1992: 7) states: 'cultures embody the authenticity and unique purposes of each community. Each culture seeks to express a people's values, sensitivity, and spirituality'. Yet there is no regard to why culture as a term is problematic or in questioning its conception. It is a given thing. As a whole the book is a compilation of folksy-explanations of different examples of cultures in conflict with a multitude of folktales and many charts without a central theme or helpful means of reconciling the plethora of cultural divergence. By essentializing culture in this way Augsburger is no closer to cultural meaning but is trapped in a morass of cultural bewilderment and uncertainty. Compare Augsburger to James Clifford (1988: 11 and 14) " […] discourse in global power systems is elaborated vis-à-vis, a sense of difference or distinctness can never be located solely in the continuity of a culture or tradition. Identity is conjunctural, not essential. Twentieth-century identities no longer presuppose continuous cultures or traditions. Everywhere individuals and groups improvise local performances from (re)collected pasts, drawing on foreign media, symbols, and languages". In other words, cultural forms and cultural identity are continually being formed and reformed, contested and negotiated, and transforming with the times. To deny the fluidity of the concept is to presuppose a cookie-cut-out of cultural identity as ready-made rather than as part of processes which are continually being reshaped. As Clifford (1988: 16) goes on to say: 'throughout the world indigenous populations have had to reckon with forces of 'progress' and 'national' unification. The results have been both destructive and inventive. Many traditions, languages, cosmologies, and values are lost, some literally murdered; but much has simultaneously been invented and revived in complex, oppositional contexts'. Hence, the reality what Augsburger takes for granted about culture does not exist. The ethnographic realities paint a much bleaker picture of our world and how peoples across the globe must face being proselytized in the name of another religion, especially Christianity, which is nowhere contentious in *Conflict Mediation Across Cultures*, largely because its final message is Judeo-Christian and one of forgiveness. In none of the passages in Augsburger's book does he speak about the ideological, material, and technological globalizing projects bent on the destruction of many peoples fighting at minimum for survival. If we ignore such explicit and unambiguous realities what are we teaching about culture or even learning about cultures in conflict?

And Augsburger is not alone, take John Paul Lederach, a well-known conflict-resolution practitioner, who defines 'culture to be rooted in the shared knowledge and schemes created and used by a set of people for perceiving, interpreting, expressing, and responding to social realities around them' (1995: 9). Others such as Elise Boulding (1990) assume a global-positivistic and utopian civic society is possible without analyzing how to think about ethnicity, nationalism, or race from more useful anthropological and sociological approaches with their antecedent histories since at least the 1950s (cf. Banks 1996; Jenkins 1997; Sansone 2003). More disappointing perhaps are theorists like Kevin Avruch who problematize culture but who do not provide nuanced examples from ethnography to assert what is missing. Even so, he quite rightly points out that his perspective is 'not to criticize them [other theorists] but to help us think more clearly about the concept', a position I support (Avruch 2004: 16). In establishing what culture is not "homogenous", "a thing", singular-associations, "custom", and "timeless"– he nonetheless contradicts his previous assumptions by over-generalizing and over-simplifying the issue toward the end of his argument (2004: 14-21). Such a general

lack of discussion of the problematics of culture can be extended to collected volumes like *The Conflict & Culture Reader* edited by Pat Chew (2001), which spends only two chapters questioning how culture is used by conflict resolution theorists.

As Andreas Wimmer (2002: 24) summarizes the issue: " […] the classical notion of culture is confronted with four principal theoretical and methodological problems. It does not give an answer to the problem of intra-cultural variation; it cannot help to understand the relation between power and meaning; its concept of human action is largely inadequate; and it does not offer an adequate tool to analyze processes of cultural and social change". Even though I do not share Wimmer's (2002: 33) idea of cultural compromise and closure, "defining the boundaries between participants and outsiders", for implying how nations emerge as entities of exclusiveness and inclusiveness, his summary of the classic idea of culture is correct. At the very least such discrepancies point to directions how to proceed in raising the level of discussion about culture and its relation to conflict. To be more precise I tend to view culture more as a reference point, or general label in a similar fashion as I do ethnicity and nationalism, as empty concepts, as not so much bounded or fixed but as an elastic and fluid concept and as "distributed" and "partible" aspects of identity which are constantly being socially manipulated, shifted, and competed with at local and regional levels and in imaginative ways whether through outside influences or because of individual reinterpretations within groups, internal divisions and group dynamics (Linstroth 2005). Culture, like ethnicity and nationalism, are empty concepts in that they have come to mean almost anything or are essentialized to such an extent as to make their meanings useless. They are in essence social fictions which can readily be reformulated in the minds of researchers and to complicate matters I offer my own definition to demonstrate how easily this can be done.

If there is anything to say about culture or cultural practice it is to try to understand how people behave and how they think and what if anything these in turn have anything to do with the interplay of cognition, language, and socialization to a myriad of social environments. In other words, culture in part is how a *set of people* imagine their worldviews, how individuals from a set of people view a set of worldviews, how *other collectives* view such worldviews and/or collective peoples from their worldviews, and how *as a whole groups* are subject to a variation of lively possibilities both accidental and purposeful and the potentialities of reifying past practices or in discontinuing such practices altogether or partially so *in opposition to* a set of primordial and pre-formed attributes. All of this happens at variance *with a means of cognitive mapping and encoded transmissions* both in forms of *language and practices* and the overall conceptualization of a socialized environment, *imperfectly, sporadically and only partially* to some extent through oral traditions and collective memories, and through a *multitude of meanings, interpretations, and reifications, reinventions, and inventions*, and discontinuously through the continuous reshaping of *groups, networks, and collective relations* over time, through *sets of competitions, negotiations and manipulations* of individuals and groups and in the relation to different environments and other groups *because of the mobility and/or impermeability* of any given group and *outside influences or internal dynamics* through processes of *gradual or radical transformations*. More simply put, people imagine a cultural identity and a cultural cohesion to particular groups, which is layered through varying aspects of belonging. This is despite the fact that such identities are constructed in multifarious ways and are ever-changing and unfolding whether in relation to myths about the past or in relation to perceptions about present circumstances particular to the individual or given group.

To broaden the discussion I include Harvey Whitehouse's (1995) study of a millennial cult in New Britain of Melanesia in that much of cultural transmission can be better perceived through a greater appreciation of cognition through his seminal study of "modes of religiosity". By drawing upon "intellectualist, psychological, and sociological perspectives on religion", but particularly from cognitive psychology, Whitehouse (1995: 3 and 194) proves how religious [cultural] notions are encoded and how "contrasting politico-religious regimes" co-exist among the Pomio Kivung movement of Papua New Guinea through both doctrinal and imagistic modes of ideological practices, demonstrating how groups rupture, splinter and re-emerge periodically, while reformulating a sense of collective belonging. What such analysis demonstrates is that periodic disputes or group-breaks reinforce identity in complex ways, which cannot be explained by simple models of social compromise or social closure according to the likes of Wimmer (2002). It proves by contrast how conflict and competing interpretations of meaning and/or belonging rather are central to group cohesion and the maintenance of ritual practice, or how to imagine a sense of communal awareness with multiple loyalties to a collective or place (Linstroth 2002a). Furthermore, Whitehouse has demonstrated how knowledge can be part of a routinized litany of practice and/or can be in a different way passed on through sensory and imagistic means from shock and deprivation. Or, putting this another way, Maurice Bloch (1998: 4) observed: "if culture is the whole or a part of what people must know in a particular social environment in order to operate efficiently, it follows first, that people must have acquired this knowledge, either through the development of innate potentials, or from external sources, or from a combination of both". It is an acquired knowledge which is equally and "relatively easily accessible" and which is derived from "learning, memory, and retrieval", meaning that anthropologists and others discussing culture should not so easily dismiss the significance of cognition for the transmission of cultural knowledge (Bloch 1998: 4).

In all this, what I call the "trap of culture", especially for many conflict resolution theorists, is in not knowing how to discuss the term "culture" in a more erudite manner and to be able to demonstrate some forethought about how social worlds are constructed by people and how researchers theorize about terminology, or even the origins of terminological usage. My suggestion is for a re-examination of such theory of culture and conflict and for a direction toward a more careful reading of anthropological and sociological literature in order to avoid the multifarious fallacies or traps of incomprehensible naiveté. To be more precise we need to be aware of the emptiness of terms like culture, the dangers of conflation and oversimplification, and why such a term can come to mean almost anything but mean nothing at all and render the very idea meaningless in the process.

Abstracting peace: the traps of peacebuilding and peacemaking

Similar to the "trap of culture" are the theoretical traps associated with assumptions of peacebuilding and peacemaking theory as well. Most often these sorts of traps are embedded in the abstraction of peacebuilding and peacemaking which favor Western models and Western self-interests rather than a concern to understand informal justice systems of many peoples worldwide who already have peaceful means of resolving their disputes (cf. Kemp and Fry 2004; Fry 2006). The assumption, often and sadly enough, is that others cannot have a means or a capacity for peace practice without "expert" advice, a perspective which in many regards parallels colonial-paternalism and a past of negative associations for peoples in the developing world.

In this context, I refer to peacebuilding to mean the establishment of grass-roots movements in order to generate a peaceful means of countering violence, which will be permeable and be disseminated throughout a given population. Whereas peacemaking is usually associated with elites and the manner by which governments such as diplomats and leaders of states are able to broker peace or not in an effective manner. To some degree and in a few cases, peacemaking happens through back channels and the efforts of non-governmental actors who are contracted by governments because of their past experience or who influence the peace process because of their long-standing involvement with a particular community in conflict. For the most part the former, peacebuilding, is more informal than the latter, peacemaking, which is more formal and often takes place in neutral settings away from given conflicts. Such terms oppose peacekeeping which is the military means in which to suppress conflict through the use of force or the show of force. Among the best-known peacebuilder practitioners is John Paul Lederach who has given workshops in numerous countries around the globe, including the Basque Country, on peacebuilding fundamentals which he views as more of an art than a science. Lederach bases his experience of peacebuilding of years spent in Central America, and conducting peace work-shops, and to his credit he has lived in Central America for extended periods of time, providing more veracity to his sociological notions. Perhaps his most widely read work is his *Preparing for Peace: conflict transformations across cultures* (1995). In this work he differentiates between prescriptive models of peacebuilding and his own elicitive approach to varying cultures in conflict. The classic-prescriptive guide is John Burton's (1987), *Resolving Deep-Rooted Conflict*, which is the embodiment for solving conflict by a step-by-step approach while assuming all conflicts are universal and can be overcome through training techniques and a set of rules if followed to the letter.

Part of Lederach's impetus and different from theorists like Burton is to promote the notion of "conflict transformation" and he states "unlike resolution and management, the idea of transformation does not suggest we simply eliminate or control conflict, but rather points descriptively toward its inherent dialectic nature" (Lederach 1995: 17). What Lederach believes is that prescriptive models for teaching people how to accommodate conflict and overcome it supposes a relationship of power by training people in techniques while the trainer remains the expert: "this is what we do" and "this is how we do it" (Lederach 1995: 50). Such an approach Lederach believes is based upon the idea of transferring knowledge and skills to participants in peace seminars much like a business model of training and supposes that all conflicts may be overcome through following this type of training methodology (Lederach 1995: 53). However as he sees it this does not allow for the creative dynamics of peacebuilding to occur and instead of being the expert, the trainer should view themselves as the "catalyst" or "facilitator" for conflict resolution (Lederach 1995: 56). This permits room for discovery and a reliance on the knowledge of the participants in a peace seminar and training. Nonetheless, and even though Lederach is quite careful in eliciting the knowledge of others in a peacebuilding process, the trainer still remains the expert. Only through the knowledge of trainer can such seminars take place. There is no mention of actually examining informal processes of justice or how societies have coped with conflicts in their pasts and moreover his ideas are wholly Western. Even though Lederach's new model of elicitation goes much further in recognizing how much participants' input from other cultures are essential in any successful peacebuidling endeavor there is still a profound lacking of any true acknowledgement of dispute resolution and informal justice approaches used by numerous peoples throughout the world.

No matter how well meaning, models and training facilitations of peacebuilding and conflict resolution are, they too often read like "how-to" guides as in "how-to-lose-weight", or "how-to-become-a-millionaire", or "how-to-influence-friends-and-people", and some are

structured in popular cook-book-formats of celebrity-chefs or home-improvements for festive occasions. If you follow the recipe of peacebuilding you will be a success. If you decorate your house just so and follow the instructions how to avoid conflict, all of your friends and neighbors will admire you and the world community as well. Perhaps the best example of this is Fisher and Ury's (1991), *Getting to Yes: negotiating agreement without giving in.* The techniques from this book include: BATNA or the "Best Alternative to a Negotiated Agreement" and following negotiation jujitsu guidelines, a form of self-defense and discursive-karate-attacking techniques in the form of the following strategy interrogation: "don't attack their position, look behind it"; "don't defend your ideas, invite criticism and advice"; "recast an attack on you as an attack on the problem"; and "ask questions and pause" (Fisher and Ury 1991: 97 and 107-116). What the Fisher and Ury model exemplifies are Machiavellian business-techniques in how to get ahead and outsmarting one's opponent in negotiation strategy. Such a how-to-guide is more worrying however in that they presuppose their techniques and verbal skills will apply to international negotiations and are universal. Again, such a model is highly Western in its orientation to other peoples and other cultures.

Another abstract approach to peacebuilding has been the work of noted scholars such as Johan Galtung and his work with the peace networking group, TRANSCEND. While I am certain that such work toward peace across a wide-range of societies are beneficial, his work like many others with an influence in international studies and political science circles tend to examine issues of conflict and its resolution in the most abstract of ways. At times such categories and categorizations follow definitional prescriptions or phases of similarity as in psychological stages of awareness. Such examples include "conflict cycles": "Phase I: before violence: peacemaking=conflict transformation, and peace-building = depolarization, Phase II: during violence: peacekeeping; peace zones, Phase III: after violence: reconciliation (with reconstruction)" (Galtung, Jacobsen, and Brand-Jacobsen 2000: xvi). Such cycles are reminiscent of biological metamorphoses of the caterpillar to the butterfly or maggot to fly –egg, larva, pupa, adult– the metamorphic life cycle of insects applied to conflict. Inclusive are listing definitions in creating models of a peaceful world without really analyzing terms like 'peace culture' which assumes there are no peaceful societies? Or the fact that "peacekeeping" is really an oxymoron and often involves much violence? (2000: xvii). It is clear that Galtung (2000: 3-15) follows the idea of stages of "conflict" quite closely by describing the escalation of violence as a flow chart as if such an abstraction encapsulated deeper levels, but at surface is reminiscent of Elizabeth Kübler-Ross' psychiatric stages of the dying individual, or even a mathematical formula of sorts. Such artificial scenarios essentialize conflicts in highly-meaningless ways as I will explain in more detail below in the discussion about intractable conflicts. The strength of Galtung's argument lies in what mainstream journalists and/or politicians fail to do: by focusing on violence instead of unresolved conflict; by confusing the conflict arena with a conflict's formation; by reinforcing polarizations; by presenting violence as inevitable; by omitting structural violence; by omitting the bereaved and their desire for revenge; by ignoring causes of protraction; by not scrutinizing interveners; by not reviewing compelling peace proposals; by confusing expectations of a cease-fire and conferences with a peace agenda; and finally, by leaving out "reconciliation" (Galtung 2000: 14-15). Yet such a critique is for the most part lost because of the "ABC triangle" or "Conflict = Attitudes + Behaviour + Contradiction. The ABC triangle" and reformulating this triangular picture into stages or phases (Galtung et. al. 2000: xiv-xv).

Other theorists such as William Zartman have concentrated their attention on peacemaking and have examined the role of governments and what sets the stage for making viable peace. Zartman in particular is well known for his theory of "ripeness" which assumes that "parties

resolve their conflict only when they are ready to do so", a formula which substantially draws upon Cold War ideas and rationales of zero-sum losses and to some extent reliant upon "game theory" (Zartman 2001: 8). What from my perspective Zartman demonstrates is a way of fitting his examples with his models and a ready-made way, which is easy enough to ponder along these lines in hindsight. International examples of testing ripeness for peace negotiations have been: "Zimbabwe, Namibia and Angola, Eritrea, South Africa, Philippines, Cyprus, Iran-Iraq, Israel, Mozambique, among others" (2001: 10).

The idea Zartman is promoting is that parties in conflict, especially those involved in protracted and intractable conflicts, will seek out a negotiated solution to their impasse when the moment is ripe and because of a "mutually hurting stalemate" (MHS). As he states: "the concept is based on the notion that when the parties find themselves locked in a conflict from which they cannot escalate to victory and this deadlock is painful to both of them (although not necessarily in equal degree or for the same reasons), they seek an alternative policy or Way Out" (2001: 8). Yet, how do such abstractions and the traps of these abstractions get us any closer to understanding conflict? What if the moment never becomes ripe? What if the fruit from the tree remains and begins to fall, causing widespread and regional chaos? Or, rather if the fruit never becomes ripe, or circumstances wipeout the crop? Or even, the fruit lies fallow and begins to ferment on the ground. What then? Do parties intervene with peacekeepers? With the foreknowledge that negotiations never may happen without outside intervention, do we allow mutually destructive adversaries continue along dangerous paths? I believe there are many more unanswered questions here than answered ones and moreover it is too facile to demonstrate where ripeness for negotiation existed in the past through a review of recent history than in addressing present-day situations of hopeless protraction. In part, Zartman (2001: 13-14) answers previews some of these critiques by asserting that his theory "only addresses the opening of negotiations" and by addressing the "absence of ripeness" and that it does "not constitute an excuse for second or third parties inaction". Such Cold War-theorizing about brinkmanship and game theories do not bring us to the ground and away from the Galtungian (2000) "bird's eye view" of war and peace. Where is the human element in all this? What about the victims and those who actually suffer and their stories?.

Adding to the peacebuilding and peacemaking side of theories is a book toward diplomacy using systems theory and methodology, Diamond and McDonald's (1996), *Multi-Track Diplomacy: a systems approach to peace*. The concept is to expand upon "Track One, Track Two" paradigms by offering a multiple means of conceptualizing international peacemaking whether at the elite level or at the grass-roots level (1996: 1). They offer nine tracks for discussion: peacemaking through diplomacy (governmental), peacemaking non-governmental means, peacemaking through commerce, peacemaking through citizen/individual input, peacemaking through learning, peacemaking through advocacy, peacemaking through faith-based organizations, peacemaking through foundations, and peacemaking through media information (1996: 4-5). Such an approach is quite positivistic but does not analyze the associated problems of different tracks or how power relations are unequal between say governmental peacemakers and non-governmental advocates. Furthermore, there is no mention how Western the systems theory of multi-track diplomacy operates and while formal and informal levels do operate simultaneously what tracks become privileged over others. It is all very positivistic and ends with some romantic goals and refrains, again in a how-to way: "take a systems view", "build relationships", "work with our internal conflicts", "create work models that reflect the vision", "create new resources", "share our knowledge", "explore systemic peacemaking", "create multi-track institutions", "work to legitimate the field", "take care of ourselves", "take responsibility", and "realize our power", which all reads like a United States Peace Corps advertise-

ment (1996: 162-165). While I have omitted their explanations for "recommendations", I think their subheadings explain this sort of idealism. As a reference guide for organizational postal addresses it is perhaps most useful but it cannot claim to expose the real difficulties involved in creating a peace process whether at the formal or informal level.

While there are many other books to consider on peacebuilding and peacemaking and the right methodologies to employ in being successful as a peace trainer or mediator, I think these few examples suffice to prove my point. Researchers in the field of Conflict Resolution are too caught up in writing how-to-guides and theorizing in abstract ways about conflict and conflict resolution without a view toward more humanistic approaches and ones which provide at least an acknowledgement of non-Western forms of social justice.

It seems though that these traps of abstraction are too seductive and too many and that such formulations continue and will continue *ad nausea* as long as theorists believe that it is fine to objectify conflict and remove human elements or to strive for non-humanism in their approaches. The traps are so many to follow the call of discipline precursors in an *ad hoc* fashion of de *jure stare decisis* that it brings new meaning to Pierre Bourdieu's (1988) work of *Homo Academicus* and *requisites about the laws of the academy*. I suppose what I am asking is what drives this discourse of abstraction. If researchers are hell-bent on claiming and disclaiming about what conflict is and what it is not and theorizing about formulas how to resolve the most basic dispute to the most internationally-devastating ones, then how did it become so fashionable to leave out victims and their narratives or the perpetrators and theirs? These are intellectual traps and they signify nothing less than keeping the muted mute and maintaining elite perspectives without bothering about what really happens in a conflict and why. These are relations of power and they are not simply about how unequal adversaries reach "mutually hurting stalemates" to use Zartmanian prose but how such reifying abstractions suppose a power relation of researcher over his or her subject of study without giving voice to those afflicted by conflict in any real way.

Recurrence: intractable conflicts and the entrapment of conflicts

As much as abstraction of peace is evident from the research above, so too, are the abstractions found in studies of intractable and protracted conflicts. Here instead of abstraction at the how-to-level of training-to-overcome or model-making to mediate, we have abstracts which underline the importance of gradation and categorization of how protracted is protracted and how active or non-active are intractable conflicts around the globe. In terms of the history of ideas I wish to turn the reader's attention to two classic thinkers, namely Aristotle (384-322 B.C.), familiar to most as one of the Greek philosophers responsible for the foundations of Western thought and scientific ideas, and Alfred North Whitehead (1861-1947), the prominent mathematician, physicist, and philosopher of science. I bring them up to illustrate a point. In order for us to grasp the significance of this endeavor of abstracting or even categorizing, I think what Whitehead has to say about Aristotle is illuminating. Quoting Whitehead from his book, *Science and the Modern World (1925: 28)*:

> […] Aristotle by his Logic throws the emphasis on classification. The popularity of Aristotelian Logic retarded the advance of physical science throughout the Middle Ages. If only the schoolmen had measured instead of classifying how much they might have learnt!.
> Classification is a halfway house between immediate concreteness of the individual thing and the complete abstraction of mathematical notions.

> The species take account of the specific character, and the genera of the generic character. But in the procedure of relating mathematical notions to the facts of nature, by counting, by measurement, and by geometrical relations, and by types of order, the rational contemplation is lifted from the incomplete abstractions involved in definite species and genera, to the complete abstractions of mathematics. Classification is necessary. But unless you can progress from classification to mathematics, your reasoning will not take you very far.

So too it is my belief that "classification" will not take us very far in addressing issues of intractable conflict. Yet many theorists choose this route, a route of scientistic-thinking and classification of conflicts rather than one of social science and a humanistic perspective of analysis. In fact I would argue that the "social" of social science has been excised altogether in many instances. Moreover, I contend that Jean-Jacques Rousseau (1712-1778) might agree with such a viewpoint, knowing his writings and his general disdain for scientism, how far some have gone to objectify their subject to such a degree as to render it lifeless and devoid of anything closely resembling the social, or more pertinently here the realities of violence. Rousseau might even have gone a bit further and have argued that intellectualism itself is a kind of trap, which is dangerous. Also, if we are honest we might wish to consider another political philosopher, Niccolò Machiavelli (1469-1527) for depicting political reality and the unequal distribution of power or even how the powerful operate, all of which apply when considering influences of elites on any given protracted conflict.

One such example of objectification is the weighty-collection of essays by Crocker, Hampson, and Aall (2005), *Grasping the Nettle: analyzing cases of intractable conflict*. The authors in this work for example choose to categorize different "types" of intractable conflicts as "interstate and intrastate conflicts", "active intractable conflicts", "abeyant intractable conflicts", and then go on to categorize such conflicts with "principal factors" as "lacking accountability for leadership", societies with "weak or divided decision-making structures", conflicts with "deep-rooted communal or ethnic cleavages", conflicts in "bad neighborhoods" [suggesting regional associations], and conflicts which are not prone to accept "third party intervention by key international actors" (Crocker, Hampson, Aall 2005: 10-15). All of this is well and good if such abstraction created a more nuanced picture about intractable conflict and the protraction of conflicts throughout the globe. However, as I will argue below, such categories are more scientific and remote and objective in their dealing with conflict than the subjective inquiries made by social and cultural anthropology through ethnographic writing. Even if we can accept their definition that "intractable" "is often understood to refer to a conflict that is unresolvable rather than one that resists resolution" (Crocker et. al. 2005: 5), there is much needed inquiry how people resist violence despite it. Or rather than thinking of conflicts as forming part of some biological schema of reality or evolutionary continuum, how do we better grasp human elements which really tell us about human realities and sufferings through narratives and stories of what it is like to live through protracted and intractable periods of time. Equally there is much talk about ethnic violence without a true exposition what ethnic identities signify in any meaningful way (cf. Banks 1996; Jenkins 1997; and Wimmer 2002). There are even allusions to the antecedent past and the influence of colonial histories on many of these intractable conflicts but with really no analysis what these histories mean or how history itself becomes part of the fantasizing project of ethno-nationalist identity (see Zartman 2005: 48). Such writings about intractability read like histories of histories of conflicts rather than histories of intractability affecting real people's lives.

Crocker et. al. (2005) are not alone in their portrayal of intractability through categories or phases or schemas. Christopher Mitchell (1997: 6) also prefers this type of exposé by placing "conflict intensity" on a continuum between "minor violence in a limited region" (referring to Northern Ireland and Kurdistan), "significant organised warfare in a large area of the state" (referring to Sudan and Sri Lanka), and "complete collapse of state in a civil war" (Somalia, Liberia, and former-Yugoslavia). In addition to this he argues that such intractable conflicts have certain "characteristics" like counting appendages or describing morphological attributes. They are: violent, protracted, internal, extensive, and inextricable (Mitchell 1997: 6). Nonetheless, do such characteristics of these conflicts in general provide a nuanced perspective why such violence continues and at such heightened levels and what people do despite it? Mitchell like many theorists in the field believe it is adequate to categorize and generalize whether in describing a particular conflict or in the levels of peacebuilding in order to affect change and like others offers how-to keys for long-term conflict resolution. His keys are much like a medical prescription, a way out of the sickness without relying upon the narratives of real actors to explain how this might work on the ground or whether such keys might be listened to elites but not by majorities affected by conflict zones.

Three similar studies which parallel the two above is Crocker's et. al. (2004), *Taming Intractable Conflicts*, Edward Azar's (1990) *The Management of Protracted Social Conflict*, and Kriesberg's et. al. (1989), *Intractable Conflicts and Their Transformation in order of publication from most recent to least*. All of them have similar approaches to intractable conflict in terms of mediation and resolution which in turn are similar to the studies mentioned in the last section. Kriesberg et. al. and contributors attempt not only to identify the root causes of intractability but also discuss variations of the idea of intractability as aspects of identity, victimization, and labor issues. The last section of the book provides a how-to for the transformation of conflicts. By contrast Azar's approach begins with "identifying" protracted conflicts and then describes the applied work as a result of hosting "forums" held at the University of Maryland to discuss conflicts in Lebanon, Sri Lanka, and the Falklands/Malvina. Participants were invited from these regions and to present ideas how to overcome protracted violence in their respective regions and in a more grounded manner addressed several issues specific to these regions. By contrast Crocker et. al. provide a general how-to guide in mediating intractable conflicts.

What is missing from all of these studies on intractability is the human dimension. In particular what I have noticed is that there is no discussion of memory whatsoever or the power of the imagination in view of the past and its looming ability to control actions in the present. In addition there is no contemplation of the effects of mass trauma on any given population involved in intractable and protracted conflict. Perhaps the best collection of essays which exemplifies the latter, that is mass trauma as a result of collective violence is exemplified by the interdisciplinary study between anthropology and psychology by Antonius Robben and Marcelo Suárez-Orozco (2000), *Cultures Under Siege: collective violence and trauma*. Here we have voices from those affected by the "dirty wars" in Argentina; the effects of trauma on children from the Israeli/Palestinian conflict; the effects of trauma on children of former-Yugoslavia; trauma upon the Parsi community of Bombay, India; the toll of trauma and post-traumatic stress suffered by immigrants and political refugees and their families in New York City, United States; the psychodynamic stresses upon Greek and Turkish population of the ongoing Turkish-Greek conflict; and the symbolic violence suffered by Turkish women over the right to wear the traditional headscarf as part of Islamic custom and the general patriarchal and gender discriminations felt by women throughout Turkey. As LeVine (2000: 272) states: "our best hope for the future development of psychological anthropology

as an instrument of human understanding lies in studies that expand and deepen our awareness of the connections between personal experience, conscious and unconscious, and social and cultural patterns in the contemporary world". I believe that such studies get us closer to the reality of intractable conflicts and their effects upon populations, the real stories of trauma whether they are women's stories or children's stories, nonetheless express the oft muted voices.

Even if we are to capture such voices or to explore memory in relation to intractable conflict, we must be wary what we mean. Regardless, if one lived through a traumatic event, memories persist among populations and these become social memories, those which are passed onto subsequent generations. Such recollections demonstrate that the past is very much alive in the present and that the role of memory is perhaps one of the key issues in understanding how intractable conflicts persist. As Maurice Bloch (1998: 120-121) explains it is why and "how the presence of a past –which one did not experience oneself, either because it occurred before one was born or was not there– can nonetheless exist in the present, as much more than simply the memory of narratives one has been told". Bloch (1998) discovered this when discussing the effects of the rebellion of 1947 in Madagascar of the Zafimaniry population in which "a village was burnt down by French troops in retaliation against the supposed support given by the inhabitants to the anticolonial rebellion of that year. This brutality was followed by a period of terrible hardship of more than two years when the villagers hid in the forest from the French fearing being captured". In terms of recollection, and aside from the narrative of a village elder, as Bloch (1998: 119-120) "[…] what was perhaps more surprising was the fact that all the members of the family, including the children, were showing me what they did then, where they had stayed, and what it had been like, although, of course, they had not been alive in 1947. Indeed the atmosphere created by being in such a situated place was the occasion for a general conversation and rehearsal of what was known where all seemed to take part, apparently not simply to inform me, but also to tell and elaborate what each knew". Indeed, the affective role of memory, especially the post-traumatic stress suffered by a population, recalls the trauma suffered by everyone in the group. It is not important so much that memories are living embodiments that is having lived through the experiences, but that the group has done so, that is recollected the memories as a collective process. In this way we see the effects of traumatic memories are passed on continuously through the social networks and kin ties of the affected members of a given group such as the Zafimaniry of Madagascar. As such autobiographical memories collide with what we consider to be historical memories of events and become transmissions of collective and social memories which are "lived" on and to this extent become "lived experiences" (Bloch 1998: 121).

The best account which I know of that explains the effects of intractable conflict on a given population is the ethnography of Carolyn Nordstrom (1997), *A Different Kind of War Story*. In this ethnographic depiction of the Mozambique civil war (1975-1994) she eloquently tells the stories of men and women alike affected by the devastations of war on their lives and despite this trauma were able in a creative fashion to resist violence and how to maintain inter-community and social networks and to rebuild lives happened against the complete destruction of communities, townships, and villages. As Nordstrom (1997: 189) explains: "self, culture, and reality are regenerative. If people are defined by the world they inhabit, and the world is socially and culturally constructed by the people who consider themselves as a part of it, people ultimately control the production of reality and their place in it. They produce themselves. As much as terror-warfare tries to dismantle the viable person, people fight back. They recreate themselves in resistance". Nordstrom is careful not to recreate a "pornography of violence" but one which accounts for the untold sufferings of men, women, and children

and their ability to resist violence in Mozambique. Above all this is a story of hope as much as it depicts the sadness of enduring violence. Treating her subjects with utmost dignity Nordstrom is able to capture the "reality of life on the frontlines" and what it was like to live through this Mozambican tragedy. As one Mozambican woman told Nordstrom:

> I don't know if anyone really knows war until it lives inside them. A person can come in and see the war, fear the war, be scared of the violence, but their life, their very being, is not determined by the war. This is my country, the country of my parents, my family, my friends, my future. And the war has gotten into all of these. I know everyone has suffered a loss in this war: a family member killed, a loved one captured and never heard of again. But it goes much deeper than this, to the very heart of the country, to my very heart. When I walk on the road, I carry nervousness with me as a habit, as a way of being. When I hear a sharp noise, I do not stop and ask "what is that?" like a normal person. I start and fear my life is in jeopardy. And I do this for my family as well. Whenever I am parted from them I have this knowing worry: will I ever see them again, is something terrible happening to them at this moment? I cringe for my very land, soaked in blood so it can't produce healthily. This lives in me, it is a part of my being, a constant companion, a thing no one can understand if they if they only enter here and worry about their own safety from one day to the next […] (Nordstrom 1997: 7).

These are the silenced voices so often left out of studies about intractable and protracted violence. They give meaning to suffering and loss. These are stories of muted voices those of whom have experienced real pain and sorrow and know what war is like. Such accounts underline I think what is not being talked about when we place abstraction and categorization of intractability above the victims of conflict and the untold havoc of devastated zones upon populations as people knew violence in places like Mozambique. Even so, and here is the crucial bit, it is not so much important in my mind, how we think as Westerners are able to train others or tell others how to build peace or what a peace process should look like. Such notions prejudice those who have already known how to build peace in their own communities and know what to do without having to be told by some mediator or peacebuilding practitioner or some political science or international relations expert obsessed with describing what a war is like. There is no humanism in such objectification and charts and graphs, and continuums and gradations never can tell the real stories or the real effects of intractable conflict or even grasp what it is like in any definable way. Such abstractions only give us a meaningless formula for writing about conflict, or writing about writing about conflicts, but do not get us near or on the ground to being there and hearing what people say about such horror.

In effect most people do not need to be told how to rebuild their communities or their lives or attend one peacebuilding session in order to recreate their lives. Such views by peacemakers and peacebuilders that people need to be told what to do when conflicts end or even told what to do as conflicts unfold or even what conflicts are like as abstracts of intensity to non-intensity are to say the least insufficient and insulting. Moreover, they recall discourses of colonialism, when the West knew better how to deal with populations and hark back to times of authoritarian ownership of knowledge through patterns of patronization and privilege.

Nordstrom (1997: 218) in her encounters of people living through the Mozambican civil war describes why peacebuilding "in the midst of war was so successful because a vast majority of people refused to restrict cultures of survival along community, language, tribal, class

or gender lines". War was the enemy, and anyone fighting this enemy was a compatriot. She further asserts:

> what is so powerful and innovative about this social process is that it is predicted on redefining violence in a nonviolent way. Fundamental to this sensibility is the idea that people choose to fight, not against one side or another, but against war itself. People choose to fight precisely by not employing violence as it has been used against them…people delegitimized the political use of violence, both as a global process and a local reality. Rather than leaving the definition of community and security to the politico-military bodies, average Mozambican citizens took it upon themselves to reconstitute community, the body politic, security.
>
> When average citizens met violence not with violence but by rebuilding town and citizenry, they were in effect saying that they did not need political institutions to forge community structure and keep social order (Nordstrom 1997: 218 and 220).

The message conveyed here is not only how we should move away from models which do not really tell us in any depth what post-traumatic stress is really like, or what war zones feel like, or what post-traumatic memory is because of privileging abstraction but also how people such as Mozambicans rebuilt their lives and created meaning in spite of violence and out of some of the worst tragedies known to humankind.

It is, I believe, increasingly obvious in order to capture and portray and tell people's stories, and retell how people reconstructed their lives from the ashes of a civil war-torn society for example, or other heartbreaking narratives from peoples affected by long-term violence. That social and cultural anthropology offers the best academic alternative to such portrayal. Of course we may find the everyday of human suffering and the human capacity to overcome from excellent literature whether we think of Baldwin, Beckett, Dickens, Dostoevsky, Ellison, Faulkner, Hugo, Kazantzakis, Maughm, Shakespeare, Steinbeck, Wright, Zola, and from Spain and the Basque Country, Bernardo Atxaga, Pio Baroja and Miguel de Unamuno, and a multitude of other literary giants and geniuses too numerous to list here.

This is not to undermine the many good studies conducted by others in the social sciences but rather to highlight and underline why speaking of intractability in the abstract does not seem to get us as academics any closer to the "truth" about such violence and their real effects on people or even how we approach the topic of peace to the victims of such war zones or to come to the realization that perhaps people already have informal means of peacefully reconstructing their and resisting all forms of violence.

From my perspective researchers such as anthropologists who spend numerous years studying in a qualitative manner the lives of those fractured by protracted violence by living with and participating in the lives of people studied come closest to the truth of this type of conflict. Anthropologists call their method of research "participant-observation", which means that over a prolonged period of time, the researcher participates in the everyday facets of existence and social reality of the people they study. This is why ethnography is so enriching to read. It takes us there. There is a sense of being there where the conflict took place, where the violence happened, and in another way of reconstructing the past realities of violence and their post-traumatic influences through the knowledge and narratives of subjects.

To illustrate this in more concrete terms, I wish to discuss the works of three ethnographers who have vividly depicted the intractable conflicts of Sri Lanka, Northern Ireland, and

Israel/Palestine. These authors are Valentine Daniel, Allen Feldman, and Laetitia Bucaille. If such studies are compared with the more political science approaches as those listed above, I argue, the humanistic value and contribution to our understanding of intractability will be self-evident. Moreover, my reason for summarizing these works in particular is a call for humanism and sensitivity and to move away from abstraction and objectification of violence.

E. Valentine Daniel's (1996), *Charred Lullabies: chapters in an anthropography of violence*, is one study which from multiple perspectives how essential it is to understand the past in the present. What Daniel does is provide more than a description of the prolonged conflict in Sri Lanka but really how Sinhala Buddhists in opposition to Tamil Hindus developed different ways of "seeing" the world in contrast to "being" in it or the epistemic and ontic expressions of reality (1996: 43-71). As I mentioned elsewhere, "the rupture in privileging the past came about through colonial rule" (Linstroth 2005: 18). More than this Daniel evokes the suffering of the conflict by explaining how both Sinhala Buddhists and Hindu Tamils conceptualize their ethnic differences through the conflict and creatively how Tamils, especially estate Tamils use "agro-agri" metaphors from cultivating tea in order to express their hate of Sinhalas. In essence what is explored is how to write about violence of the conflict with sensitivity, not only in giving the reader a sense of being there, but how to represent violence from the perspectives of Sinhala Buddhists and Hindu Tamils of Sri Lanka. To penetrate this cloudy ambiguity of ethnic hate, Daniel relies upon semiotic explanations from philosophy, particularly referencing the works of Charles Peirce or even how the body becomes objectified through the works of Michel Foucault. Especially poignant are the poems of Tamils who experienced "embodied terror" from torture. One such example is a poem by Thiyagarajah Selvanity (known as Selvi), who was awarded the prestigious Poetry International Award in 1994:

My soul, full of despair
Yearns for life
Where ever I turn
I see
Primitive humans
Yellow toothed, ugly mouthed
Thirsting blood, slit flesh
Salive adribble
Cruel nails and horrifying eyes
Bragging and jubilating
Over victories are not new
Legs lost from long walks for miles and miles
In search of a throne
Days wasted waiting for full moons
Only boredom lingers…

(Daniel 1996: 146-147)

Such evocations give the reader the suffering involved at the hands of the torturer "a felt quality of experience in toto, present, immediate, uncategorized, and prereflective" (Daniel 1996: 152). As Daniel (1996: 152) remarks: "terror remembered disarticulates and deindividuates". "Terror shatters pain and in so doing make it available for union with beauty". In other words if anything through prose the beauty found from suffering is recaptured and reified and recalls Paul Celan's poems as a survivor from the horrors of the Holocaust. Even though the intellectual Theodor Adorno "judged it barbaric to write a poem after Auschwitz",

Celan retorted: "perennial suffering has as much right to expression as the tortured have to scream […] hence it may have been wrong to say that no poem could have been written after Auschwitz" (Daniel 1996: 153). What is clear from Daniel is how to situate such violence. "Often forgotten are (a) that ethnographic objects are, by definition, theorized objects, and (b) that insofar as theory and object can be separated from each other by an abstract mental activity called 'prescinding', we must also remember that the two are dialectically, if not dialogically, code-terminant" (Daniel 1996: 12). To put it another way, we as researchers must be aware how we write about our subjects and what objects they become in writing, especially for populations who have suffered the consequences of prolonged civil war.

Without dwelling too long on Valentine Daniel and why I think his work exemplifies one of the best examples of an ethnography of violence, I move on to the provocative account of Allen Feldman (1991), and his *Formations of Violence: the narrative of the body and political terror in Northern Ireland*. Indeed, there are few anthropologists who have better captured the voices of paramilitary activists in the Northern Irish conflict than Feldman and with such gripping force. Literally the political actors come to life in the pages of this ethnography whether from the prison narratives of Long Kesh or the H-Blocks or how the body becomes the object of violence from the discursive views of PIRA (Provisional Irish Republican Army), INLA (Irish National Liberation Army), and UDA, UDR, UVF (Ulster Defense Association, Ulster Defense Regiment, Ulster Volunteer Force) commandos, or even women's voices from the sectarian communities of Belfast. These are oral histories which evoke in brutal and striking detail the reasons behind sectarian violence in Northern Ireland with an emphasis upon bodily violence. As Feldman (1991: 9) explains "from Hegel, through Nietzche, to Lukás and Foucault, the formation of the body has been treated as the formation of the political subject". To portray this violence from the perspective of his subjects, Feldman conducted over one hundred interviews in the Protestant and Catholic working-class districts of Belfast between 1984 to 1986 (Feldman 1991: 10-11). His treatment of the subject is profound and unique because as he sees it, the body in Northern Ireland among paramilitaries became the center of political violence, where its objectification signified the manipulation and negotiated destruction of the political instrument of the Troubles.

He writes: "In Northern Ireland the body is not only the primary political instrument through which social transformation is effected but is also the primary site for visualizing the collective passage into historical alterity. The body's material deformation has become commensurate with the deformation, instrumentation, and 'acceleration' of historical time… In Northern Ireland the practice of political violence entails the production, exchange, and ideological consumption of bodies" (Feldman 1991: 9). More than this, we as the reader get a sense of the ethnic strife among the sectarian communities between the Catholic and Protestant populations, and spatial divisions which make everyday life, or did before the Stormont Agreements (or Good Friday Agreement), unbearable. Compare these two perspectives, a PIRA (Provisional Irish Republican Army) gunman observed: "on the street you know you go to prison or you can die…you can't dwell on it when you go into the street with a weapon in your hand". In a different manner, a UDA (Ulster Defense Association) gunman remarked to Feldman, "when they come to lift [kill] anybody they do a profile on them. Where is he at this moment? What's happening with him? What way is he performing?" (Feldman 1991: 85). Such expressions of violence become part of a way of explaining the realities of the conflict in its most grotesque and rawest form. "The act of violence transposes the body whole into codified fragments: body parts and other larger totalities. The violent reduction of the body to its parts or disassociated aspects is a crucial moment in the political metaphorization of the body, which in Belfast is a material practice as much as it is a linguistic practice…" (Feldman

1991: 69). What emerges is how the body is transformed into the political object of the Troubles, how those living in the sectarian communities viewed violence and their adversaries, and why the collectivized hate was so unwieldy, so intractable and so prolonged. In effect, these are not abstractions but the real oral histories of violent perpetrators who viewed the conflict in terms of what they did to the Other, Catholic or Protestant, but the horrors of living such realities day in and day out. Additionally there is the notion how the body was used as a political weapon of protest in the H-Blocks (Long Kesh), when Bobby Sands and other IRA members protested their internment. Yet all of these accounts are not about paramilitaries but also reflect the stories of people living the conflict. As one Catholic housewife recalled:

> I remember the barricades. One of my mates was shot; he was on a barricade at the time to keep the Loyalists from getting into the area. To go from one Catholic area to another there was a password. It was all "bread" or "butter" or "milk". We must have had food on our minds then. It was really exciting as a kid watching those barricades built and actually having somewhere to play. We had trees to climb not up them, but over them. We'd play hide and seek and 'You're the Brits and we're the RA [IRA]'. It was all brilliant. They had pulled the trees down on August 15, 1969. They had put spikes in the middle of the road to prevent cars from driving in. they had dug up all the roads. The barricades got turned into a playground by the children. We had been kept in the house through all the violence and now we were allowed to move. We all got together and went down to the barricades (Feldman 1991: 33).

Such a brief narrative distills what it was like to live through the troubles but also provides a picture of what it was like as a child to live through such violence. We as researchers interested in conflict also need to concern ourselves of the effects such conflicts have upon children. This is something none of the political science approaches mentioned above bother to discuss. The psychological effects for children in protracted violence are all too real.

This is why I have chosen to discuss, Laetitia Bucaille's (2004) excellent ethnography, *Growing Up Palestinian: Israeli occupation and the Intifada generation* as a final note how powerful ethnography can be for understanding intractability. Through the eyes of Sami, Najy, and Bassam, Palestinian *shebab* youth, we grasp the first and second Intifada of the West Bank and the Gaza Strip as it unfolds around their young lives and in different ways shapes their young existence, lives focused by resistance. While Bucaille's account is far less philosophical in reference to the degree Nordstrom, Daniel, and Feldman impart knowledge through of their social subjects from a philosophical framework, Bucaille nonetheless portrays the historical reasons for the Intifada movements and the politics and differing factions among the nationalist groups in Palestine. As Bucaille (2004: 17-18) explains an

> Important aspect of the Intifada was its ritual of sheer bravura. Masking the face with a keffieh, scrawling political slogans on walls, flying Palestinian flags, escaping the army's vigilance during curfews, distributing and reading NUC communiqués: all these things were strictly prohibited on pain of arrest. The idea was to create a daily series of acts of defiance whereby the people of the territories could stand up to the IDF [Israeli Defense Forces] and reaffirm the personality and the existence of the Palestinian nation.

In not only explaining the motives of varying Palestinian youths but also in explaining the Palestinian/Israeli conflict as a political history, we become acquainted by this protracted struggle on a personal level. Her vivid portrayal of Najy illustrates this:

> Najy was always a handful. When they were thirteen, he and Sami physically threatened a teacher who had expelled one of them from school for a few days. Shortly after, they and some other boys cobbled together a home-made gun and let it off in the general direction of an Israeli settlement. Sami got off scot-free and nobody denounced him. But in 1985 Najy, who wasn't yet fourteen, was arrested and sentenced to five years in prison by an Israeli military court. He remembers how he burst into tears when he heard the verdict. Then he became overwhelmed with fury. 'When the judge handed down the sentence, I punched my lawyer [who is Palestinian] and spat on the judge. I said: You're sending a kid to prison, but you'll see, a man will walk out again!'. (Bucaille 2004: 3).

At other times she demonstrates how the Palestinian struggle is often divided between factions and suspicions among its activist members.

> Outside Arafat's immediate political circle, the sense of newfound freedom was shadowed by suspicion. Yussef, a resident of the Jabalya refugee camp and a partisan of the PFLP [Popular Front for the Liberation of Palestine, a left-wing division of the PLO], saw the TV images of Palestinian police being trained in Egypt. "Why've they got night-sticks? There'll be nobody to beat us!" was his angry comment. The setting up of an authority with a monopoly on physical constraint provoked a ripple of fear in a generation for whom institutional violence had always been closely identified with the illegal occupation of their country by the Israelis. (Bucaille 2004: 34).

By demonstrating that the Palestinian conflict is mired in its own internal politics also portrays the reality of the uprising against the Israeli state. The Palestinian movement is mired in factional politics which at times punish their own population for not conforming to the Palestinian Authority. Moreover, militants have diverse views of the struggle:

> Of course I'll accept a Palestinian state that includes the West Bank, Gaza, and Jerusalem. You could hardly dream of more. If they'll respect us, we'll respect them. If they want peace, if they give us peace, we'll give them pace back. I agree with Gaddhafi: if Israel gives the Palestinians their rights, the Arab world will no longer view Israel as its enemy. If the Israelis accept us, I'll be very happy to place them at the head of the Arab League.
> Muffled up in his bomber jacket, with his pistol and his cell phone stuck in his belt, Sami grinned as he threw out this daring proposal to welcome Israel into the Arab world. The occupation had not ceased; on the contrary, it was continuing to affect the daily lives of Palestinians as well as their minds. Sami added: 'I'd like to see a country where every child has rights. I'd like to be able to go wherever I like, like anybody else in the world. I want a country without war and without weapons, like Switzerland. Of course that won't happen in my lifetime, but maybe my children will see it'. (Bucaille 2004: 112).

Such narratives demonstrate the contradictory and personal levels and general sentiments of imaginations about the enemy and imaginations of living in a post-conflict world. Throughout this wonderful study, we come much closer to a more complete understanding of Palestinian/Israeli discord through the lives of people who live it. If as scholars we are to avoid traps of abstraction and objectification and concentrate how conflicts endure in a subjective manner through the lives of people who suffer these struggles or survive civil wars, we are closer to

freeing ourselves from the constraints of scientism. By reaching outward to a humanistic perspective through philosophical empiricism and to the underlying philosophical issues of these complex struggles, we find people's lives and the enduring human faces who live conflict day-to-day away from academic seminars and the jargon of much of the academy. We find people who are trapped in existential dilemmas of overcoming the horror of civil wars like the one described by Nordstrom in Mozambique; or, how the differing reckonings of ethnic difference come into being in Sri Lanka as depicted by Daniel; or, how paramilitary commandos and the voices of Republicans or Loyalists project political violence onto the body through Feldman's account; or, how Palestinian youths cannot extricate themselves from the atmosphere of a state of war in which they have been socialized since their birth.

As an anthropologist, I see the strengths of ethnographic depictions of intractability not in the abstract but question our own academic endeavors how best to write about violence and come to terms with it and search for truths from the narratives of people who live violence. In depicting violence as much as we, anthropologists, try to understand it and come to terms with it, often we know we are depicting trapped lives. Perhaps to some small degree by portraying the violence in very real ways through narratives and by examining what violence means from underlying philosophical queries leads us to shedding light in very dark corners. Such documentation is also testimony of the overwhelming power of such violence and their devastating repercussions. If anything these testimonies provide us a way in and a way inward and like the humanist literary novel provide answers of looking outward to better futures.

At this point, I would be remiss if I did not say something about the Basque conflict and its intractability. As a non-Basque, I do not want to speak for any Basque. I can only account for what has been told to me during my time spent on a study abroad program here and for an extensive stay of fieldwork of almost two-years in two fishing villages along the Gipuzkoan coast. What I know is that the topic of politics is quite sensitive. There are reasons why the conflict has persisted so long whether we look for the narratives of those who remember the Dictator Franco years and the oppression of the state, the activists who have been tortured following arrest, or the living memory of the atrocities committed by the GAL (Grupo Antiterrorista de Liberación, Anti-terrorist Liberation Group). There is no doubt we will find in many narratives the terror of the state against the Basque people. There are also the mnemonic devices which stir the memory of past atrocities on the urban landscape, whether graffitied on some rocky outcrop depicted painted-outlines of human figures who had been shot in the back while running away from the police; or a corner dedicated to the memory of a young man gunned down by the civil guard; or the newspaper stories which depict questionable accounts of a young-activist shot in the chest, while the paper stated it was a self-inflicted wound; or other media accounts of activists dying mysteriously in Spanish jails and in other mysterious circumstances; or the story of the activists Lasa and Zabala who were tortured and then executed by the state and left in an unmarked grave, only to be exhumed some years later; or the stories of not being able to speak Basque in the street under the Franco regime; or the story of the activist thrown out of the police station-window; or the narrative I was personally told how a young man lost his sight to a stray rubber-bullet fired on him by the Basque police; and these go on and on. If there is anything to learn about this is how memory persists from a conflict where the past is definitively alive in the present for many. For many these are "imagistic", "episodic", and "flashbulb" memories of recollection and of recalling trauma and they are not easily erased or forgotten (Laidlaw 2004: 6-7).

So too and aside from state violence, there are the narratives of victims of the conflict at the hands of "Basque Homeland and Freedom", ETA (Euskadi Ta Askatasuna). There are the

narratives of the kidnapped and the families of victims "which implies the victimization of an entire family" not just the individual (Zulaika and Douglass 1996: 194). As two anthropologists who study Basque culture and society have written: "Of the victims interviewed for one study in the province of Gipuzkoa, 23 percent of civilian casualties had been caused 'by error', 65.4 percent of those interviewed still suffered psychological trauma, and 73 percent of them cited negative social consequences". In 65.4 of the cases their economic circumstances had worsened. Nothing better captures in cold numbers the vastness of ETA's real violence than these hundreds of victimized families. There are also the narratives of being threatened and living in fear. Equally there are the narratives in not being able to express opinions against violence in general.

The question is how do we reconcile with these differing memories of the Basque conflict? How do we reckon with this Basque past? How do we write about this violence in a meaningful way? Those who study conflict know that while the prevalence of living with the past in the present is and can be overbearing, somehow this past has to be reconciled with and talked about more and discussed in open-forums and in truth commissions if these ghosts are ever to be excised for the present and if a peace process has any hope of becoming a reality. These memories are real and are lived and cannot be so easily dismissed. Uncovering them and revisiting them is painful. The superb documentary-film by Julio Medem (2003), *Euskal Pelota: larrua harriaren kontra/La Pelota Vasca: la piel contra la piedra,* goes a long way in conducting such an exercise and more projects should continue in this time of ceasefire in order to keep the dialogue alive and in order that every memory of the conflict is carefully documented and portrayed in a thoughtful manner but more so in order to come to terms with this past. To do so more in social terms truth and reconciliation commissions should be established in order to shed light on the numerous aspects of the tragedy of the Basque troubles.

Recognition: human rights, deliberative democracy, and the idea of freedom

In order to overcome the traps of conflict and the trap of the conflict past, a more profound understanding of such issues as human rights, deliberative democracy, even the idea of freedom, also should be discussed in a meaningful manner. I view these topics as having direct practical implications for the Basque peace process which have been drawn from anthropology, political theory, and the history of ideas.

First, I will explain the difficulties in assessing "human rights" and why some theorists fall into the trap of trying to explain the universality of human rights without taking issue with some further theoretical implications in such studies. Some anthropologists in contrast to human-rights experts have tackled this difficulty and have provided some answers or talking points in which to assess associated issues to human rights and peoples vying for more rights. Partially, we must ask then "what are rights?" and "who is counted as a full person or human being eligible to enjoy them?"(Messer 2002: 321). As Messer points out anthropologists have for example attempted to offer some answers in contradiction to many human rights experts who have provided many unsatisfactorily notions tied to United Nations standards of universal human rights (2002: 321). Perhaps the two best studies which go a long way toward broader theory in the study of human-rights perspectives are: Jane Cowan, Marie-Bénédicte Dembour, and Richard Wilson's (2001), *Culture and Rights: anthropological perspectives* and Richard Wilson and Jon Mitchell's (2003), *Human Rights in Global Perspective: anthropological studies of rights, claims and entitlements.*

As Cowan et. al. (2001: 1) explain: "constituting one historically specific way of conceptualizing the relations of entitlement and obligation, the model of rights is today hegemonic, and imbued with an emancipatory aura. Yet this model has had complex and contradictory implications for individuals and groups whose claims must be articulated within its terms". These authors believe that anthropology is poised to make a difference in the discussion of human rights, particularly through "empirical, contextual studies of rights processes" and how at local levels the notion of universal rights continue to be "implemented, resisted, and transformed" in different ways. Partly many discussants of human rights tend to essentialize the idea of culture, which is a trap of conceptualization pointed out at the beginning of this essay (Cowan et. al. 2001: 3). They ask in a positive manner: "Might it not help us, for example, to identify and think more productively about the specficities of, and differences and relations between, a) local or group specific, b) nation-state and c) supra-national concepts, institutions and processes concerning rights? In shifting from a formulation which opposes culture and human rights is approached as itself a cultural process which impinges on human subjects and subjectivities in multiple and contradictory ways. Might it not also help us transcend certain impasses and raise new kinds of questions?" (Cowan et. al. 2001: 3). In answering their formulation, they query about the ideas of "rights versus culture", "rights to culture", and "rights as culture", in other words it is commensurably important to use the notion of culture as a tool for analysis and the analysis of concepts concerning rights (Cowan et. al. 2001: 4).

According to these authors the very idea of "culture versus rights" has its antecedents in German Romanticism and the French Enlightenment which pitted ideas of "blood and soil" of the former political movement in opposition to the "universal" human needs of the latter movement, which is currently transformed in the debate as a choice between "universalism and cultural relativism" (Cowan et. al. 2001: 4). What is interesting is how the language about culture has become one of resistance in defining rights movements. As such "culturalist" claims –claims which invoke notions of culture, tradition, language, religion, ethnicity, locality, tribe or race– have become a familiar rhetorical element in contemporary rights processes. More and more, though not without exception, they are likely to carry weight in contexts of adjudication. They may, additionally, be used to ground and justify other kinds of claims, for example, to land, environmental protection, education, employment and even political autonomy or independence (Cowan et. al. 2001: 9-10). This is not to delegitimatize or demean such claims based upon culture or culturalist definitions but simply to point out how the terms have been conjoined as in "asserting a universal right to culture" (Cowan et. al. 2001: 8). Moreover, as mentioned above, least discussed are how the discourse and practices surrounding rights and rights practice in themselves form a culture of "associated identities" or "rights as culture", or as Cowan (et. al. 2001: 11-12) point out, "rights, understood as rights talk, rights thinking, rights practices, entail certain constructions of self and sociality, and specific modes of agency".

The aim of this discussion of human rights in these directions is of course to highlight how and why human rights are being discussed in certain ways. If researchers on these topics are mindful of the fallacies surrounding the study of culture but do emphasize its "fluidity and contestation" as a process and in terms of human rights will come closest in determining the agency of such a term rather than as an object (Cowan et al. 2001: 14). Furthermore, as Cowan et. al. (2001: 20) have observed that in all likelihood it is doubtful "that any single model of the relationship between culture and rights, or between minority and majority rights, is going to be adequate for all cases, either normatively or analytically".

Here is what Wilson and Mitchell (2003: 4) have said concerning these issues in regard to anthropology:

> When anthropologists take a critical view of the definition or operation of rights, this critique now seems more based in analyses of power, discipline and social regulation, rather than the inherent logic of cultures. The criticisms that rights fix social categories that are in reality unbounded and permeable, or that rights isolate out acts that are embedded in wider contexts are more criticisms of state legality than cultural difference. States all operate, at least formally, through law and law has a propensity to essentialize social practices. So there is plenty to speak about in terms of the unintended consequences of rights, but anthropological commentaries are less about "culture" and ideational systems than they are the regulating and disciplining practices of nation-state and intergovernmental bureaucracies.

Hence, what Wilson and Mitchell (2003: 5) are saying is that the anthropological concern needs to move away from "translating different legal cultures or rights regimes" and instead focus upon "relationships of power", or rather, "between orders of power-enshrined in both nation-state and transnational institutions and their constitution in everyday settings". In part, their critique is based upon one against "positivism" or "the convergence of sociological and legal positivism in rights discourses" and one which "cannot seem to account for human subjectivity and intentionality" (Wilson and Mitchell 2003: 6). What human rights is founded on is the philosophy of "liberalism" which stresses that "human nature" is "definable and rational" and that humans are "empty vessels" in which to fill the potentiality of rights (Wilson and Mitchell 2003: 7). The strength of anthropology is that is based upon understanding that "human rights" are in fact "embodied in social persons and embedded in social networks" (2003: 8). In my view, however, Wilson and Mitchell (2003) do not go far enough in their project, which is understanding the true nature of the project of nationalism in general, or ethno-nationalism as a conjoined project. What needs to be understood is how pervasive "nationalist principles to the institutionalised practices of inclusion and exclusion in modern states" has been for many societies (Wimmer 2002: 9). This relationship of inclusion and exclusion explains Spain's relationship with the Basque Country in excluding it and undermining it and in not allowing Basques to form their own state. As Wimmer (2002: 5) argues "that nationalist forms of inclusion and exclusion bind our societies together served as an invisible background, not only of political discourse, but also of the most sophisticated theorising about the modern condition". By disallowing Basques to form their own state also entails in not allowing them to join in a deliberative democratic process or even have their own. In regard to the Basques' self-determination movement it is important to recognize how important deliberative democracy is and can be in creating a discourse which will allow democratic practice to take shape and in building a peace process built upon principles of freedom and liberty.

To bridge some of these disparities and overcome this analytical and theoretical impasse it might be wise for some groups such as Basques with established political and social institutions to consider and reconsider the political theories which are known as "deliberative democracy" and a re-examination of ideas of freedom and liberty in the project of the history of ideas. This is not to say that there are not problems with the study of these ideas too but that such notions may be seen as the incipient bases for expanding ideas into these areas and do project how to talk about rights in public forums in a more effective manner.

In discussing the dynamics of democratization, John Dryzek (2000: 113-114) explains that "democratization is largely (though not exclusively) a matter of the progressive recognition and inclusion of different groups in the political life of society. This general inclusion is in turn sometimes manifested in inclusion in the life of the state. However, recognizing that pressures and movements for democratization almost always originate in insurgency in civil society rather than the state, a flourishing oppositional civil society is the key to further democratization". A key to this understanding is that deliberative democracy is a vital by-product of "discursive mechanisms for the transmission of public opinion" and that "contestation of discourses in the public sphere' is allowed for and that such processes of deliberation further "influence collective outcomes" (Dryzek 2000: 162). Even so, and as I mentioned above, the reader here should be mindful of the problems associated with liberalism and the Liberal State in that such political theories tend to exclude how persons become socialized or even how such formations need to be considered for peoples involved in processes of self-determination or subaltern movements. Such discussions promoted by political theorists like Dryzek (2000), among others, normally presuppose in the "good" of the state, rather in determining the faults of state systems or what Wimmer (2002) has argued to be states of exclusion and inclusion.

The importance here is to be able to engage in "communicative action in the public sphere" and to shape discursive foundations which allow for such democratic processes to happen in a thoughtful mode of practice. In order for such self-determination or even peace-process discourse to be realistic presupposes that there is "political equality" in "that all participants in a process have an equal chance of affecting the outcome" (Dryzek 2000: 172). In explaining this "communicative rationality", Dryzek (2000: 172) asserts that "if we open deliberation to kinds of communication other than argument, then still the only power should be the forceless force of better communication". In other words, in a deliberative process and for it to take shape, then types of power relations or the exercise of certain authorities must be excluded in order to make certain that the outcomes of such arguments are fair and equal. Of course, and in regard to peace processes, or in states deliberating against self-determination movements, the unequal aspects of power relations almost always come to the foreground. There are good reasons why the notion of "deliberation" is significant and the philosophical implications for having fair deliberation. "Deliberation is best suited to those decisions which are important, or otherwise intractable, or both". (Dryzek 2000: 174).

During such deliberations and here I am directly referring to the Basque peace process, we should expect difficulties since there is bound to be disagreement. However, what can be expected is a means for creating an equal and fair process for peace to be realized and in order to formulate "a process of free, equal, and collective deliberation" (Stotsky 1999: 161). This is the bare minimum which can be expected in order to create equitable outcomes.

Commensurably in order for such equal deliberation to work and be effective we must recognize that "autonomy consists of the exercise of self-governing capacities", or as Stotzky (1999: 162) states:

> Free persons have and are recognized as having such capacities [for self-governance]. In a political order dedicated to securing the conditions of free deliberation for its members, those members can legitimately expect that the order that it not only permit but also encourage the exercise of such capacities, that it permit and encourage autonomy.

Only by recognizing the fact that people do have rights of self-governance and of self-determination can such deliberations for peace really happen. Hence, in my view, perhaps as important if not more so, is really understanding what freedom and liberty entail to accomplish these realizations. I believe for the Basque peace process the political and social actors need to take steps in determining the philosophical implications of this peace process and what it means for the future of all Basques. In order to elaborate on the "idea of freedom" I base my discussion on certain writings of Sir Isaiah Berlin, one of the premiere thinkers on the history of ideas. Of freedom, he remarked:

> Freedom, both social and political, is one of the most ancient, and, prima facie, one of the most intelligible human ideals. The desire for freedom is, in the first place, the desire on the part of individuals or groups not to be interfered with by other individuals or groups. This is its most obvious meanings and all other interpretations of it tend to seem artificial or metaphorical. (Berlin 2006: 88).

In my view there are few individuals and intellectuals who have had the capacity to write on the concept of freedom with more eloquence than Isaiah Berlin. Moreover, he bases his notions upon a historical examination of the concept in order to demonstrate how it came into being as an ideal through the philosophies of liberalism and romanticism. "In terms of the 'ideal of liberty' for example derives from 'eighteenth century thought' which culminated in the Declaration of Independence of the United States and of the 'rights of man and citizen' of the first French Republic". (Berlin 2006: 156). As Berlin (2006: 156) maintains: "political liberty is a negative concept: to demand it is to demand that within a certain sphere a man be not forbidden to do whatever he wishes, not forbidden, that is, to do it whether in face he do it or not". Essentially such concepts of freedom and liberty centered upon the idea that in order to obtain ultimate happiness in society meant also establishing laws against infringement of such liberties and to forbid others from trespassing against certain individual spheres of autonomy as given rights whether in the form of pursuing a secure life, owning property, being able to think and speak freely, obtaining employment, or participating "in the political or social life" of the community. (Berlin 2006: 2006).

> Liberty in its political, non-metaphorical, sense means absence of interference by others, and civil liberty defines the area from which interference by others has been excluded by law or code of behaviour, whether "natural" or "positive", depending on what the law or code in question is conceived to be. (Berlin 2006: 158).

What Berlin means by freedom as having a negative conceptualization is that freedom means a "freedom against" and "liberty is liberty from", which is in essence is "freedom from obstructors, freedom against individuals seeking to interfere" (Berlin 2006: 160). Such defenses of freedom and liberties against certain encroachments are also preventions and in the preservation of rights of individuals to live in civil society. Such a notion of freedom is contrasted with "a positive notion of freedom, as opposed to the so-called 'negative' one" (Berlin 2006: 166). By positive freedom, Berlin asserts it is a "doctrine of self-adjustment to the unalterable pattern of reality in order to avoid being destroyed by it" and consequentially it is an idea which does not see interference as interference in reconciling "conflicts by declaring them to be always illusory and thus needing no solution at the level at which they occur" (2006: 166). What freedom in this connotation suggests is one of the self and the individual's inner state, free of the material world such as the beliefs of "Christian and Stoic thinkers" or

in the Buddhist concept of "killing all carnal desires or love of things" (Berlin 2006: 168). Such contrasting views of freedom the former negative kind stemming from political liberalism and the latter from philosophical notions of romanticism exemplify how in the West we view such ideals.

In defining what human rights are or are not, and in recognizing the communicative need for deliberation in the public sphere for peace to occur in an equitable and fair manner, and in comprehending where the concepts of freedom and liberty originate and how such notions have evolved in current thinking, all are essential components in realizing a peace process and for political actors to move forward with mental road-maps. For the Basques the peace process implies many consequences and several expectations.

Pitfalls of peaceful negotiations: how to address basque peace

In discussing possibilities for a Basque peace process I do not wish to speak for any Basque how to move forward with their peace process. I also wish to suggest that no so-called peace expert or peacebuilding practitioner or even peacemaker can determine the Basque peace process better than the Basques themselves. Therefore, I derive my ideas from one Basque peace activist who has been involved in the Basque peace process for a long time, namely Gorka Espiau, who was active as a foreign representative of Elkarri [Togetherness, peace organization] and was a Jennings Randolph Senior Fellow at the United States Institute of Peace (USIP). In summarizing his views, I do not mean to privilege his perspective over others. Indeed I think it is worth noting that Batasuna and all voices, inclusive of the Basque government and the Basque National Party and all Basque political parties and all Basque citizens, are equal partners in a deliberative dialogue toward Basque peace. In sum, I will discuss and elaborate on some of his points and suggest further areas for deliberation.

In a *United States Institute of Peace Special Issue Report*, Espiau (2006: 9) wrote that the "Spanish and Basque governments and main political parties are willing to participate in inclusive talks. The sides have yet to agree on the methodology for transforming the political roots of the conflict". In order for the talks to move forward I believe that "talking points" need to be established by all parties and that these will then provide the forum for a "deliberative debate" in a fair and open manner. It does not matter that any one party agree with all points in the "talking points" suggested by different political parties or different political actors. What is important is that no political party is excluded from such talks and deliberations, which means that Batasuna have a say in the peace process.

Espiau (2006: 10) asserts that all key parties in the peace process "should make an unequivocal commitment to defend political ideas exclusively through peaceful means, honor the memory of the conflict's victims, guarantee the participation of the victims' families, allow the participation of all political traditions, and address concerns about the treatment and proper detention of ETA prisoners". In addition, all views about these different issues need to be discussed in an open manner but there needs to be guaranteed recognition as well. The Spanish government needs to recognize all Basque political parties and allow for difference in order for true reconciliation to take place and in order for the peace process to have long-lasting consequences and effects for Basque and Spanish societies.

In relation to sovereignty and allowing for the Basque and Navarran governments to have open-talks as well, there should be allowances by the Spanish government to allow the Basque government to dialogue with the European Union as well. In other words, if the move toward

a unified Europe is happening, one without boundaries and borders, then surely allowing for Basques to maintain sovereignty separate and apart from Spain can be allowed in this wider federation of European states. Espiau (2006: 10) quite rightly discusses the notion of establishing a "Euroregion" for the Basque territories in Spain and in France and for Navarra, which would build upon the pre-existing cooperation between these territories. A further point might allow for Euros to be printed in the Basque Country and this new Euroregion territories with distinctly Basque banknotes and coins to display national images of Basquesness as much as the Scottish have done so in Great Britain.

To elaborate on his point about allowing for civil society to have a greater say in the talks, this is why political forums of deliberative democracy need to be established both at the party levels for political actors and at the grass-roots level for everyone in Basque society.

Furthermore, in order for the peace process to be fair and open the Spanish government has to eliminate all states of exception which it employs in relation to the Basque territories. Equally the amnesty of political prisoners needs to be discussed and how to guarantee greater human rights for the Basque prison population.

I would further argue that truth and reconciliation commissions need to be established in order for the civic process to begin happening and for the beginnings of a deliberative democracy approach to the peace process. Moreover, allowing for international actors to help instigate and make the peace process a reality will guarantee that it is also fair to all parties.

In general, Espiau's (2006) conceptualization for a peace process is comprehensive and outlines the major concerns and issues for all parties. I believe in order to build upon these frameworks political theories based upon deliberative democracy and even philosophical notions of freedom and liberty need more scrutiny in order to generate more ideas of constructing future frameworks of nation-building.

The pitfalls or traps of any peace process is allowing for any one party to get stuck in details or to put prerequisites for any given party before beginning the dialogue process. What is needed is recognition, recognizing that in order for dialogue to take place in an effective manner, all parties are recognized and to ensure a fair and open peace process that international political-actors are allowed to observe the peace process. Equally it is recognizing that any peace process is difficult and will be met with many obstacles and roadblocks and takes patience. It means not privileging some voices over others and in not privileging certain positions. Commensurably it means giving up something for peace and recognizing that in order for a stable peace process to happen that every party will have to relinquish some guarantee. Above all it means for the Spanish government to recognize Basque rights, based upon the antiquity of their ancient non-Indo-European language and the antecedence of their culture, their cause of separation is quite unique in comparison to many other groups with similar claims. For the Basques a peace process means reconciliation, that is reconciling the past with the present, and looking toward a future and finding the means to build that future.

Concluding Remarks

This essay began with the double-metaphor of traps, how people become stuck in conflicts with little means of extracting themselves and as a way of analyzing the abstraction and objectification theories so prevalent in the disciplines of political science, international relations, and conflict resolution. By unraveling the metaphor, that is escaping such traps, I demonstrated through the ethnography of Carolyn Nordstrom how people such as the survivors of the Mozambican civil war were able to creatively resist violence and what they did to rebuild their lives. To some degree people who have been traumatized by conflict I said are trapped in the past or rather relive the trap of the violent past in the present. What I also showed was that trying to comprehend intractability from abstraction does not get us very far into coming close to understanding the realities of violence. As my ethnographic examples illustrated from Mozambique, Sri Lanka, Northern Ireland, and Palestine point to on many levels are the humanistic means of understanding protracted-conflict. Moreover, I demonstrated how often peacebuilders and peacemakers assume too much by reifying colonial discourses of patriarchy upon the people they wish to help. I stated that the most prevalent approaches to peace are limited to Western perspectives and self-interests and do not go very far in getting us closer how non-Western and established forms of informal justice systems operate and what we can learn from non-Western others rather than vice versa. It is altogether overwhelmingly apparent how those writing about peacebuilding and peacemaking are obsessed with placing such studies in the scientific realm, which is ironic because they study "human'"conflict. Most of these studies read like pseudo-science, bad biology, or perverted math by applying formulas, hierarchical charts, and metamorphoses of gradation and evolution to the study of intractable conflict.

I began this essay with an analysis of culture and conflict and showed why conflict resolution theorists misunderstood the concept of culture and why. Such a misconception of culture also applied to human rights studies and human rights theories, wherein culture is essentialized, making it meaningless and without considering its conflictual, ever-changing, and negotiated aspects. I went on to discuss how human rights can be better theorized from the viewpoint of anthropology and discussed how self-determination movements and those willing to build a peace process, like that in the Basque region, should pay attention to the political theory of "deliberative democracy" and to the philosophical foundations of concepts such as Freedom and Liberty. At the end of the essay, I discuss some aspects for creating a lasting Basque peace which is based upon a Basque peace activist's recommendations and further elaborate upon his ideas.

Overall what I have demonstrated is how caught up many people become in the existential dilemma of intractable conflict, how much memory serves to continue the prevalence of violence in a given society, and some ideas how to think about escaping such humanistic traps of conflict. In another way, I described how some theories are enamored by their seductive theorizing and abstraction of conflict, which as I have proven is an intellectual trap. I showed why it is much more effective to try to understand conflict through collecting narratives and by conducting ethnographic research in zones of conflict. Such perspectives only become possible after extended stays of research. It is an intellectual trap to think we can only think about conflicts in certain ways or for political and social actors that there is no way out of the violent impasse in a given conflict.

I can only hope I have provided for those interested in the Basque peace process some ideas to think about and incorporate into a peace initiative. To this end, I hope I have helped the Basque peace process in a small way with some analytical tools in which to think about the Basque conflict and the construction of a Basque peace for a Basque future.

Appendix

Elsewhere I wrote the following: excerpt from J. P. Linstroth commentary: "Basque Avenues Toward Peace: building the new road to a new dawn, a new beginning" in Journal of Peace and Conflict Studies, Fall Issue (November 2006), pp. 4-6:

"As researchers and peace practitioners it is essential to understand cultures we are describing first and actively find the voices within them, indeed all expressions of cultural mentality. Only then can we hope to reach indigenous concepts of reconciliation and resolution from the subjective point of view. This is the imagining we need, not one based upon false and high moralizing of others, but grounded in deep-human concerns within the cultural matrix of societies and from their multiple points of view. If we are telling stories of other cultures, such views must be based upon respect and true empathy and as much as possible to attempt capturing an essence of reality, and not one from passing snippets. Only then is this road to peace a viable reality, and for Basques only then can it be called "peace" (bakea). For this reason when I think of the Basque peace process, I think how they formulate ideas in their own words and the meanings they give to concepts within the Basque language (euskera), one of the only non-Indo-European languages and perhaps the most ancient in Western Europe.

As Basques embark on this untested path, they will look toward mutual support and fellowship in this process and reach some sort of "harmony" (gogaidetasuna). Even more difficult for Basques in peace development is how to incorporate the "other" (aurkakoa), Spain and France, as part of this process. So too Spain and France have to decide how to allow Basques to achieve more autonomy, perhaps even independence in the new Europe, the Europe without borders, this new federation and union of European states.

To summarize, there is no blueprint to peace apart from communication and dialogue. Therefore, if the Basque Country and Spain look to Ireland for this avenue, they will be mindful of keeping an open-mind and allowing for dialogue among all political parties as essential components toward amity, reconciliation, and resolution. The lesson in Ireland, among many, is that a space of trust must be created, even if seemingly, there is not one. Likewise a sense of "respect" (begirunea) must be created, the openness to listen to all sides, openness to be patient, and to allow dialogue to happen. This means putting aside past differences and creating a space for peace, brick by brick, slowly, slowly, and "calmly, calmly" (lasai-lasai). In essence, the way to peace is long and arduous.

There is more than just a peace process at stake here, or a meeting at a table, it is the creation of a "peaceful society" which is vital. Creating an actual, practicable, and sustaining peace is more an art than a science, and it has to do with changing fundamentals, transforming value systems, beliefs, and a willingness to imagine living in a peaceful space. What are peaceful societies and how do we conceptualize them, we might ask?

This of course means giving up the bellicose capacity toward war, and toward conflict to be "peacemakers" (bakegileak). Aside from ETA giving up its "actions" (egintzak), as well as its arms, kidnapping, and revolutionary taxation it too means Spain must lessen its police presence in the Basque region. Equally it means that Spain must repeal anti-terrorist legislation, and abolish unconstitutional laws, especially those which suspend *habeas corpus* and facilitate states-of-exception. Furthermore, it means legitimizing political parties, which the Spanish government deems to be terrorist-oriented, importantly the "Unity" political party, which in the past supported ETA terrorism (Batasuna). It also means calling for an amnesty of all political exiles, those activists living in other countries.

Such are the apparitions of the state to Basques as these repressive leftovers are haunting reminders of the Franco dictatorship, the presence of that totalitarian state in the present. In short, all such new beginnings are about concessions, mutual concessions, even if such measures are exceptionally uncomfortable.

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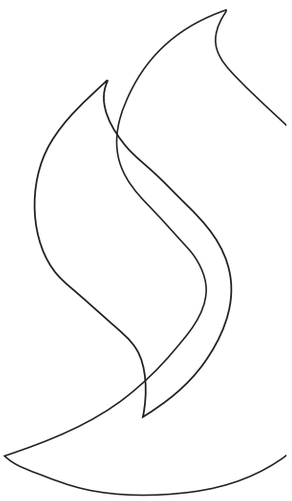
Note

Alfred Gell's (1999, new edn. 2006) influential article, 'Vogel's Net: traps as artworks and artworks as traps,' originally appeared in the Journal of Material Culture (vol. 1 [1]: 15-38) and was reprinted posthumously in a collection of essays, *The Art of Anthropology: essays and diagrams* (ed. Eric Hirsch), pp. 187-214.



Northern Ireland: the experiencies of the Northern Ireland human rights commission

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Curriculum

Brice Dickson is a legal academic and qualified barrister who has been researching and campaigning in the field of human rights since the late 1970s. He has taught law at three UK universities (Leicester, Ulster and Belfast) and spent two years studying law in France and Germany.

From 1990 to 1996 he served as a member of the Equal Opportunities Commission of Northern Ireland and from he worked full-time as the first Chief Commissioner of the Northern Ireland Human Rights Commission, a statutory body set up as a result of the peace agreement in Northern Ireland in 1998.

In that capacity he strongly advocated the establishment and efficacy of national human rights institutions around the world. Since March 2005 he has been the Professor of International and Comparative Law at Queen's University Belfast, Northern Ireland.

Summary

In this paper I reflect on the lessons that might be learned by the Basque and Spanish governments from the experience gained by the Northern Ireland Human Rights Commission in functioning during the first few years of the implementation of a peace agreement. Amongst the key lessons I would draw are:

If a human rights institution is to be established for the Basque territory, it is vital that it be given adequate powers and resources to make a real difference for the future;

Amongst its powers should be the power to involve itself in court cases;

The new human rights institution should be empowered to deal with past human rights abuses but its role, if any, in a truth and reconciliation process in the Basque territory needs to be specified, and specific powers and resources need to be allocated to it for that purpose;

The new institution should commit itself to promoting and protecting the full range of international human rights standards, including standards on equality and economic and social justice.

Northern Ireland: the experiencies of the Northern Ireland human rights commission

Introduction

In this paper I reflect on the lessons that might be learned by the Basque and Spanish governments, and by civil society in the Basque area, from the experience gained by the Northern Ireland Human Rights Commission (the NIHRC) while it operated during the first few years of the implementation of a peace agreement. I do so knowing that the circumstances prevailing in Northern Ireland and the Basque area are not identical and that it is dangerous to assume that institutions which may be suitable in one context can be transplanted without difficulty to a different context.

The background

The NIHRC was officially constituted on 1 March 1999. Its creation had been promised in the Belfast (Good Friday) Agreement of 10 April 1998, and the legislation fulfilling this promise (the Northern Ireland Act 1998) had been passed on 19 November 1998. The appointment of the first full-time Chief Commissioner (the current writer) and the nine other part-time Commissioners was announced in early 1999. Of the 10 original Commissioners, five were women and five were men; six were perceived to be from the Protestant community and four from the Catholic community[2]. They were appointed by the British government minister who had responsibility for Northern Ireland (the then Secretary of State, Dr Mo Mowlam), but all 10 had applied for their posts by responding to a public advertisement and had been interviewed by a group of people of whom only one was a government civil servant (the others being external lay people).

The NIHRC was not the first official body appointed to work on human rights in Northern Ireland. Following an earlier attempt to settle the Northern Ireland troubles in 1973, the Standing Advisory Commission on Human Rights (SACHR) had been established in 1974[3]. It continued in existence until it was replaced by the NIHRC in March 1999.

Why was a new body required? Mainly because SACHR was viewed by many observers as a low-profile and ineffectual body, one that had not succeeded in significantly improving the human rights situation in Northern Ireland over its 25 year lifespan. There was a recognition that it had done good work on religious and political discrimination, being influential in the adoption of new hard-hitting laws in those fields in 1976, 1989 and 1998, but that it had not perhaps achieved much in the fields of anti-terrorism law, criminal law, civil compensation law or the compilation of a Bill of Rights for Northern Ireland[4]. Its lack of success was attributed by many to (a) its lack of resources, which permitted the employment at any one time of only two or three members of staff and no full-time Commissioner, (b) its lack of powers, which restricted the body, as its name makes clear, to a purely advisory role, and (c) a lack of respect for its views within government and parliamentary circles, reflected to

some extent by the fact that only once in its history was one of its reports debated at Westminster. Throughout the life of SACHR Northern Ireland was ruled directly by the British government: attempts to bring the violence in Northern Ireland to an end, and to get the political parties there to agree to share power in a local Assembly, had all come to nothing, except for a few brief months at the start of 1974[5].

When negotiations eventually began in the late 1980s on how to bring about a lasting peace settlement in Northern Ireland, some of those engaged in the negotiations emphasised that in their analysis the troubles had persisted because the record of the British government in protecting human rights in Northern Ireland was very poor. This was mainly asserted by the nationalist parties –the Social Democratic and Labour Party and Sinn Féin– but also by individuals and non-governmental organisations interested in civil liberties and justice. Unionist parties, and the British government itself, did not share these views. One of the main demands of the human rights campaigners was for the enactment of a Bill of Rights for Northern Ireland, that is, for an Act of Parliament which would ensure to everyone in Northern Ireland the full range of human rights contained in international human rights treaties such as the European Convention on Human Rights and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights[6].

What were the main human rights concerns in Northern Ireland at this time? Many were related to the troubles and included, for example:

> Police practices regarding the use of force, especially the use of real and plastic bullets;
>
> The application of 'emergency' anti-terrorism laws to searches of people and homes, to detention of suspects for questioning and to trials of terrorist suspects without a jury in so-called 'Diplock' courts; and
>
> The 'collusion' of police and other security services with members of illegal Loyalist paramilitary organisations, whose members were frequently used as informers.

Most human rights campaigners were not, at this time, concerned about human rights abuses committed by illegal non-state organisations such as the Irish Republican Army, the Irish National Liberation Army, the Ulster Defence Association or the Ulster Volunteer Force. By 1999 the rate of killings and bombings by those groups had diminished very significantly, following the announcement of ceasefires in 1994 and 1997[7], but the rate of so-called 'punishment attacks', where young males, predominantly, were viciously beaten with baseball bats, or shot through the knees, ankles or elbows, to punish them for their alleged anti-social behaviour, was continuing unabated[8].

Amongst the non-troubles related human rights issues which campaigners were increasingly concerned about were the rights of children, the rights of Irish Travellers and members of other ethnic minorities, the rights of people with disabilities and the rights of women. Interestingly, the fact that women could rarely obtain an abortion in Northern Ireland was not something about which much was said: most of the campaigning organisations realised that abortion was such a divisive issue for their members that to raise it at all would be to risk a split in the organisation[9].

To ensure that human rights issues would be properly dealt with after the peace settlement and the restoration of devolved government in Northern Ireland in 1998, campaigners began to argue for the replacement of SACHR with a human rights commission that

would be comparable to institutions already in place in other countries emerging out of conflict (noticeably South Africa[10]). It would also need to comply with the standards for national human rights institutions agreed by the General Assembly of the United Nations in 1993, the so-called Paris Principles[11]. At the same time, pressure mounted for the creation or strengthening of other bodies with a role, direct or indirect, in protecting human rights in Northern Ireland. After frantic discussions about the wording of the Good Friday Agreement in March and April 1998, the final version did eventually include a section on human rights[12].

The Agreement led to the establishment not just of the Northern Ireland Human Rights Commission (in March 1999), but also the Equality Commission (October 1999[13]), the Police Ombudsman and Policing Board (November 2000) and the Criminal Justice Inspectorate (in 2002). Later, a Commissioner for Judicial Appointments[14], a Policing Oversight Commissioner, a Justice Oversight Commissioner and an Independent Monitoring Commission were added[15]. The role of other relevant bodies was confirmed, including that of lay visitors to police stations, the Independent Commissioner for Detained Terrorist Suspects and the Independent Assessor of Military Complaints Procedures. An Independent Commission for the Location of Victims' Remains was created in 1999 but a Victims Commissioner (with a limited remit) was not appointed until 2005. The Human Rights Commission was thus one of a number of bodies set up to help implement the peace process.

It is important to note that, completely coincidentally, just at the time when the Northern Ireland Human Rights Commission was establishing itself, the British Parliament enacted the Human Rights Act 1998 for the whole of the United Kingdom. The effect of this Act was to require all courts and tribunals in the United Kingdom to guarantee most of the rights in the European Convention on Human Rights. This was the fulfilment of a manifesto pledge given by the Labour Party while it was vying for power prior to the British general election in 1997, at a time when the country had been governed by the Conservative Party since 1979. The Human Rights Act had nothing whatsoever to do with the peace settlement in Northern Ireland. It came into force in October 2000.

The remit of the Human Rights Commission

The remit of the Commission is set out in section 69 of the Northern Ireland Act 1998. It *must*:

> keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights;
> advise the Secretary of State and the Executive Committee of the Northern Ireland Assembly of legislative and other measures which ought to be taken to protect human rights;
> advise the Assembly whether a proposed Assembly Bill is compatible with human rights;
> promote understanding and awareness of the importance of human rights in Northern Ireland (and for this purpose it may undertake, commission or provide financial or other assistance for research or educational activities);
> provide advice on the scope for defining rights in a Bill of Rights for Northern Ireland;
> do all that it can to ensure the establishment of a Jint Committee with the Irish Human Rights Commission.

The Commission *may* also:

give assistance to individuals and bring court proceedings involving law or practice relating to the protection of human rights;
conduct such investigations as it considers necessary or expedient;
decide to publish its advice and the outcome of its research and investigations.

The challenges faced by the Commission

When the NIHRC was first established, hopes were high in some quarters that it would be able to achieve a great deal on the human rights front. But almost immediately it became apparent that the Commission would have to fight hard to make its mark. With the benefit of hindsight, I think this was due to four main factors:

- Although the need for a Human Rights Commission was recognised in the Agreement, it is clear that the unionist politicians who helped negotiate the Agreement were far less supportive of the idea that the nationalist politicians; the Commission may have been a concession made by the unionists in exchange for some part of the Agreement which they wanted but which the nationalists did not; coupled with this lack of political consensus around the need for a Commission was a difference of opinion over the credentials of those appointed to the Commission;

- Heretical though this may seem to some people, the human rights situation in Northern Ireland, by 1999, was not so serious as to be in *desperate* need of reform; of course there were many things that needed to be changed, but this was also the case in other parts of the United Kingdom and also in the Republic of Ireland; to the extent that changes needed to be made to legislation, such as the legislation governing the police, the Commission itself had no power to insist upon such legislation being enacted; in any event, other institutions were established to bring about police reform;

- The powers and resources given to the Commission were inadequate from the start;

- Divisions of opinion as to how to campaign on human rights issues, what priorities to set and what balances to strike between individual rights and the interests of society eventually opened up amongst the Commissioners.

A few words must be said about each of these factors[16].

The lack of political support

From the very early days of the Commission it was clear that the politicians who were most sceptical about the value of the Commission were the unionist politicians. For example, Mr Trimble, the then First Minister of the Northern Ireland Executive, was particularly opposed to it (and would not shake my hand at meetings). The Commission always found it difficult to persuade the unionist parties to contribute views on human rights issues (including on proposals for a Bill of Rights for Northern Ireland, on which there is more below).

In particular, unionist politicians were unhappy that so many members of the Commission (six) were, or had recently been, members of the Committee on the Administration of Justice, a non-governmental organisation that was perceived in some quarters as being unduly sympathetic to the nationalist view of the political situation in Northern Ireland

(a position flatly denied by the organisation). Some also thought that there were too many legal academics on the Commission (four) and not enough legal practitioners (only one). Anti-Agreement unionists complained that none of the 10 Commissioners was from their camp, despite the fact that 28% of people who voted in the referendum on the Good Friday Agreement in May 1998 had voted against it and by law the Commission was to be "representative of the community". They also claimed that some of the Commissioners who were notionally from a Protestant background were in fact nationalist by political persuasion. Despite efforts by the Commission to shake off these criticisms (which, if valid at all, were the fault of the government for making the appointments in the first place[17]), they remained salient and problematic for the Commission for the first six years of its life.

It is, of course, not uncommon for political parties to complain about the appointments made to public bodies. Elected politicians are naturally resentful that other people can reach positions of influence without having to go through the rigours of an election. In Northern Ireland there is the added problem that legislation often requires particular public bodies, including the Human Rights Commission, to be "representative of the community". So far, courts have interpreted that phrase to mean only that the religious background of members of the public bodies in question should broadly reflect that of the population as a whole in Northern Ireland.

The prevailing human rights situation

It must not be forgotten that by 1999 the original demands of Northern Ireland's civil rights movement in the late 1960s had long since been met. Discrimination in voting arrangements and in the allocation of housing was a thing of the past, and very strong laws preventing discrimination on the basis of religious belief or political opinion in both the public and private sectors had been in place for years[18]. Police brutality against detainees had also ended. The remaining human rights issues centred around abuses allegedly committed in the application of anti-terrorist laws (e.g. during searches and arrests) and collusion between the legitimate armed forces and illegitimate Loyalist paramilitaries. Given this reality, it was always going to be difficult for the Commission to claim major successes on the human rights front. It might, and did, successfully argue for amendments to some proposed laws, policies and practices, but few of these interventions hit the headlines. It worked a great deal on improving the human rights training given to police officers, producing several reports on the topic, but this work tended to be overshadowed by that of the much more powerful and better resourced office of the Police Ombudsman. A full record of the Commission's activities during the period 1999-2005 is provided in its annual reports, available on-line[19].

The Commission's powers and resources

The powers and resources given to the Commission were indeed rather paltry from the first day of its existence. On the resources side the budget was a meagre £750,000. This was, admittedly, three times the annual budget of the outgoing SACHR, but it was far from enough to enable the new Commission to conduct the research, the investigations and the casework which it needed to conduct in order to make a real impact in Northern Ireland. By the end of the Commission's sixth year (2004-05), through much lobbying by Commissioners and others, and the submission of convincing business plans, the Commission had succeeded in getting its annual budget increased to £1,350,000, an 80% rise on the original allocation. However this is still small in comparison with the budget of some cognate bodies[20].

As regards its powers, the Commission was not so successful. As required by the legislation which established it, the Commission submitted a report to the government two years after it was formed, in 2001. In this report it fully reviewed its existing powers and concluded that it needed a lot more powers if it was to be truly effective as a human rights watchdog. The government did not respond to this report until a further 15 months had elapsed, and then did so by issuing a consultation paper, giving people until August 2002 to make a response. Thereafter, despite further lobbying by the Commission (including the submission of a supplementary review of its powers in April 2004), nothing further happened until December 2004, when the government announced that it had decided in principle to grant the Commission a right of access to places of detention and the power to compel the production of evidence when conducting its investigations. Almost a year later, in November 2005, the government issued another consultation paper on these proposals, allowing comments until February 2006.

Since then nothing has been heard of the proposals; no doubt the government would say that it is waiting for a convenient legislative opportunity to enact the changes. But even when the powers are conferred, they will not go as far as the Commission itself wanted them to go when it reported in 2001. The devil will be in the detail of the draft legislation. The power to enter places of detention is in practice already accorded to the Commission (although there was a dispute over this in 2003-04). The power to demand the production of written evidence will probably not give the Commission greater access than is now available (to itself and to others) through the Freedom of Information Act 2000, which came into force in January 2005. The Commission will still be barred from seeing documents which relate to 'national security'. In that respect the Commission's powers will be nothing like those vested in the Police Ombudsman for Northern Ireland, which are amongst the most extensive of any oversight body in the world[21].

Divisions of opinion within the Commission[22]

Looking back at how the Commission operated in those early days, it is my opinion that the Commission had the potential for two splits to emerge within it. One was between, on the one hand, those Commissioners who felt they had been appointed to the Commission in order to apply their personal expertise and experience to the analysis of human rights issues arising for their consideration and, on the other, those who felt they had been appointed first and foremost to represent a certain constituency or to make sure that the rights of a particular sector of the community were protected. The other potential split was between those Commissioners who believed that the Commission's work should be very largely, if not entirely, focused on alleged human rights abuses committed by organs of the state, and Commissioners who believed that the Commission should also be speaking out about alleged abuses (usually much more serious ones) committed by non-state organs such as illegal paramilitary organisations.

This last difference of opinion manifested itself most publicly in the autumn of 2001, at the time of the so-called 'protest' by sympathisers of Loyalist paramilitaries against the use of a certain road by young Catholic schoolgirls and their parents when walking to and from their school (the 'Holy Cross dispute'). While some Commissioners wanted to focus on the abuse of children's (and adults' rights) by the paramilitaries, others wanted to focus on what they saw as the failure of the police to prevent the *protestors* from making their views known. The difference of opinion came to a head when a group of Commissioners involved the Commission in a court case in which the police were accused of breaching the Human Rights Act, even though at a full Commission meeting the proposal for such

involvement had already been rejected on the basis of advice that had been sought from an external legal expert[23].

A further focal point for differences of opinion within the Commission was its work on a draft Bill of Rights for Northern Ireland, work which was allocated to it by both the Good Friday Agreement and the Northern Ireland Act 1998. Having consulted for more than a year on what the public thought should be contained in such a Bill, the Commission published its draft proposals in September 2001, and again put these out for consultation. They did not meet with unanimous approval[24]. Those who were not in any event supportive of the Commission (mainly unionist politicians) tended to argue that the Commission had exceeded its statutory remit by producing a draft Bill rather than just some ideas for reflection. Some of those in human rights NGOs were unhappy because the Bill did not contain everything they had wanted it to contain. The British government was unenthusiastic because it did not want a Bill of Rights giving people in Belfast greater rights than people living in Birmingham, Glasgow or anywhere else in the United Kingdom. And the Irish government was likewise unimpressed because, according to the Good Friday Agreement, anything put in place to protect human rights in Northern Ireland would eventually have to be mirrored in the Republic of Ireland and the government feared it could not live up to such a Bill.

Some nationalists in Northern Ireland did not like the draft because in one clause it gave people the right not to be labelled as either unionist or nationalist or as Protestant or Catholic; these critics appeared to think that such a reform would undermine the laws on political and religious discrimination in Northern Ireland by allowing applicants for jobs (for example) to say that they were not Protestants when in fact they were. An influential New York state comptroller of investment funds was even persuaded to speak out about this proposed clause (though he later admitted he had not read the draft Bill). To others the clause was a sign that the Bill of Rights would recognise the right of people not to be perpetually labelled as emanating from the Protestant community or the Catholic community; there is a large 'middle ground' in Northern Ireland who consider themselves to be both Irish *and* British and who want their children educated in integrated schools. They are fed up with sectarian labelling and feel that their right to live in a pluralistic multi-identity society is being breached.

Government inactivity and the Commission's achievements

The 2001 draft Bill of Rights had been unanimously agreed by all of the Commissioners, even if in places it contained different options reflecting the opinions of Commissioners expressed during discussions. But in 2002, quite unexpectedly, two Commissioners resigned from the Commission, citing their disagreement with the Commission's approach to the Bill of Rights. A third Commissioner followed suit in 2003. The government did not move to fill these vacancies and nor did it react when the terms of office of other Commissioners expired in 2004. By that stage the Commission consisted of seven members and it was that group which issued a second draft of the Bill of Rights in April 2004 (see below). It was not until September 2005 that the government appointed additional Commissioners to work with the two Commissioners who were by then still in post. Today there are again ten Commissioners, four women and six men; four are perceived to be Protestants and six are perceived to be Catholics. They seem to work more harmoniously together than the original group did.

A good case can be made for the proposition that the British government created a Human Rights Commission for Northern Ireland knowing that it would not have to take the Commission's advice at all seriously and that the Commission would not have enough power to unearth human rights abuses from the past which could embarrass the government. The fact that the courts in Northern Ireland were, almost at the same time, given the power through the Human Rights Act 1998 to ensure that public authorities in Northern Ireland did not in future breach people's European Convention rights was also important. The British government might have thought that it did not need to react to the Commission's advice because on most issues the power to make changes rested with the Northern Ireland Assembly and its Executive Committee. But of course the Assembly only sat between December 2000 and October 2002, with a hiatus of three months in the spring of 2001. And even when the local Assembly was sitting, responsibility for "reserved" matters, including criminal justice and policing, remained with the British Parliament in London. Those issues have still not been devolved, although they probably will be soon after the Assembly is reconvened, whenever that might be. The British government certainly knew that it could stall on the Commission's proposals for a Bill of Rights because (a) it had already enacted the Human Rights Act 1998, (b) the Irish government had no interest in lobbying in favour of the proposals and (c) opposition parties in Westminster were not likely to complain if further progress was not made on the Bill.

The Commission's second draft of the Bill of Rights was an attempt to deal with the criticisms made of the first draft published two-and-a-half years earlier. I would maintain that it is an excellent document, but ever since the suspension of the Northern Ireland Assembly in October 2002 (because of alleged spying activities by Sinn Féin), there has not been a suitable political environment in Northern Ireland for discussion of the Bill of Rights. As of now, the prospects of that environment improving sufficiently for meaningful inter-party discussions to take place around a Bill of Rights are dim indeed[25].

One aspect of the NIHRC's work which has been universally acknowledged as worthwhile has been its activities on the international plane. This has taken the form of annual addresses to the UN Commission of Human Rights, the submission of papers to treaty-monitoring bodies such as the Human Rights Committee, the Committee on the Rights of the Child and the Committee Against Torture, and engagement with other UN human rights mechanisms such as special rapporteurs, special representatives and working groups. The Commission has participated fully in meetings organised by the International Co-ordinating Committee of National Human Rights Institutions and has twice provided training sessions for the staff from such institutions around the world. The Commission has intervened in a European Court of Human Rights case, taken part in discussions at the Council of Europe on reform of the European Court and on more effective anti-terrorist measures which nevertheless guarantee human rights, and advised the UK government that by invading Iraq in the circumstances prevailing in March 2003 it had breached international law.

The Commission also had greater success in advising bodies other than the government. The Police Service of Northern Ireland and, eventually, the Northern Ireland Prison Service, did take advantage of the Commission's expertise, especially as regards advice on training and the care of vulnerable detainees. The Commission also succeeded in bringing some human rights issues before the courts, either by funding individual litigants or by intervening in cases, including cases in the House of Lords. In one important case the Commission went to the House of Lords to get confirmation that there was no legal obstacle preventing it from intervening in court cases or from accepting invitations from judges to serve as an *amicus curiae*[26].

The Commission was, and still is, a primary source of information for the media, who frequently turn to it for opinions on the latest human rights controversy. It has networked successfully with the full range of other "quangos"[27] in Northern Ireland, agreeing formal Memoranda of Understanding with many of them. It has worked very closely with the Irish Human Rights Commission, which was also foreseen in the Good Friday Agreement but was not established until 2001[28]. The general public's awareness of human rights has also been heightened by the Commission's work, as evidenced by several opinion surveys. A glance at the NIHRC's annual reports (all available on its website), and at the very wide range of its publications, provides some indication of how busy and productive it has been. It was the focus of a largely complimentary report prepared by the Joint Committee on Human Rights of the UK Parliament in 2001[29].

But on some important issues the Commission has necessarily led to disappointment in some quarters. This is because there is a host of conflict-related issues of significance in Northern Ireland which, at the moment, are not regulated by international human rights standards (the lodestone by which the Commission has been guided in all its activities). These issues include the optimum system for ensuring power-sharing in a divided society, the de-commissioning of weapons held by unlawful paramilitary organisations, the dismantling of invasive security installations, the involvement of ex-prisoners and former supporters of violence in positions of responsibility, and the flying of flags and displaying of emblems. Nor are there many unambiguous human rights standards which can help to determine how a truth and reconciliation process should operate in a post-conflict society. Not being able to participate significantly in the debates on these sorts of issues, let alone influence the outcome of those debates, the Human Rights Commission may be perceived by some to be a rather peripheral player in the working out of the 1998 peace process. But it has nevertheless performed very valuable work in the areas of responsibility assigned to it.

The key lessons

What, then, are the key lessons I would draw from the Northern Ireland Commission's experience for the peace process in the Basque country?

First, whether we like it or not, political organisations will tend to be selective about the human rights issues they choose to take up. They will tend to make use of human rights rhetoric to substantiate their most pressing demands, while not always recognising that very few human rights are absolute and that most rights of individuals must occasionally, for good reasons, take second place to the interests of society. In Northern Ireland it has been particularly difficult to apply a "human rights analysis" to the problems around contentious marches and protests. People should therefore not have unrealistic expectations of a national human rights institution: its room for manoeuvre is not always very great, especially if the institution itself becomes a political football.

Second, if a human rights institution is to be established for the Basque territory it is vital that it be given adequate powers to make a real difference for the future. It will need to be a body which is shown respect by the government(s), in public as well as in private. The government(s) will need to make a commitment to respond to all of the body's published opinions[30], even if the response is a negative one.

Third, the role of the human rights body in any future truth and reconciliation process in the Basque territory will need to be specified, and specific powers and resources will need to be allocated to it for that purpose.

Fourth, in order to carry out its other activities effectively the institution will need to be properly resourced. Moreover, while the body should of course be fully accountable for how it spends its money, the government should not be able to control how it does so. The corporate and business plans of the body should not have to obtain the approval of the government, nor should the staffing arrangements require to be officially endorsed.

Fifth, the individuals who are chosen to operate the body, whether as leaders or as members of staff, will need to have certain personal characteristics, the most important of which is probably the ability to act as members of a team. They must all, of course, be committed to upholding the full range of international human rights standards (receiving specialised training on these standards if required) and be prepared to recognise that the UN and other international bodies now accept that human rights can be violated by non-state agencies as well as state agencies.

Finally, the body will need to be guided by professional media experts, who will know how to help the body project itself effectively and deal with challenges. The political environment in which it will operate is bound to be difficult to navigate, and if it is not to founder, or to lose significant public support, it will have to be proficient in selling itself, in this case as an authoritative human rights-focused institution, one which is embedded in an international network of human rights institutions and compliant with the UN's Paris Principles. The new institution will need to play a role on the world stage as well as the local stage. It will gain strength and admiration as a result.

Notes to the conference

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[2] The population of Northern Ireland (1.7 million) is roughly 46% Protestant and 54% Catholic.

[3] Northern Ireland Constitution Act 1973, s.20.

[4] A summary of the position it adopted on a number of issues is given in W D Flackes and S Elliott, *Northern Ireland: A Political Directory* (2nd ed., 1983; Blackstaff Press, Belfast). On a Bill of Rights its preference was for a Bill which would cover the whole of the United Kingdom, not just Northern Ireland, and which would be heavily based on the European Convention on Human Rights.

[5] A further attempt at 'rolling' devolution in 1982 petered out within a couple of years.

[6] See, e.g. *Making Rights Count* (Committee on the Administration of Justice, Belfast; 1990), ch.7.

[7] An Independent International Commission on Decommissioning [of paramilitary arms] had been in place since 1992.

[8] See, e.g., C Knox and R Monaghan, *Informal Justice in Divided Societies: Northern Ireland and South Africa* (2002) and D Feenan, *Informal Criminal Justice* (2002). In 1997, for example, there 228 such attacks, in 2000 there were 268 and in 2003 there were 305.

[9] The right to an abortion is still very restricted in Northern Ireland, as it is in the Republic of Ireland.

[10] The South African Human Rights Commission derives its powers principally from the Constitution of South Africa 1996 and the Human Rights Commission Act 1994.

[11] See Annex 1 below.

[12] See Annex 2 below.

[13] This body was effectively the result of a merger between the former Equal Opportunities Commission (dealing with gender discrimination), the Fair Employment Commission (dealing with discrimination on the basis of religious belief and political opinion), the Commission for Racial Equality and the Northern Ireland Disability Council. It was also charged with supervising the 'section 75' duties, which require all public authorities in Northern Ireland to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations.

[14] Since converted into a Judicial Appointments Commission.

[15] This last body was set up to monitor the extent to which paramilitary activity was still occurring. See the Northern Ireland (Monitoring Commission etc) Act 2003.

[16] See too S Livingstone and R Murray, *Evaluating the Effectiveness of National Human Rights Institutions: The Northern Ireland Human Rights Commission, with Comparisons from South Africa* (University of Bristol and Queen's University Belfast, 2005).

[17] Yet the government did not speak out in the Commission's defence.

[18] See the Northern Ireland Constitution Act 1973, s.19; the Fair Employment (NI) Acts 1976 and 1989; the Fair Employment and Treatment (NI) Order 1998.

[19] See www.nihrc.org.

[20] In 2004-05 the government grant to the Northern Ireland Commissioner for Children and Young People was £1,632,000; in the same year the Equality Commission for Northern Ireland received £6,639,000 and the Police Ombudsman for Northern Ireland received £7,006,000.

[21] They are set out in the Police (NI) Acts 1998, 2000 and 2003.

[22] See, e.g., Harold Good, 'Making Mischief. The Betrayal of the Human Rights Commission', *Fortnight*, April 2004, pp. 7-9.

[23] The case did fail in the High Court, almost two years after the dispute on the ground had been settled (see *Re E's Application for Judicial Review* [2003] NIJB 39), and an appeal against that decision has also recently failed (see [2006] NICA 37). Both decisions are available on the website of the Northern Ireland Court Service. An application to appeal to the House of Lords is likely, as is an application to the European Court of Human Rights.

[24] See, for instance, the articles in the special double issue of the Northern Ireland Legal Quarterly, vol.52 (2001).

[25] See the Hansard record of the debate within the Preparation for Government Committee at the Northern Ireland Assembly, 18 August 2006 (available on the Assembly's website). There was no consensus to establish a round-table at which the political parties and representatives of civil society could discuss the options for a Bill of Rights. The largest political party, the Democratic Unionist Party, wants any such round-table to be set up within one of the Committees of the Northern Ireland Assembly, if and when that Assembly is restored (it has been suspended since October 2002).

[26] *Re Northern Ireland Human Rights Commission* [2002] NI 236, [2002] UKHL 25.

[27] This is an acronym for 'quasi-autonomous non-governmental organisations'.

[28] There is a Joint Committee between the two Commissions, which meets three or four times a year to discuss matters of mutual interest.

[29] 14th Report of Parliamentary Session 2002-03 (HL 132; HC 142).

[30] As is the case for the *Commission nationale consultative des droits de l'home française*.

Annex 1: The Un's Paris Principles 1993

Principles relating to the status and functioning of national institutions for protection and promotion of Human Rights

Note: In October, 1991, the UN Centre for Human Rights convened an international workshop to review and update information on existing national human rights institutions. Participants included representatives of national institutions, States, the United Nations, its specialized agencies, intergovernmental and non-governmental organizations.

In addition to exchanging views on existing arrangements, the workshop participants drew up a comprehensive series of recommendations on the role, composition, status and functions of national human rights instruments. These recommendations were endorsed by the Commission on Human Rights in March 1992 (resolution 1992/54) and by the General Assembly in its resolution A/RES/48/134 of 20 December 1993.

A. Competence and responsibilities

1. A national institution shall be vested with competence to protect and promote human rights.

2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

3. A national institution shall, *inter alia,* have the following responsibilities:

   a) To submit to the government, parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the protection and promotion of human rights. The national institution may decide to publicize them. These opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

   - Any legislative or administrative provisions, as well as provisions relating to judicial organization, intended to preserve and extend the protection of human rights. In that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights. It shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;

   - Any situation of violation of human rights which it decides to take up;

   - The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;

   - Drawing the attention of the government to situations in any part of the country where human rights are violated and making proposals to it for

initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the government;

b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations, and, where necessary, to express an opinion on the subject, with due respect for their independence;

e) To cooperate with the United Nations and any other agency in the United Nations system, the regional institutions and the national institutions of other countries which are competent in the areas of the protection and promotion of human rights;

f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

B. Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

   - Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;
   - Trends in philosophical or religious thought;
   - Universities and qualified experts;
   - Parliament;
   - Government departments (if they are included, these representatives should participate in the deliberations only in an advisory capacity).

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the government and not be subject to financial control which might affect this independence.

3. In order to ensure a stable mandate for the members of the institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

C. Methods of operation

Within the framework of its operation, the national institution shall:

1. Freely consider any questions falling within its competence, whether they are submitted by the government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;

2. Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

3. Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

4. Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly consulted;

5. Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;

6. Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the protection and promotion of human rights (in particular, ombudsmen, mediators and similar institutions);

7. In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to protecting and promoting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

D. Additional principles concerning the status of commissions with quasi-jurisdictional competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

1. Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;

2. Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;

3. Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;

4. Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations or administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

Annex 2: Extract from the Belfast (Good Friday) Agreement 1998

Human Rights

1. The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:

   - The right of free political thought;
   - the right to freedom and expression of religion;
   - the right to pursue democratically national and political aspirations;
   - the right to seek constitutional change by peaceful and legitimate means;
   - the right to freely choose one's place of residence;
   - the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
   - the right to freedom from sectarian harassment; and
   - the right of women to full and equal political participation.

United Kingdom Legislation

2. The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.

3. Subject to the outcome of public consultation underway, the British Government intends, as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation. Public bodies would be required to draw up statutory schemes showing how they would implement this obligation. Such schemes would cover arrangements for policy appraisal, including an assessment of impact on relevant categories, public consultation, public access to information and services, monitoring and timetables.

4. The new Northern Ireland Human Rights Commission (see paragraph 5 below) will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and taken together with the ECHR to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be:

   - The formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and
   - A clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.

New Institutions in Northern Ireland

5. A new Northern Ireland Human Rights Commission, with membership from Northern Ireland reflecting the community balance, will be established by Westminster legislation, independent of Government, with an extended and enhanced role beyond that currently exercised by the Standing Advisory Commission on Human Rights, to include keeping under review the adequacy and effectiveness of laws and practices, making recommendations to Government as necessary; providing information and promoting awareness of human rights; considering draft legislation referred to them by the new Assembly; and, in appropriate cases, bringing court proceedings or providing assistance to individuals doing so.

6. Subject to the outcome of public consultation currently underway, the British Government intends a new statutory Equality Commission to replace the Fair Employment Commission, the Equal Opportunities Commission (NI), the Commission for Racial Equality (NI) and the Disability Council. Such a unified Commission will advise on, validate and monitor the statutory obligation and will investigate complaints of default.

7. It would be open to a new Northern Ireland Assembly to consider bringing together its responsibilities for these matters into a dedicated Department of Equality.

8. These improvements will build on existing protections in Westminster legislation in respect of the judiciary, the system of justice and policing.

Comparable Steps by the Irish Government

9. The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction. The Government will, taking account of the work of the All-Party Oireachtas Committee on the Constitution and the Report of the Constitution Review Group, bring forward measures to strengthen and underpin the constitutional protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights and the question of the incorporation of the ECHR will be further examined in this context. The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland. In addition, the Irish Government will:

   - Establish a Human Rights Commission with a mandate and remit equivalent to that within Northern Ireland;
   - proceed with arrangements as quickly as possible to ratify the Council of Europe Framework Convention on National Minorities (already ratified by the UK);
   - implement enhanced employment equality legislation;
   - introduce equal status legislation; and
   - continue to take further active steps to demonstrate its respect for the different traditions in the island of Ireland.

Joint Committee

10. It is envisaged that there would be a joint committee of representatives of the two Human Rights Commissions, North and South, as a forum for consideration of human rights issues in the island of Ireland. The joint committee will consider,

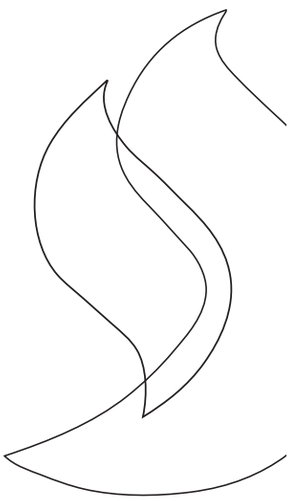
among other matters, the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland.

Reconciliation and Victims of Violence

11. The participants believe that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation. They look forward to the results of the work of the Northern Ireland Victims Commission.

12. It is recognised that victims have a right to remember as well as to contribute to a changed society. The achievement of a peaceful and just society would be the true memorial to the victims of violence. The participants particularly recognise that young people from areas affected by the troubles face particular difficulties and will support the development of special community-based initiatives based on international best practice. The provision of services that are supportive and sensitive to the needs of victims will also be a critical element and that support will need to be channelled through both statutory and community-based voluntary organisations facilitating locally-based self-help and support networks. This will require the allocation of sufficient resources, including statutory funding as necessary, to meet the needs of victims and to provide for community-based support programmes.

13. The participants recognise and value the work being done by many organisations to develop reconciliation and mutual understanding and respect between and within communities and traditions, in Northern Ireland and between North and South, and they see such work as having a vital role in consolidating peace and political agreement. Accordingly, they pledge their continuing support to such organisations and will positively examine the case for enhanced financial assistance for the work of reconciliation. An essential aspect of the reconciliation process is the promotion of a culture of tolerance at every level of society, including initiatives to facilitate and encourage integrated education and mixed housing.



Contribution of the international supervision mecanisms to the application of peace agreements: lessons from Bosnia-Herzegovina

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Office of the High Representative of the International Community in Bosnia and Herzegovina, 2002-2005. Head of the Law Reform Department and Special Advisor to the HR on Domestic Institutions.

DFID Project on Safety, Security and Access to Justice in the Balkans, 2001. Expert.

Royal Institute of International Affairs (Chatham House), London, 1998-2001. Associate Fellow, International Security Programme.

International Crisis Group, Office in Bosnia and Herzegovina, Sarajevo, 1999-2000. Senior Legal Adviser.

The British Institute of Human Rights, King's College London, 1998 to present. Member, Advisory Board.

Human Rights Quarterly, 1994 to present. Member, Editorial Review Board.

Institute of War and Peace Reporting, London, 1994 to present. Member, Board of Trustees.

United Nations Development Programme, Office in Bosnia and Herzegovina, 2000. Team Leader, National Consultants Team.

King's College London, 1994-1999. Senior Research Fellow in International Human Rights, School of Law (to June 1997) and British Institute of Human Rights.

United Nations International Criminal Tribunal for the Former Yugoslavia in The Hague, 1997. Expert Witness for the Prosecution.

University of Essex, Department of Law and Centre for Human Rights, Colchester, September 1992 to June 1994. British Council Fellow and Visiting Professor.

U.N. Commission on Human Rights, ad hoc Working Group of Experts on Southern Africa, United Nations, Geneva, 1991-1995. Member.

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In 2002-2005 he was the Head of the Legislation Reform Unit at the OHR, and in 1999-2000 served as a Senior Legal Adviser to the ICG office in Bosnia.

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Summary

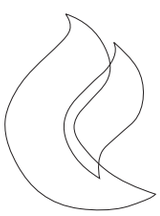
Following the 1995 Dayton Peace Agreement, Bosnia and Herzegovina was granted an overwhelming presence of outside powers and appropriate international community supervision mechanisms. Tasked with monitoring peace-implementation and helping the postwar reconstruction, DPA has implicitly put the country under *de facto* "protectorate" of the international community. This case is part of a wider mandate undertaken by the international community in the mid-1990 to administer war-torn and strife–ridden territories.

Such a heavy-handed mandate of any outside power is, per definitionem, incompatible with a sovereign status of a country (Bosnia) which had been internationally recognized, acquiring along the way full membership in almost all major international organizations. Although there is no doubt that these limitations are based on the agenda of restoring human rights, rule of law and democracy, the Bosnian experiment nonetheless set a precedent for a temporary surrender of sovereignty to governance by international agencies.

As the years went by, it became obvious that the (Dayton) Constitution of B&H could not open the way to a consistent process of state-building. Rather than changing the Constitution through a formal procedure, the Office of the High Representative opted for the extensive interpretation of Annex 4. Over the past four years this has resulted in a substantial *de facto* revision of the Constitution. While not a single word of it has been touched, this process established a trend of shifting the governing responsibilities from the entity to the state level in almost all areas.

Bosnia and Herzegovina has reached a crossroad of the state-building process. The continuity and success of the international community in pursuing *de facto* amendment approach notwithstanding, the potentials of changing the Constitution in that way have now been exhausted. The country has completed the post-Dayton period and opened the door of its pre-European phase.

Any further changes will have to follow the formal amendment procedure stipulated by the Constitution itself. They may include re-drawing of the internal design of the country, as well as changing borders between the entities or the cantons. They may involve restructuring of Bosnia's tripartite rotating Presidency, transforming the Parliament and competences of its houses, guaranteeing general and equal electoral rights for all, as well as addressing dual citizenship issues, etc.



Contribution of the international supervision mecanisms to the application of peace agreements: lessons from Bosnia-Herzegovina

It was rather obvious back in 1991 that Bosnia and Herzegovina, then one of the six Yugoslav republics, was not going to survive the collapse of Yugoslavia without plunging into violence. The question, which was discussed at a few workshops in Sarajevo that year[1], still sounds pertinent: could the 1992-5 war had been avoided and a relatively smooth transition to independence achieved in an internationally enforced and administered protectorate? The idea of a protectorate was based on the experience of the UN "trusteeship" system, which had been established over certain territories to help them to sort out tensions and conflicts that were threatening their internal stability and transition toward independence[2]. This "Question X" of our time had survived the war and was still debated in the first years of the Dayton Peace Agreement[3]. Hardly a meeting in Bosnia or an interview in the media went by without making a reference to that dilemma[4]. A group of NGOs from the region have had it on their agenda and were even granted a hearing before a committee of the European Parliament in 1994[5].

Legacy of the Dayton

Eventually, neither protectorate nor trusteeship had ever been tried in Bosnia. Instead, following the 1995 Dayton Agreement, the country was granted an overwhelming presence of outside powers and the international community institutions tasked with monitoring peace-implementation and helping the postwar reconstruction. At the same time, it should be pointed out that the Dayton Agreement has implicitly put Bosnia and Herzegovina under the "protectorate" of the international community. This label may sound rather controversial, but it is still more acceptable than "trusteeship". Leaving aside political sensitivities regarding the definition of the Dayton Agreement institutional structure in Bosnia and Herzegovina, the argument about protectorate can be clearly illustrated. First and foremost, the Office of the High Representative acts as the steering power on behalf of the international community and is based in Sarajevo. The High representative is instructed "to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement[6]". The Constitutional Court of Bosnia and Herzegovina is composed of nine members, three of whom are foreign nationals appointed by the President of the European Court of Human Rights[7]. A foreigner served as Governor of the Central Bank, for the first 5 years and was appointed by the International Monetary Fund[8]. The Human Rights Ombudsman used to be appointed by the Organization for Security and Cooperation in Europe (OSCE) and this position was also held by international officials for the first 8 years of the Dayton Agreement. The Human Rights Chamber with a majority of foreign members (8 out of 14 were appointed by the Council of Europe) functioned until 2003[9]. Finally, the international armed force deployed in Bosnia and Herzegovina is without precedent as far as manpower, heavy armoury and the mandate are concerned. Consequently, it can

safely be asserted that the mission of the international community in Bosnia has been a *de facto* protectorate, or to put in a politically correct vocabulary. The country, by and large, has been governed by an international administration. The case of Bosnia's "protectorate" falls into the category of a wider mandate undertaken by the international community in the mid-1990 to administer war-torn and strife-ridden territories. Primarily United Nations and the European Union have been entrusted with exceptional authority and assumed responsibility for governance in Bosnia and Herzegovina, Eastern Slavonia, Kosovo and East Timor. These initiatives represent some of the boldest experiments in the management and settlement of intra-state conflict ever attempted by third parties[10].

This was crowned by unprecedented executive and legislative powers over a sovereign country given to the High Representative of the international community in Bosnia[11]. Such a heavy-handed mandate of any outside power is, *per definitionem*, incompatible with a sovereign status of a country which had been internationally recognized as well as confirmed as an independent state by the Dayton Accords, acquiring along the way full membership in almost all major international organizations, from the UN to the Council of Europe. In the context of contemporary international law B&H escapes any formal categorization. De iure, it has full sovereignty, accepted by the international organizations through the process of admission to full membership. Furthermore, its statehood is guaranteed by an international instrument, i.e. Dayton Agreement and explicitly defined in its Annex 4, which makes the Constitution of Bosnia and Herzegovina[12]. On the other hand, the very same agreement contains a number of crucial *de facto* limitations imposed by the international community over the authorities of B&H to exercise their sovereign prerogatives in full capacity, which puts a big question mark over its statehood[13]. Although there is no doubt that these limitations are based on the agenda of restoring human rights, rule of law and democracy, the Bosnian experiment nonetheless set a precedent for a temporary surrender of sovereignty to governance by international agencies. Bosnia and Herzegovina could be safely categorized a state *sui generis*, but this escapism only blurs the answer to the question about the responsibility for running the country and providing safety and security for its citizens.

At the time Dayton Agreement was reached it looked like a perfect international instrument by which to stop the war and turn the tide of events in Bosnia. Written in a diplomatic language widely open to interpretation, the agreement was evasive enough to make all concerned parties, including the international community, satisfied. At the same time, the text of the agreement was precise enough in its function to safeguard peace and prevent a new outbreak of violence under the watchful eye of the international community.

Dayton constitution versus state-building

As the years went by, it became obvious that the Dayton Agreement could not open the way to a consistent process of state-building and the consolidation of institutional prerogatives at the State level. Most commentators and analysts blame the Dayton Constitution (Annex 4 of the Dayton Agreement) for instituting a stalemate in the country and allowing for the fragmentation of Bosnia along ethnic lines. The blame should not focus on the Constitution itself, but rather on the fact that the Dayton Agreement failed to rescind the Constitutions of Bosnia's two entities, the predominantly Bosniak (Bosnian Muslim) and Croat Federation and the Serb-dominated Republika Srpska (RS). The Croat Community (later Republic) of Herzeg-Bosnia, although it had never been as prominent as the other two, has also left its mark on the consistency of the Dayton Agreement.

The agenda for the constitutional controversy was first set by depriving the country of the "republic" attribute in its name (of Bosnia and Herzegovina). In spite of the "continuation" paragraph of the Constitution, the drafters of the Dayton Agreement were explicit in stipulating that the Republic of B&H was no more the official name of that country, but merely "Bosnia and Herzegovina[14]". This wording implicitly put the entities' status above B&H, which as a state was supposed to accommodate within its territory one "republic" and one "federation". Thus, the way the country had been structured escapes any practical logic as well as principles of the constitutional theory. Furthermore, in the process of dissolution of the former Yugoslavia, all the former socialist republics, i.e. member states of the federation (SFRY), had retained the "republic" in their respective names-except Bosnia and Herzegovina[15]. It can be argued that this, often ignored, fact left Bosnia in an inferior political position in relation to the other successor states that have emerged from the former Yugoslavia and allowed for questioning its statehood by the Serbian and Croatian political establishments in the early years of the Dayton Agreement.

More importantly, the Annex 4 of the Dayton Agreement failed to deal with entities' constitutions and had left them intact, regardless the fact that when negotiations in Dayton started in November 1995, both constitutions already belonged to a different era having been created under the circumstances which the international community wanted to put behind the post-war Bosnia and Herzegovina. The Dayton Constitution even failed to provide for a provision that would secure bringing entities' constitutions in compliance with the State one in due course. Instead, it limited such a possibility to a case-to-case approach that eventually had to be resolved by the Constitutional Court of B&H[16].

The Serb Republic (RS) was proclaimed as early as in 1992 (9 January) and its Constitution was adopted on 28 February of the same year. The Constitution leaves no doubt that the RS was meant to be an independent state of the Serb people, having made no reference to Bosnia and Herzegovina or to the Muslim and Croat peoples whatsoever[17]. The Federation of Bosnia and Herzegovina (FB&H) was conceived by the Washington Agreement in March 1994, as a "Federation in the areas of the Republic of B&H with a majority of Bosniak and Croat population". The Constitution of the FB&H was proclaimed on 30 March 1994 with no reference to the Serb people, except in a conditional way[18]. It contained no explicit provisions that would characterize the Federation as an independent state, but its institutional structure reflected sovereign aspirations. The Washington undertaking reflected the Clinton administration's desire to simplify the Bosnian conflict by reducing the three-way war ("all against all") to a two-way one. In effect, two separate countries were created on the territory of Bosnia and Herzegovina: the already existing self-proclaimed RS and the FB&H[19].

It is obvious that in the spring of 1994 the international community did not consider the RS as an element to be built into the reconstruction of Bosnia and Herzegovina. Furthermore, the Washington Agreement foresaw establishing a confederation between the Republic of Croatia and the proposed Federation of Bosnia and Herzegovina[20]. Although this idea had never materialized, it undoubtedly showed the intentions of the state-making character of the "fathers" of the Federation in the aftermath of the Washington Agreement.

The Dayton Agreement assumed quite the opposite position bringing all three "constituent peoples", including the Serbs, under one roof of the State of Bosnia and Herzegovina, which was explicitly confirmed by the Annex IV. This was the least controversial outcome in the new circumstances: revive and reconstruct Bosnia and Herzegovina in her pre-war borders and move on! Historically it could be justified and politically it followed the pattern of the dissolution of the former Yugoslavia when all constituent republics maintained their previous

borders. But this logic was going to be undermined until the present times by the presence of both entities' constitutions and their respective government structures that have obstructed the implementation of the Dayton Agreement with variable but continuous dynamics. The entity constitutions were inconsistent with the ideas expressed in the Preamble of Annex 4. As much as the Preamble reads as an agenda for the future and re-integrated B&H, it created an illusion that helped both entities to pretend that their constitutions were in line with the new thinking of the international community on Bosnia and Herzegovina[21].

Repealing the entity constitutions at Dayton would have been the only way to give the Annex IV some breathing space to assume a life of its own. But this was nobody's priority at the time. Instead, the Annex IV became a hostage of the entity constitutions. There is a provision, though, which stipulates that "the entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the Constitutions and law of the Entities[22]". But the decision making procedures at the State level were obstructed or fully blocked by the overall constitutional settlement, which had left this provision by and large ineffective.

Leaving the entities' constitutions in full force made it very difficult for the drafters of the Annex 4 to reconcile it with the requirements to provide for a viable state in the new Constitution. Consequently, the general provisions of the Dayton Constitution are rather hesitant on how to define the country and accept a clumsy compromise between the requirement to guarantee "a pluralistic society" and to protect the existing concept of *de facto* ethnic statelets within Bosnia and Herzegovina. The Constitution's operative paragraphs, however, clearly follow the reasoning of the entity constitutions and thus fail to open the way towards state building that would be supported by an appropriate and effective governing structure at the State level. This anomaly gradually brought Bosnia to the point of constitutional crisis and statehood paralysis. For the future of the country this was the best possible outcome. It proved right the old wisdom that things have to get worse before starting to get better, what in Bosnia may mean the new beginning of the state building process.

The present situation took too long to emerge, but it could have been predicted. While the basic constitutional framework stayed intact for almost a decade, the life went on. Economic growth, however insufficient, has been rather steady and kept opening new opportunities; foreign investors started testing the waters and made quite a few ventures in various parts of the country; foreign trade and import in particular are on a constant rising curve, etc.[23] All ethnic communities have undergone dramatic social changes: massive return of refugees; repossession of the property once usurped or confiscated; presence of the new generation born 15-25 years ago, etc. Political process brought the new issues, both internally and externally: the war-lords have been replaced by the post-war generation of politicians; reckoning with the past, including with the war atrocities, have become a normal experience for many; joining the European Union and NATO is firmly on the agenda of all major political parties, as well as on the minds of people in general, etc. The list of new and positive issues in the Bosnian reality is long and still open, but it has been in a desperate need of a different and more flexible legal and administrative framework in order to get properly articulated. The above trends find themselves trapped by the old, inadequate and outlived constitutional agreement and composition of the country in which they tend to develop and open new possibilities.

De Facto revision of the Constitution

Voices have been raised advocating amendments to the Constitution through a formal procedure, but that course of action did not seem realistic until just a year ago. On one hand, the international community was too impressed by the firm opposition, coming mainly from the RS, to any change of the Dayton Agreement, and terrified by the prospect of destabilizing the "Dayton peace" if the amendment ball started rolling[24]. On the other, the procedure for amending the Constitution was a non-starter because it required a large majority in the Parliamentary Assembly, which was quite unlikely to be won[25].

In the meantime, the international community, led by the Office of High Representative (OHR), tried an alternative way of improving and securing the efficiency of the State structure in order to enable Bosnia and Herzegovina to become a credible member of the international community and to participate fully in the European integration process. Rather than changing the Constitution through a formal procedure, the OHR opted for *de facto* changes of the Annex 4. This option was born out of the realization that Annex 4 was not going to be amended any time soon and might prevent successful outcome of the Bosnia bid for the European Union.

There were two alternatives on that road, one based on a restrictive and the other one on an extensive interpretation of the Dayton Agreement. The former would give more power to the entities and solidify the power of nationalistic elites, maintaining the status quo. This approach is restricted to applying the Constitution word for word and strictly following the phrasing of each and every provision. The latter would be inspired by the preamble of the Constitution, which does allow for a different vision of the country with more substantive prerogatives for the State level legislative and executive branches of government, what in turn would make Bosnian institutions more compatible with those in developed democracies, including the European institutions. In reality, the choice has not been as clear-cut and lots of gray areas still exist between these two options. Whoever advocated one or the other alternative, in the international community or in the country itself, should have kept in mind the bottom line: the mandate of the High Representative and of the Peace Implementation Council is to implement the Dayton agreement and not to change it[26]. It means that all decisions by the OHR had to thread carefully on a thin line between maintaining the peace and stability, helping the country to consolidate its institutions and international position, but at the same time to work within the strict remit of the Dayton Agreement without shooting itself in the foot.

So far the international community has followed an extensive approach in interpreting the Constitution and has given priority to the institution building process at the State level. This approach has been possible because of a favorable international and European environment in the first place. The process of European integration, including the EU enlargement, provided a necessary carrot for Bosnian politicians and stimulated the debate on the "European future" for the country. It required a more functional government structure, as well as the State level institutions with wider powers. Internally, the inevitable inter-entity cooperation gradually relaxed the attitudes towards State institutions even in the areas, which were considered the last resorts of entity prerogatives defense and police force. Over the past four years, the extensive interpretation of Annex 4 has resulted in a substantial exercise of amending of the Constitution in a *de facto* manner. While not a single word of the Annex IV has been touched, this process established a trend of shifting the governing responsibilities from the entity to the state level in almost all areas.

The steps initiated by the High Representative and later accepted by domestic authorities include some striking examples. The Council of Ministers of Bosnia and Herzegovina started initially as a modest State-level executive body with a dysfunctional rotating chairmanship and only three ministries[27]. This is the best that was possible to squeeze out of the Constitution in first years after Dayton. The Council of Ministers is now under a permanent chairmanship (since 2000) and the number of state ministries gradually reached eight[28]. The Court of Bosnia and Herzegovina was established in 2003 as the first State level court of law in the country. Simultaneously, the new state level criminal and civil legislation has been enacted, while the existing entity laws had been gradually harmonized with the State codes. Finally, in late 2005, leading political parties agreed to carry out police reform and to relax the entity grip on its institutional structure. This is to name just a few breakthroughs that were achieved and based solely on the "functional" interpretation of the Constitution, without attempting to open up the sensitive issue of formally amending its text.

It must be said, though, that some of these changes have not yet resulted in full and real governance and functionality of the new or transformed institutions. Their inauguration was not always followed by appropriate legislation and book of rules, the work of some of them is still obstructed by entities, sufficient office space is sometimes critical for a proper internal organization, etc. Most of the ministries can be described as "empty shells" without genuine powers and responsibilities of their own. They still lack proper administrative procedures, as well as an army of competent civil servants to man them and to secure continuity and smooth running of day-to-day businesses. This is a good example of a turning point when the ball got into the court of the domestic team to take over. It shows that there are limits to what the international community can do in the state building process, in spite of such a wide and forceful mandate.

Crossing the crossroads

Bosnia and Herzegovina reached a crossroad of that process. The country has completed the post-Dayton period and just opened the door of its pre-European phase. The first one is generally known as post-conflict reconstruction and applies to countries emerging from violent conflict, where state authority has collapsed completely or had been hijacked by warlords and militia rule. Cases of Afghanistan, Bosnia, East Timor, Iraq, Kosovo and Somalia, although very different in nature, share many similarities. The main purpose of this phase is to rebuild devastated institutions and to restore stability and public safety through deployment of peacekeeping military force and police (in Bosnia, SFOR and IPTF). As a rule this phase is considered to be under the responsibility of outside powers and international agencies. In Bosnia and Herzegovina it included more mundane but non-less important tasks like humanitarian relief and technical assistance in clearing mine fields, restoring public transport, electricity and water supply, supporting local currency, banking and payment system, rebuilding hospitals, schools, etc.

If the collapsed state is "lucky enough to achieve a modicum of stability with international help (as in the case of Bosnia)[29] ", it will be ready to move on to the next phase. The next step in Bosnia has coincided with its pre-European process. Here the chief objective is to create self-sustaining State institutions that can achieve public confidence among its population and credibility in international affairs and finally survive the withdrawal of the international community.

The continuity and success of the international community in pursuing *de facto* amendment approach notwithstanding, the potentials of changing the Constitution in that way have now been exhausted. Any further changes would have to follow the amendment procedure stipulated by the Constitution itself. They may include re-drawing of the internal design of the country, as well as changing borders between the entities or the cantons (within the Federation). They may involve restructuring of Bosnia's tripartite rotating Presidency, transforming the Parliament and competences of its houses, guaranteeing general and equal electoral rights for all, as well as addressing dual citizenship issues, etc.

When it comes to the future of the constitutional settlement, the crossroad for Bosnia is even more complex. In other words, the present situation has deep roots in the events and political bargaining that date back long time before Dayton Agreement. That legacy cannot be overcome by a single stroke of the international community's brush or by a package of constitutional amendments assembled in haste.

Broadly speaking, three distinct options have emerged over the past few years of discussions, press releases and interviews on how to overcome the present impasse[30]. The first one advocates the unstitching of the Dayton structure altogether, whereby the entities and the District of Brcko would be abolished and the concept of territories controlled by ethnic majorities rejected. Territorially, B&H would be reorganized into several "logical" economic areas and decentralised on different principles than today. The second approach would rather see an entirely centralized State of Bosnia and Herzegovina, whose institutions would be transformed accordingly. And finally, yet another vision advocates a country made up of three rather than the existing two entities, consequently applying the principle of "symmetry" between ethnicity and territoriality.

It will be up to the people of Bosnia and Herzegovina to choose a system they want to live by and to forge a consensus in the process of changing the Constitution. As part of Bosnia's EU bid, the European Union and the Council of Europe should monitor this process closely. Since the start of talks between Bosnia and the EU on a Stabilization and Association Agreement in late 2005, the country has found itself on what is now commonly understood to be irreversible journey toward membership of the European Union.

Controversies and concerns

This may be an appropriate moment to voice scepticism toward the current American initiative for the change of the Bosnian Constitution at the beginning of 2006. While the United States, including American lawyers and NGOs, might have some valuable advice to offer, they should refrain from taking a leading role in the process of drafting amendment proposals. That job should be left to their European colleagues. It is really about time that Bosnia takes a serious and honest turn toward Europe on all fronts. Pushing for the Eurpean agenda cannot be responsibility of a few State ministries only, while many other areas of public services continue to pay the lip service to European standards. Europe is where this country should look for principles and criteria of good governance, democracy, rule of law and human rights[s]. In Bosnia today "the road to Europe" is the most powerful incentive for all groups and communities, be it ethnic, political, social, professional or age ones. Listening to and accepting "all American" in the state-building process may now be counterproductive and even alienate Bosnia from its European partners, as well as put the country on a path inconsistent with European constitutional standards. At the same time, the work of the Council of Europe in Bosnia and Herzegovina should also be reconsidered. Its presence in the country has

been rather inert and passive, to say the least. This organization, which Bosnia joined with great expectations in 2002, should be at the forefront of debates on a new constitutional framework and rule of law principles. The Council of Europe is in the best position to offer its experience in implementing the democratic principles defined in its Statute, not to mention legal and technical assistance that this organization could provide as a lead agency in the "europeanization" of the region.

Finally, it is an illusion to believe that the crisis of the Bosnian statehood can be salvaged by changing the Constitution only. The Bosnian society is dramatically lacking a sense of belonging to its own country. Bosnian citizens are often unsure of their own identity, apart from ethnicity or religion. Process of forging an identity often goes hand in hand with success stories that one's country is able to provide. These cohesion-promoting narratives may stem from building general trust in state institutions or from an attractive image of the country internationally, but they all potentially build self-esteem among citizens. In other words, a sense of identity and belonging is a key foundation for state-building and consolidation of a "homeland" feeling. To get to this point happens to be far more delicate and slow moving than to reach any consensus on constitutional amendments. Bosnia's transition will nevertheless have to move on both of these tracks simultaneously.

Notes to the conference

[1] Elaborated in a series of articles published by this author in a Sarajevo weekly "Nedjelja", March-April 1992.

[2] Charter of the United Nations, Chapter XII.

[3] General Framework Agreement for Peace in Bosnia and Herzegovina, with Annexes. International Legal Materials, Volume XXXV, No. 1, January 1996, pp. 75-183 (hereinafter referred to as "Dayton Agreement"). This agreement is usually referred to simply as "Dayton" because it was entirely drafted in the course of negotiations held in the Wright Patterson Air Force Base in Dayton, Ohio, for 3 weeks in November 1995.

[4] Pajic, Zoran, Protectorates Lost. *War Report*, London, February-March 1998.

[5] The Experts' Committee on the Former Yugoslavia; Verona Forum; Helsinki Citizens Assembly, etc. (from the author's personal files).

[6] Annex 10 of the Dayton Agreement. In practice though, the role of the High Representative grew to the point that some observers compared it to the British Raj. Knaus, Gerald and Martin, Felix: Travails of the European Raj. *Journal of Democracy*, 14(3) 2003, pp. 60-74.

[7] Annex 4 of the Dayton Agreement: Constitution of Bosnia and Herzegovina, Article VI, Para. 1a.

[8] Ibid, Article VII, Para. 2.

[9] Annex 6 of the Dayton Agreement, Articles IV and VII.

[10] See: Caplan, Richard, International Governance of War-Torn Territories. Oxford University Press, 2005.

[11] See: Peace Implementation Council Bonn Conclusions, PIC Main Meeting, Bonn 9-10 December 1997. The Council welcomes the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of difficulties by making binding decisions, as he judges necessary, on the following issues:

a. timing, location and chairmanship of meetings of the common institutions;
b. interim measures to take effect when parties are unable to reach agreement, which will remain in force until the Presidency or Council of Ministers has adopted a decision consistent with the Peace Agreement on the issue concerned;
c. other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities, as well as the smooth running of the common institutions. Such measures may include actions against persons holding public office or officials who are absent from meetings without good cause or who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation.

[12] Its Article I on "Continuation", Para. 1, states the following: The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina," shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations.

[13] See a wider discussion on the issue of "imposing democracy" in Democracy by Force, by Karin von Hippel. Cambridge University Press, 2000.

[14] See foot-note 11.

[15] Namely, Republic of Slovenia, Republic of Croatia, Federal Republic of Yugoslavia (then effectively Serbia and Montenegro). Even Macedonia, in its imposed peculiar name, did so: Former Yugoslav Republic of…

[16] Conf: Art III, Para 3b and Art VI, Para 3a.

[17] Constitution of the Republic of Srpska, *Preamble (as amended by Amendments XXVI and LIV):*

> Starting from the natural, inalienable and untransferable right of the Serb people to self-determination on the basis of which that people, as any other free and sovereign people, independently decides on its political and State status and secures its economic, social and cultural development;
> Respecting the centuries-long struggle of the Serb people for freedom and State independence;
> Expressing the determination of the Serb people to its democratic State based on social justice, the rule of law, respect for human dignity, freedom and equality;
> Desiring to provide the general welfare and economic development through the protection of private property and the promotion of a market economy;
> Recognizing the natural and democratic right, will and determination of the Serb people from the Republic of Srpska to link its State completely and tightly with other States of the Serb people;
> Having in mind the readiness of the Serb people to pledge for peace and friendly relations between peoples and States; the National Assembly of the Republic of Srpska passes.

Article 1 has been replaced by Amendment XLIV, reading as follows:

> "Republic of Srpska shall be the State of Serb people and of all its citizens".

Paragraph 1 of Article 2 has been replaced by Amendment XLV, reading as follows:
"The territory of the Republic shall be unique, indivisible and inalienable".

[18] Constitution of the Federation of Bosnia and Herzegovina, Article 1:

> (1) Bosniaks and Croats, as constituent peoples, together with the others, realising their sovereign rights, transform the internal structure of the territories with majorities of Bosniak and Croat population in the Republic of Bosnia and Herzegovina into the Federation of Bosnia and
>
> (2) Decisions on constitutional status of the territories of the Republic of Bosnia and Herzegovina, with the majority of the Serb population, shall be taken in the course of peace negotiations at an international conference on the former Yugoslavia.

[19] "The Croat Community of Herceg-Bosna", although founded before the RS (18 November 1991), was never officially mentioned in the Dayton Agreement, but its institutional structure had survived for many years within the Federation. While the international community officially strongly opposed the "third (Croat) entity", in practice it condoned its existence in judiciary, certain legislation areas, administration, military institutions, etc.

[20] "The undersigned" of the Washington Agreement, who included the Foreign Minister of the Republic of Croatia, "agreed to establish a high-level Transitional Committee which will take immediate and concrete steps toward … the Confederation". See: Preamble of the Agreement.

[21] Constitution of Bosnia and Herzegovina, Preamble:

> Based on respect for human dignity, liberty, and equality,
> Dedicated to peace, justice, tolerance, and reconciliation,
> Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society,
> Desiring to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy,
> Guided by the Purposes and Principles of the Charter of the United Nations,
> Committed to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina in accordance with international law,
> Determined to ensure full respect for international humanitarian law,
> Inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments,
> Recalling the Basic Principles agreed in Geneva on September 8, 1995, and in New York on September 26, 1995,
> Bosniaks, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows: …

[22] Article III, Para. 3b, of the Constitution of B&H.

[23] See: Rajko Tomas, Efficiency Constraints on the Economy of Bosnia and Herzegovina, pp. 99-119. In, *Dayton and Beyond: Perspective on the Future of B&H*, edited by Christophe Solioz and Tobias K. Vogel, Nomos 2004, pp. 99-127.

[24] The international community kept an informal ban on mentioning the change of Annex 4 until a few years ago. This author argued in favor of changing the Constitution while he was a legal adviser to the International Crisis Group (1999-2000) and was temporarily "black-listed" by the OHR. "If Bosnia wants to Europe it will have to change its Constitution". Interview in a Sarajevo daily, Oslobodjenje, 5 October 1999, p. 4.

[25] Article X, Para. 1,: This Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives.

[26] See: Annex 10 (Agreement on Civilian Implementation).

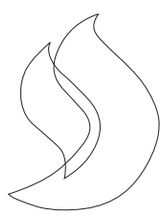
[27] Ministry of Foreign Affairs, Ministry for Foreign Trade and Ministry for Communication and Civilian affairs.

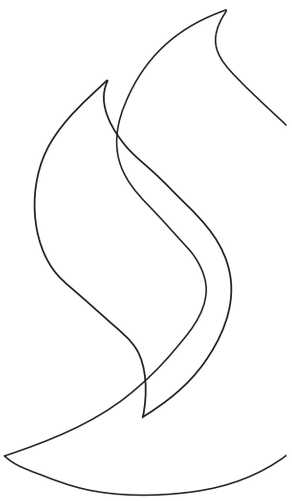
[28] They cover the following areas: foreign affairs; foreign trade and economic relations; finances; communications and transport; civilian affairs; human rights and refugees; justice; and defense. The Law on the Council of Ministers, 18 July 2003, amended 2 December 2003.

[29] Fukuyama, Francis, *State-Building: Governance and World Order in the Twentieth Century*. Profile Books 2004, pp. 135-136.

[30] For an early summary of policy options, see: *Is Dayton Failing. Bosnia Four Years after the Peace Agreement*. International Crisis Group, October 1999.

[31] This course of action was outlined in a timely resolution by the European Parliament. See: European Parliament resolution on the outlook for Bosnia and Herzegovina, 16 February 2006, P6_TA-PROV(2006)0065.





Prisioners and the peace process in Northern Ireland

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Curriculum

Kieran McEvoy is Director of the Institute of Criminology and Criminal Justice and Professor of Law and Transitional Justice at the School of Law, Queens University Belfast. He previously worked in the Voluntary sector as Information Officer for NIACRO, a large prisoners rights organisation. He has been a Visiting Scholar at Fordham University Law School; New York University Law School; Institute of Criminology, University of Cambridge; the Mannheim Centre of Criminology at the London School of Economics and the School of Law at Berkeley, University of California and a Fulbright Distinguished Scholar at Harvard Law School. He is Review Editor of the *British Journal of Criminology*, and a member of the Editorial Board of *Criminology and Criminal Justice and Contemporary Justice Review*. He is also Vice-Chairperson of CAJ (the Committee on the Administration of Justice), and a member of the Executive Committee of NIACRO and the Social Justice Committee of the Community Foundation. He has written extensively on the issue of political prisoners, ex-combatants, restorative and transitional justice and human rights. He is currently completing a major study on the ex-combatants in N. Ireland, Rwanda, Sierra Leone, Colombia and South Africa. He is author, co-author or co-editor of a number of books including *Crime Community and |Locale* (with J. Morison, R. Geary and D. O'Mahony, 2000, Ashgate); *Paramilitary Imprisonment in Northern Ireland* (2001, Oxford University Press); which was awarded the British Society of Criminology book of the year award in 2002; *Criminology Conflict Resolution and Restorative Justice* (2003, co-editor with T. Newburn, Palgrave); *Judges, Human Rights and Transition* (2006\7, co-editor with J. Morison & G. Anthony, Oxford University Press), *Truth, Transition and Reconciliation: Dealing with the Past in Northern Ireland* (Willan, 2007); *Beyond the Wire: Ex-prisoners and Conflict Transformation in Northern Ireland* (with B. Graham and P. Shirlow, 2007, Pluto) and co-editor of a special issue of the Journal of International Criminal Justice (with L. McGregor) on Transitional Justice From Below (2007, also to be published as an edited book by Oxford University Press).

Summary

The way the prisoners were treated was a key element in the Northern Ireland peace process.

This treatment firstly tackled the situation of the prisoners in the prisons. The situation varied depending on the British government´s attitude and the penitentiary authorities, which changed over the yeras. In the 1970s, this was based on containing the violence inside penitentiary institutions, from 1976 the political prisioners were criminalised and from 1981 a pragmatic style was imposed with less political interferences.

From 1998, the release of political prisoners in Ireland was based on the Northern Ireland Sentences Act which established an independent Commission to supervise freeing paramilitary prisoners.

On fundamental aspect in developing this new attempt to end violence was that the Labour Government firmly sustained that freeing prisoners was not dependant on disarmament.

The critical points of the process were related to the effect that freeing prisoners had on the conflict victims, who do not have a unanimous criterion on this fact, and with the reintegration of the prisoners in civil society so different resources were created, some of them with economic funding from the European Union.

Prisioners and the peace process: lessons from Northern Ireland

Introduction

Beware international experts. You decide what is relevant in the Basque context. In this speech I am going to focus on the process of prisoner release and reintegration in Northern Ireland –before that some history of political imprisonment in Northern Ireland over 30 years of conflict. I wrote a book on this which took me four years– I will sum it up in 3-4 minutes.

The British Government & Prison Authorities responded in different ways over the conflict to how *to manage politically motivated prisons*.

Prisons were key practical and symbolic site of conflict-ways in which prisoners are treated speaks directly to the *political will* of the different protagonists. If the state is torturing prisoners, or deliberately making them or their families *suffer*, it is not interested in peace. Similarly if prisoners are attacking staff, of their comrades on the outside are carrying out attacks, then they too are not interested in peace. So prisons allow us a central insight to see the *heart and mind of the actors*.

Reactive Containment

Early 1970's the model of prison management was reactive containment. Ie the stated tried to *react and contain* the violence. Prison population went from 600-3500 in 2-3 years. Prisons were filled very quickly convicted prisoners were held in camps like World War Two. Prisoners had *special category status*, separated by organisational factions groups like IRA and loyalists had their own command structures, held military and political lectures, drilled and marched and leaders negotiated with prison managers. Also the state introduced interment without trial of paramilitary suspects and used widespread torture of suspects. That said, there was no sustained attempt to deny the political character of conflict, particularly in the prisons. The model was an adaptation of British colonial experience in Kenya, Malaysia and elsewhere. Prisons were places to hold the armed actors in as secure accomodation as possible while the *British army fought the war* with the IRA (with loyalist as less significant players) while a negotiated political settlement was sought.

Criminalisation

Second model from 1976 onwards *criminalisation* ie denial of political nature of conflict. Famously summed up by Margaret Thatcher as *A crime is a crime is a crime is a crime. It's not political its a crime*. This policy meant removing practical and symbolic aspects of political imprisonment from the ways in which prisoners were held. Internment without trail ended. Special Category Status Ended. Anyone convicted after March 1976 treated like an ordinary criminal. Prisoners were forced to work, *forced* to wear a prison uniform,

attempt to end segregation by faction, *forced* integration with ordinaries and *mixing* loyalist and republicans, *no* recognition of command structures in groups, *rigid* rule enforcement, hard-line violence against prisoner, brutal body cavity searches all designed to *break* the prisoners, to *efeat* te IRA in particular in the prisons.

This policy now acknowledged by all sides as *disastrous* led to violence in the prisons, violence outside, the republican hunger strikes and dirty protest, widespread international condemnation of Britain for human rights violations. *Also* it didn't work. It strengthened the IRA. It made heroes of republican hunger strikers like Bobby Sands.

Third Style Post 1981Managerialism

Much more *pragmatic*, acknowledgement managerialism that prisons can't be used to "defeat" armed groups, just *manage* the consequences of violence. Less political interference from ministers, letting managers manage, gradual acceptance that segregation makes management more easy, although reluctant to do so, redrawing of the battlelines at various stages rather than simply pragmatic aquiesence.

Of course the prisoners themselves were not simply passive throughout prison history. The deployed a range of strategies of resistance including *collective mobilisation* and organisation in the prisons, *escapes*, *violence* inside and outside the prisons (including the strategic and calibrated use and threat of violence designed to "condition" prison staff), using courts and legal setting as a place for both symbolic and practical sites of resistance (not recognising the courts through to judicially reviewing almost all prison management decisions) and possibily most famously, strategies of dirty protest and hungerstrike to death.

The Prisoner Release Process in Northern Ireland

The Prisoner Release Legislation

Before examining those issues it might be useful to offer a brief overview of the way in which prisoner release is given effect under the Northern Ireland (Sentences) Act in the North and the Criminal Justice (Release of Prisoners) Act 1998 in the Republic.

Under the Northern Ireland (Sentences) Act 1998 an independent commission was established with the responsibility for overseeing the release of "qualifying" paramilitary prisoners. The membership of that Commission included a number of prominent individuals who had long argued for the release of paramilitary prisoners. Qualifying prisoners are defined in the Act as prisoners convicted of a scheduled or "terrorist" offence before April 10th 1998 when the agreement was signed; that he\she is not a supporter of an organization not on cease-fire, that if released a prisoner would not be likely to become a supporter of such an organization and; for life sentenced prisoners; that if released immediately the prisoner would not be a danger to the public[1]. The power of the Secretary of State to "specify" organizations under Section 3, (8-10) provided for both a monitoring function in ensuring that organizations maintain their "complete and unequivocal" cease-fires, as well as allowing sufficient flexibility to encourage organizations not on cease-fire to declare a cessation and thus ultimately ensure that their prisoners would benefit from the early release mechanisms.

The process for releasing prisoners was that prisoners were encouraged to make applications for release to the commission, 446 of which were received by the Commission by 21st August 1998. The Secretary of State retained an overall power to suspend or later revive the scheme or prevent the release of a person adjudged to be failing to meet any of the criteria outlined above[2]. The scheme came to an end with a total of 433 eligible prisoners released (193 Loyalists, 229 Republicans and 11 others) by the end of October 2000.

Prisoner release as an incentive to peace for dissident paramilitary groupings: the carrot?

The provisions for the release of prisoners in both jurisdictions permitted for the exclusion of those groupings initially opposed to the peace process and continuing to engage in armed actions. These groupings included the Loyalist Volunteer Force, the Irish National Liberation Army, the Continuity IRA and the "Real" IRA. However, in the event of a cease-fire being declared by any of these organizations, the legislation contained sufficient flexibility to allow the respective governments to recognize such cessations and include such groupings in the release provisions. This strategy, allied with the changed political landscape of the post-agreement era and the technical limitations of these smaller organizations, has proved highly successful with only one of the groupings above (at the time of writing) not currently observing a cease-fire.

The first such grouping in the post-agreement era to declare a cease-fire was the dissident Loyalist grouping the LVF who announced a cessation in May 1998 during the run up to the Referenda[3]. The LVF, formed as a breakaway from the larger UVF and led by the former head of the Mid Ulster UVF Billy Wright, had been bitterly opposed to the peace process and the political direction taken by the UVF's political wing, the Progressive Unionist Party (Cusack & McDonald 1997). The LVF initially denied that their cease-fire was called in order to benefit from the early release provisions. However their Officer Commanding in the Maze subsequently demanded *parity of esteem to prisoners from other organizations on cease-fire*[4] and their spokesperson Pastor Kenny McClinton indicated a willingness to engage on decommissioning in return for movement on *prison conditions*. Their cease-fire was ultimately accepted by the British government on November 12th 1998 and approximately 25 LVF prisoners became eligible to apply for release at that juncture.

On the Republican side, the INLA were the first of the dissident groupings to declare a cease-fire in the wake of the agreement. The INLA announced their cease-fire on August 24th 1998. Speaking from the Maze prisoner, INLA Officer Commanding in the jail Christopher McWilliams (the man responsible for shooting Billy Wright in the prison the previous year) argued *that* "…securing releases has never been our primary concern. At the end of the day, throughout the world in every conflict political prisoners have been an issue. If anything does come about, we will be part of it, we are confident of that".

OK as a carrot, what about as a stick ?

Prisoner release and decommissioning : the stick ?

As noted above, the insistence upon the prior decommissioning of paramilitary weapons before all party talks could commence is widely viewed as having lead to the collapse of the first IRA cease-fire in 1996. This issue (which remains a key area of dispute at the time of writing) is imbued with symbolic importance to Unionists, Loyalists and Republicans in particular (Von Tangen Page [b]1998). For Unionists, it is portrayed as a litmus test of the good faith of those seeking to move out of political violence[5]. For Loyalist and Republican paramilitaries, it is an act imbued with notions of surrender and runs contrary to an ideology

deep within both sets of paramilitary protagonists which views such weapons as the final guarantors for the defence of their communities against attack by their enemies.

Some commentators have suggested that the question of prisoner release is connected to the provisions regarding prisoner release in the Agreement (Ruane & Todd 1998, Morgan 2000). Although no such linkages are in fact made in the Agreement, considerable energies were expended by both Unionist and Conservatives MPs in the passage of the Bill on prisoner release to make such a connection explicit.

The Labour government held firm that prisoner release is not linked to actual decommissioning.

Greater pragmatism in the management of prisons in the 1980s and 1990s on the other hand undoubtedly contributed to an environment in which paramilitaries began to consider strategies other than violence. The history of political imprisonment in Ireland would suggest handling of prisoners is an issue around which confidence can be *built* or *eroded* within the paramilitary constituency. It is not an issue which can be used to *force* concessions.

Prisoner release and the victims of violence

One of the most difficult issues regarding the early release in the process of conflict resolution is the impact of releases upon those who have been victims of the conflict. As demonstrated in other jurisdictions, the social and psychological consequences for those who have been either the victims or the families of victims during a violent political conflict are severe (Foster and Skinner 1990, Straker 1993, Dawes 1994). The release of a prisoner who has served their full sentence can in itself be traumatic for the family of those killed or injured by the prisoner (Maguire 1991). However, where such releases occur earlier than laid down by the original sentence, such feelings may be exacerbated.

For this and previous research the author has interviewed the victims of politically motivated violence, their organisations and spokespeople in Northern Ireland as well as in Italy, Spain, South Africa and Israel (Gormally & McEvoy 1995). Before outlining the broad themes which emerged from those interviews, it is important, however, to bear a number of things in mind.

Not a monolith. Range of Views from victims including :

Outright opposition.
No position, need support.
Victims of state violence, 360 killed, 4 security forces ever went to jail. All got out early.
Necessary part of healing and reconciliation.
Some bad errors. Eg release of an IRA man on the anniversary of the policeman he killed.

Most difficult part of the process.

The reintegration of paramilitary prisoners

> The Governments continue to recognise the importance of measures to facilitate the reintegration of prisoners into the community by providing support both prior to and after release, including assistance directed towards availing of employment opportunities, re-training and/or re-skilling, and further education. (The Good Friday Agreement 1998).

The notion of "reintegrating" paramilitary prisoners has always been a problematic one for many politically motivated prisoners. As previously discussed, many politicals have traditionally been reluctant to use some of the services of professional reintegration agencies such as the Probation or NIACRO, lest they be seen to acquiescing to the label of "criminal" (McEvoy et al 1999). During the conflict and in the period after the 1994 ceasefires, in asserting their status as political, many paramilitary prisoners and their supporters argued that they were not in need of reintegration. They argued that they were not stigmatised by their communities and that they would not have committed their "crimes" were it not for the political circumstances in which they found themselves (Sinn Fein 1995). The professional agencies argued that such ideological struggles should be ignored in the provision of practical services to prisoners[6].

As the peace process unfolded, prisoner groupings (and the professional agencies) adapted their positions to one wherein prisoners would take advantage of pre and post release facilities. The model for such reintegration was a "self help" model, wherein the former prisoners themselves would take responsibility for the management and delivery of services (Ritchie 1998). The European Union Peace and Reconciliation Fund, established by the European Union to support the peace process, made available £1.25 million to support prisoner reintegration in 1998. These monies are distributed through the Belfast based Northern Ireland Voluntary Trust, a vastly experienced grant giving agency in the non-profit sector (NIVT 1998).

Given that projects are established and run by and large according to paramilitary factions, there are now over 26 community based ex-prisoner projects spread throughout Northern Ireland[7]. IRA affiliated Republicans established an umbrella project (Coiste na n-Iarchimi) to manage a range of their projects, and appointed a manager from outside the ranks of former Republican prisoners to run it[8]. The work covered by reintegration projects include education, job skills programmes, financial and welfare advice, housing and accommodation and family orientated counselling (McShane 1998).

Former prisoners have also lobbied successfully to have the issue of discrimination against former prisoners included in the strategic plan for the new Northern Ireland Human Rights Commission and draft Bill of Rights

Prisoner release and the acknowledgement of political motivation

> We are on the brink of securing the *de facto* recognition of the political character of the conflict, a fact represented by the release of political prisoners[9].

In this important interview Padraig Wilson, IRA Officer Commanding in the Maze, underlined the symbolic importance of the prisoner issue. The Good Friday Agreement has been famously described by the Deputy First Minister Designate, Seamus Mallon of the SDLP as "Sunningdale for slow learners[10]". This reference is to the failed 1973 agreement which contained a number of features similar to the 1998 Agreement including a power sharing executive, limited cross border cooperation and the establishment of some human rights and nondiscrimination protections (Bloomfield 1994). However, such a description of the Good Friday Accord undersells its complexity.

The Sunningdale process, like much of government policy during the conflict, reflected a mindset which sought to "re-establish normal constitutional politics in Northern Ireland", build the center ground, politically marginalise and then contain the paramilitaries

via an effective security policy (Cunningham 1991). The Good Friday Agreement on the other hand is characterised by a desire to bring the bulk of "extremist" opinion inside the process, an endeavour admittedly made easier in 1998 by the presence of organised political parties representative of Republicanism and Loyalism. Such parties had no electoral mandate in 1973. It could be argued that it represents an acceptance of the political motivation of paramilitaries, an implicit acknowledgement of the state as a protagonist in the conflict and a preference for politics over "security". All of which underscore and are informed by a recognition of the political nature of the conflict.

Von Tangen Page (1998 [a]:164) has suggested that the more pragmatic approach adopted by the Irish government to the question of prisoner release when compared to their British counterparts was because the Irish state had not been directly targeted by the IRA campaigning. Quite apart from the numerous acts of violence which occurred in the Republic during the conflict, such an analysis fails to take account of the political and ideological insights into the respective states provided by prisoner releases.

In a violent political struggle, the treatment of prisoners is a mirror to the state's view of the conflict. The internment of suspects without trial and the granting of special category status to prisoners in the early 1970s, the removal of such status from 1976 and the attempts at criminalisation until the early 1980s and the policies of managerialism in the 1980s all of these offer insights into the British governments' ideological and political approach to the conflict during those eras. While they too have maintained the fiction that "there are no political prisoners in British prisons" the willingness of the Labour government to sensibly engage on the prisoners issue is indicative of a mindset that has made the necessary transformation for conflict resolution.

It is no accident that the greatest obstacle to the Unionist "Yes" campaign was the issue of prisoner release. At one level, one might attribute this to the horrors of the past thirty years and the atrocities carried out by the IRA and other Republican groupings. Such an explanation is inadequate however, ignoring as it does the fact that Nationalists voted overwhelmingly for an agreement which saw Loyalist prisoners released, despite the indiscriminate nature of Loyalists attacks on Catholics throughout the conflict. Another explanation, equally unconvincing, is the respective influence of Catholicism and Protestantism within Nationalism and Unionism. Such a view might juxtapose the variant theological emphasises within the two religious blocks, the former with its new testament emphasis on forgiveness and redemption, the latter with its old testament focus upon punishment and retribution. As with most religious explanations of Northern Ireland, such views do not stand up to analysis beyond the crudest of generalisations.

The key difference between the two principal communities on the prisoner issue may be attributed to their very different understandings of the conflict.

For Nationalists, both Republicans and supporters of the non-violent SDLP, the political character to the conflict has never really been in question. The indiscriminate nature of the Loyalist campaigns against the Catholic community have not dimmed the perception that the violence was political in character, aimed at the achievement of political objectives and therefore capable of political resolution. No shade of Nationalist opinion has ever suggested that "a military" or "security" victory might be possible over Loyalist paramilitarism. Painful though prisoner releases have been for many Nationalists, they have been viewed by a clear majority of that community as necessary in order to *politically* resolve the conflict[11].

For many Unionists on the other hand, "terrorism" was an aberration on the body politic perpetuated by a few irredentist "men of violence" for whatever combination of criminal or psychopathic reasons (Robinson 1980, Cochrane 1997). With little support or sympathy for Loyalist prisoners beyond the narrow electoral base of the fringe Loyalist parties, and no comparable historical experience of political imprisonment to the Nationalist community in Ireland, the mainstream Unionist view of "terrorist" violence was sustained and nurtured by the official discourses of the state. Pro-Unionist security force members were not protagonists to the conflict but rather upholding "law and order" in the face of a vicious attack on *their* democratic state.

It would be putting the cart before the horse to suggest that prisoner releases have only occurred within the context of a shared acknowledgement of the political character of Northern Ireland's violent struggle. We are some distance from any shared view of history in this jurisdiction. That said, a slim majority of Unionists did in the end vote in favour of the Good Friday Agreement and its provisions relating to prisoner release. Together with the overwhelming number of Nationalists, this constituted a 71% majority in favour of the Accord. While support for the process has waxed and waned, and the decommissioning issue remains as a perennial cloud, the potential for a working consensus on the governance of Northern Ireland appears possible. If that happens, it will be the first time in the lifetime of the author that politics is conducted without significant numbers of paramilitary prisoners as a feature of the political landscape.

Conclusions

- Removing prisoners from conflict. *Pragmatism* in prisons gave space for unarmed struggle reflection.
- No peace process without prisoner release.
- Recognition of prisoners as a key constituency during negotiations. Both the British and Irish governments facilitated Sinn Fein and the Loyalist parties in ensuring that the prisoners were kept on board.
- Prisoner release is a political not a legal process. Law is a vehicle, not an obstacle. Cultures of legalism should not be allowed to stand in the way of something that is required to underpin and solidify the peace process.
- Licensing and public confidence. The fact that prisoners were released on licence and could be returned to prison if they re-engaged in violence or other illegal activities was important in securing political confidence and giving politicians some "political cover" for what needed to happen.
- Independent commission (with some international input) was also key in both getting the job done practically but also securing the trust of all parties, in particular the political wings of the paramilitary groups that that this would actually happen.
- Views of victims respected in their diversity ie victims are not a monlith, there views should be respected in their plurality and no victims we interviewed suggested that they had the right of veto over the process.
- Need to properly fund reintegration and remove structural barriers to full participation in the new polity.

- Ex-prisoners are agents of conflict transformation to peace process on ground.
- *It was a success*. 14 licenses revoked, approximately 15% recidivism rates (ordinary and political) 8 years after releases began the average recidivism rate is over 50% prisoners returned to prison within two years for ordinary offences in the UK.
- *Remove the prisons from the war zone*. Earlier negotiation with the prisoners by late 1980s "IRA said Maze Prison 'Outside War Zone' ie let go 2 prison officers, shot 2 police". Celebration of technical science or management. "Sausage rolls" reduction in conflict created space for dialogue re "unarmed struggle" some thinking from armed groups game from *prisons*. Can't think tactics, strategy if you are being tortured.
- *Finally never ask your adversaries to do something that cannot be delivered*. The deliberate decoupling of prisoner release from decommissioning was a key tactic decision by the two governments. It simply would not have been possible for the IRA or Loyalists to deliver decommissioning in 1998. The sequencing of key issues is absolutely crucial. There would have no peace process without prisoner release and if decomissioning had been linked to prisoner release it would not have happened.

Peacemaking requires a finely honed political antannae at what ones own political constitutency will wear and the limits of its malleability. It also requires fine judgements concerning the capacity of advseraries to manage their constituencies as well. These are the judgements that often mark the difference between success and failure.

Notes to the conference

[1] Northern Ireland (Sentences) Act 1998, Section 3 (2-7).

[2] The Northern Ireland (Sentences) Act 1998, Section 16. The most high profile use of this power has concerned the senior UDA prisoner Johnny "Mad Dog Adair". In the original decision to release Mr Adair, the Secretary of State came under considerable pressure from the police to delay his release fear that he would re-engage in "terrorism" and use his paramilitary infrastructure to engage in the illegal drugs trade. "RUC Plea to Keep 'Mad Dog' in Jail". Sunday Times, 3rd January 1999, "RUC Silent on Adair Claim". Irish News 4th January 1999. Adair was ultimately released after the then Secretary of State withdrew her objections. "Adair Freed" Belfast Telegraph 14th September 1999. However he was re-arrested and had his license revoked in August 2000 after the Secretary of State took a decision that he had been implicated in the "commission, preparation and instigation of acts of terrorism", some of which were related to a feud between the UDA and UVF in which a number of people were killed including leading Loyalists. That decision was ultimately upheld by the Sentence Review Commission. Adair to Launch Legal Challenge", Irish Times, 23rd August 2000, "Adairs Prison Release Application is Turned Down". Irish Times 10th January 2001.

[3] "The soldiers of the LVF have fought against the Irish peace process and the sell out of our country. This has not been an easy task especially when you have all the different sides fighting against you. Northern Ireland has come to a crucial part of its history, on the 22nd May people will vote for a United Ireland through a yes or vote no to remain British and hold onto everything Protestant people hold dear. The LVF are now calling an unequivocal cease-fire to create the proper climate in people's minds, so when they do go to vote they will make the proper decision for Ulster and that is to vote no." reproduced in "LVF Announces Unequivocal Cease-fire". Irish News 15th May 1998 (b).

[4] "LVF Chief in Maze Confirms Cease-fire". Irish Times 12th August 1998.

[5] "Trimble Remains in Ditch over Arms". Irish Times 29th December 1998.

[6] "It is important to the peace process as a whole that the different ideological perspectives of government and of the prisoners about the reasons why they are in prison be left aside and that we see prisoner reintegration as an integral factor in rebuilding our communities. Further it will have to be recognised that progress cannot be achieved without the active participation of the prisoners themselves". Dave Wall, Director of NIACRO, Submission to the Forum for Peace and Reconciliation, 20th January 1995. Dublin : Forum for Peace and Reconciliation.

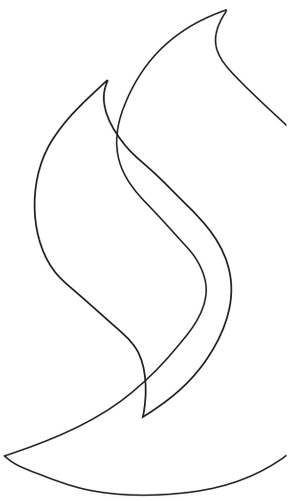
[7] Data made available to the author by Northern Ireland Voluntary Trust.

[8] "Prisoners Group Launched". Irish News 20th January 1999.

[9] "IRA Chief in the Maze is Ready to Seek a New Way Out". Financial Times, 17th June 1998.

[10] "A Favourite Cumudgeon". Irish Times 20th October 1998.

[11] "Most Nationalists Willing to Accept Some Kind of Amnesty". Belfast Telegraph 30th September 1996.



National security and the protection of human rights

Mr.Bill Bowring

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Curriculum

Professor Bill Bowring is Professor of Law at the University of London, Birkbeck College. His research interests include human rights, minority rights, international law, and the law and practice of Russia and the former Soviet Union.

He has over 40 publications in these fields, including Minority and Group Rights in the New Millennium (1999, with Deirdre Fottrell), and he will shortly publish *The Degradation Of The International Legal Order: The Rehabilitation Of Law And The Possibility Of Politics.*

He is also a practising barrister, and has taken over 20 cases to the European Court of Human Rights.

He founded the European Human Rights Advocacy Centre, which now assists more than 90 Russians, Georgians, Latvians and others in taking cases to Strasbourg.

He regularly advises international organisations including the Council of Europe, European Union, and United Nations.

He is President of the European Association of Lawyers for Democracy and Human Rights, which has members in the Basque Country; and is International Secretary of the Haldane Society of Socialist Lawyers. He is a founder and Executive Committee member of the Bar Human Rights Committee of England and Wales, and a Trustee of the Redress Trust, which works for reparation for torture survivors.

Summary

Terrorism is notoriously hard to define in legal terms, and its widespread use in condemning especially serious crimes against civilians leads to serious threats to human rights norms and standards.

My own view is that existing criminal legislation is entirely adequate to identify and punish the crimes committed by "terrorists".

This presentation will analyse the attempts by the UN and the Council of Europe to set clear limits to the interference by governments with civil liberties and human rights.

The policies of the USA and UK have led to especially serious encroachments. The United Kingdom has a particularly problematic history of hasty and ill-judged legislation in response to the conflict in Northern Ireland from the 1970s onwards.

This will be compared with the legislation enacted before and after 9/11. One effect of both sets of legislation has been to transform first the Irish and now the Muslim populations of the UK into "suspect communities".

Bans and proscriptions, of organisations in the UK and individuals in the EU, are arbitrary, inconsistent, and lead to real hardship. More recently, the English Court of Appeal has followed the lead of the EU's Court of First Instance in permitting UN resolutions to "trump" fundamental procedural protections.

National security and the protection of human rights

Abstract

Terrorism is notoriously hard to define in legal terms, and its widespread use in condemning especially serious crimes against civilians leads to serious threats to human rights norms and standards. My own view is that existing criminal legislation is entirely adequate to identify and punish the crimes committed by "terrorists". This presentation will analyse the attempts by the UN and the Council of Europe to set clear limits to the interference by governments with civil liberties and human rights. The policies of the USA and UK have led to especially serious encroachments. The United Kingdom has a particularly problematic history of hasty and ill-judged legislation in response to the conflict in Northern Ireland from the 1970s onwards. This will be compared with the legislation enacted before and after 9/11. One effect of both sets of legislation has been to transform first the Irish and now the Muslim populations of the UK into "suspect communities". Bans and proscriptions, of organisations in the UK and individuals in the EU, are arbitrary, inconsistent, and lead to real hardship. More recently, the English Court of Appeal has followed the lead of the EU's Court of First Instance in permitting UN resolutions to "trump" fundamental procedural protections.

Introduction

I am very grateful to the Basque Government and the organisers of this conference for the opportunity to contribute to the important debates taking place this week. This paper seeks to address a number of issues arising from international and national responses to what is described as the "war on terrorism".

Following a short discussion of the meaning and significance of the phrase "national security", I turn to the vexed question of the definition(s) of "terrorism". Third, the dangers inherent in the indeterminacy and over-inclusiveness of this term are analysed with reference to the UK's four recent anti-terror laws. Fourthly, I refer briefly to the human rights safeguards upon which both the United Nations and the Council of Europe insist, before turning to the actual practice of the European Union, composed as it is of members of both the UN and CoE.

Fifth, I examine two cases of individuals and organisations affected by national and EU measures: those of Professor Sison and the Basque youth organisation SEGI. Finally, I examine the way in which, in the UK, the anti-terror legislation of the 1970s-80s, and the current legislation, have created "suspect communities". This has in the past turned out to be absolutely counter-productive, and may well do so again.

This is not my first time in the Basque Country, nor my first involvement in Basque affairs. In 1983 I was asked by Amnesty International to be an expert witness at the State Security Court in Madrid, in the trial of six Basque town councillors charged with "insulting

the Chief of State", an offence punishable by imprisonment. It was alleged that they had said, in Basque, that "King Juan Carlos is not worthy to walk on Basque soil". My evidence was to the effect that in the majority of Western European countries there is no such offence. The councillors were convicted, but sentenced to one year imprisonment, which is a suspended sentence. Their advocates were the famous lawyers Txema Montero and Miguel Castells: the latter in 1992 won his own case against Spain at the European Court of Human Rights[1], following his conviction in 1985 for the offence of "insulting the State". Both these provisions of the Criminal Code were carried over from the Franco period.

Now, as President of the European Association of Lawyers for Democracy and Human Rights, and active member of the Bar Human Rights Committee of England and Wales, and the Haldane Society of Socialist Lawyers, I am actively cooperating with Behatokia, the Basque Observatory for Human Rights. I am very glad that Julen Arzuaga and Iratxe Urizar of Behatokia are participating in this Conference.

National security

Although I have been involved in issues concerning the Basque country in various ways since 1983, I am concerned on a day to day basis with issues in the United Kingdom. The first question which arises is this: what is national security? Despite a recent judicial pronouncement to which I will return, the UK is not at the present day engaged in a struggle for national survival.

I remind myself that according to Article 15 of the European Convention on Human Rights a state is entitled to derogate from certain human rights standards when there is a war or emergency which threatens the life of the nation. In the well-known Northern Ireland cases *Brogan v UK*[2] and *Brannigan and McBride v UK*[3] the European Court of Human Rights was called upon to test the UK's assertion that the conflict in Northern Ireland, if not an international war, was at least an emergency which threatened the country's democratic existence. A number of leading human rights and civil liberties organisations –notably Liberty and Amnesty International– questioned whether the various events of those years, the 1970s and 1980s, had reached the level of intensity at which it could truthfully be said that the life of the nation was at stake so as to justify a derogation from human rights standards.

Nevertheless, the loss of life was considerable. At least 40,000 people died during the "troubles", including the victims of the notorious pub bombings in Guildford[4] and Birmingham[5] in 1974. I remember all too clearly the various explosions in London, and my own daughter was very nearly the victim of a bomb at Victoria Station which killed and injured many people, including school-children, on their way to work and school.

Although this is not the topic of my paper, it is my own view that the greatest achievement of the Blair government was the negotiation of the Good Friday Agreement, and, taking an enormous political risk in sitting down to negotiate with "terrorists", laying the basis for relative peace which continues to this day.

But the point of this section is that government of any state has a primary duty to protect the lives and security of its population, citizens and non-citizens. Furthermore, a European state can claim, in accordance with its commitments to the Council of Europe, to be under a duty to defend the democratic constitutional order. To do this it will use all the resources of criminal law and the various law enforcement agencies. This brings me to my next question.

The definition of "terrorism"

On 29 November 1974, immediately after the pub bombings, the UK parliament enacted the *Prevention of Terrorism (Temporary Provisions) Act* 1974 in record time. A number of people who happened to be Irish were swiftly arrested. The Birmingham Six (and others) were convicted of murder in 1975 following highly questionable jury trails, conducted in an atmosphere of hysteria, and were only released in 1991 following the overturning of their convictions by the Court of Appeal on 14 March 1991. The point is that they were not convicted of terrorism, but of the ordinary crime of murder. The word "terrorism" simply heightened the drama of the proceeding.

A starting point in considering the issues should be the implications for human rights protection of the lack of any precision in the definition of "terrorism".

In this paper I align myself with the position of Professor John Dugard[6]. In 1974 Dugard wrote a seminal essay on the problems of the definition of terrorism[7]. In the Rhodes University Centenary Lecture delivered in 2004[8], he argued that:

> The Security Council of the United Nations, guided by the major powers (or power?) has shown little interest in a search for definition or balance; in a search for a definition that takes account of the causes of terrorism and condemns both non-State terrorist and State terrorists even handedly.
>
> In the wake of 9/11 the Security Council adopted two resolutions, resolution 1368 (of 12 September 2001) and resolution 1373 (of 28 September 2001), which condemn terrorism in the strongest terms and direct States to act against it, but make no attempt to define it.
>
> Terrorism for the Security Council is what obscenity was for the American judge who remarked that he knew obscenity when he saw it! The danger of this approach is that it gives each State a wide discretion to define terrorism for itself, as it sees fit. It encourages States to define terrorism widely, to settle political scores by treating their political opponents as terrorists. It is a licence for oppression.

He extended this criticism to the European Union:

> Of course, we in South Africa have experienced this before. Remember the Terrorism Act of 1967 which defined terrorism as any act, committed with the intent to endanger the maintenance of law and order? Such an intention was presumed if the act was likely to encourage hostility between whites and blacks or to embarrass the administration of the affairs of the State.
>
> The European Union is no better. In 2002 it has adopted anti-terrorism legislation which would include unlawful protest actions (Council Framework Decision of 13 June 2002).

Martin Scheinin, the UN's Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, made a similar point in his report for 2005, published in 2006[9]:

> Of particular concern to the Special Rapporteur's mandate is that repeated calls by the international community for action to eliminate terrorism, in

> the absence of a universal and comprehensive definition of the term, may give rise to adverse consequences for human rights.
>
> Calls by the international community to combat terrorism, without defining the term, can be understood as leaving it to individual States to define what is meant by the term. This carries the potential for unintended human rights abuses and even the deliberate misuse of the term. Besides situations where some States resort to the deliberate misuse of the term, the Special Rapporteur is also concerned about the more frequent adoption in domestic anti-terrorism legislation of terminology that is not properly confined to the countering of terrorism. Furthermore, there is a risk that the international community's use of the notion of "terrorism", without defining the term, results in the unintentional international legitimization of conduct undertaken by oppressive regimes, through delivering the message that the international community wants strong action against "terrorism" however defined.

These authoritative comments from persons at the highest levels of the UN, who are equally leading scholarly authorities in the field, are clear indications of the dangers inherent in anti-terror legislation, and especially asset freezing.

McCulloch and Pickering have denounced the new anti-terror regime in even stronger terms[10]:

> The targeting of non-government and non-Western systems and programmes as terrorist suspects under the financial 'war on terror' creates an artificial island of intense financial regulation in a sea of free markets. This intense financial regulation is directed primarily at activities outside the corporate mainstream of investment capital and is aimed at not-for-profit organizations, charities and solidarity groups that challenge the political status quo, as well as communities and individuals popularly stereotyped as terrorists. The mandated regulation of informal financial systems is an example of cultural and economic imperialism that is accompanying the progressive colonization of the global commons that exist outside of corporate control. Under the auspices of the financial 'war on terror', 21st-century warriors on the neo-liberal frontier are more likely to be wearing suits than combat gear, and armed with briefcases rather than weapons[11].

This paper concerns the human rights implications of anti-terror laws on groups and individuals in Europe. Professor Colin Warbrick has urged[12] that:

> [...] the insistence on the application and observance of international legal standards on human rights, even if they must be modified in extremis, should be an essential feature of any response to terrorism, even a war against terrorism, which is waged to protect the rule of law.

UN and Council of Europe safeguards

On 27 April 2006, the United Nations Secretary General launched "Uniting against terrorism: recommendations for a global counter-terrorism strategy[13]". This included the following:

> 118. Upholding and defending human rights –not only of those suspected of terrorism, but also of those victimized by terrorism and those affected by the consequences of terrorism– is essential to all components of an effective counterterrorism strategy. Only by honouring and strengthening the human rights of all can the international community succeed in its efforts to fight this scourge.

Bardo Fassbender was commissioned by the United Nations Office of Legal Affairs. Office of the Legal Counsel to prepare a study as part of this strategy. He proposed the following[14]:

> Every measure having a negative impact on human rights and freedoms of a particular group or category of persons must be necessary and proportionate to the aim the measure is meant to achieve.
>
> (p. 8) 12. While the circumstances and modalities of particular sanctions regimes may re quire certain adjustments or exceptions, the rights of due process, or "fair and clear procedures", to be guaranteed by the Security Council in the case of sanctions imposed on individuals and "entities" under Chapter VII of the UN Charter should include the following elements:
>
> > (a) the right of a person or entity against whom measures have been taken to be informed about those measures by the Council, as soon as this is possible without thwarting their purpose;
> > (b) the right of such a person or entity to be heard by the Council, or a subsidiary body, within a reasonable time;
> > (c) the right of such a person or entity of being advised and represented in his or her dealings with the Council;
> > (d) the right of such a person or entity to an effective remedy against an individual measure before an impartial institution or body previously established.

These requirements were clearly and expressly reflected in the Council of Europe's 2002 *Guidelines of the Committee of Ministers on Human Rights and the Fight Against Terrorism*[15]. First of all, in line with the remark of the Court that safeguarding national security concerns need not involve a denial of justice, the Committee of Ministers:

> [recalls] that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law; and
>
> [reaffirms] states' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member states in particular, the Convention for the protection of Human Rights and Fundamental Freedoms [i.e. the ECHR] and the case-law of the European Court of Human Rights.
>
> (Preambles (d) and (i))

More specifically, the Guidelines stipulate the following basic principles of direct relevance to this Background Paper[16]:

II Prohibition of arbitrariness

All measures taken by states to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

III Lawfulness of anti-terrorist measures

> 1. All measures taken by states to combat terrorism must be lawful.
>
> 2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

IV Right to property

> The use of the property of persons or organisations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property have the possibility to challenge the lawfulness of such a decision before a court.

These principles clearly echo the Convention and the case-law of the ECtHR in relation both to the substantive articles (Arts. 10 and 11 of the Convention and Art. 1 of the First Protocol) and the articles requiring procedural protection (Art. 6 and 13 of the Convention), discussed above. In particular, they recall the requirements relating to "law" which seek to counter arbitrariness, and those requiring that all restrictions on fundamental rights are "necessary" and "proportionate" to a clearly-defined "legitimate aim". They also expressly affirm that it must be possible to challenge "freezing" before a court.

UK anti-terror legislation

The UK now has four current anti-terror laws, generating great uncertainty and possibilities for arbitrariness, as well as a series of skirmishes with the judges on human rights issues. In the Queens Speech of Wednesday 15 November 2006, delivered at the time of this Conference, and outlining the UK Government's legislative programme for the next session of Parliament, there was no terrorism bill announced, even though counter-terrorism lies at the heart of the Labour government's legislative programme. Instead, there is to be a review of current capabilities and resources. The UK government certainly intends to combine the four existing laws into what will be a legislative monster, with hundreds of provisions.

As the BBC's Andy Tighe reported:

> If gaps are identified, the government says it will not hesitate to fill them by passing whatever laws are necessary. And these could give rise to considerable controversy. In the last few days pressure has been mounting to extend the maximum period the police can hold terrorist suspects before charging them. Last year, when a 90-day limit was proposed, the government was defeated. And the tide has been shifting in recent months on the admissibility of intercept evidence such as phone taps in courts in England and Wales. Other measures could include greater powers to freeze terrorists' assets and a review of the system of control orders under which foreign terrorist suspects are held without trial[17].

Even before the terrible crimes of 9/11, the UK was leading the way in enacting draconian legislation. The *Terrorism Act 2000* provided the broadest definition in UK history of "terrorism", and, by an Order made on 29 March 2001 (Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001 ("the Order")), the first under the Act, 21 organisations were proscribed through provisions which allow for the banning of organisations which the Home Secretary believes are involved in terrorism, or promote or encourage terrorism. The definition of "terrorism" is as follows:

> 1) In this Act "terrorism" means the use or threat of action where:
>
> a) the action falls within subsection (2),
> b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
> c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
>
> 2) Action falls within this subsection if it:
>
> a) involves serious violence against a person,
> b) involves serious damage to property,
> c) endangers a person's life, other than that of the person committing the action,
> d) creates a serious risk to the health or safety of the public or a section of the public, or
> e) is designed seriously to interfere with or seriously to disrupt an electronic system.
>
> 3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
>
> 4) In this section:
>
> a) "action" includes action outside the United Kingdom,
> b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
> c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
> d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
>
> 5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

The *Terrorism Act 2000* was considered to be inadequate for the fight against terrorism. It was followed by the *Anti-Terrorism, Crime and Security Act 2001* (ATCSA 2001), which introduced indefinite detention without trial for foreign nationals. This measure was denounced by human rights and civil liberties activists. And on 16 December 2004, in a blow to the government's anti-terror measures, the Judicial Committee of the House of Lords, the UK's highest court, ruled by an eight to one majority in favour of appeals by nine detainees. The Law Lords found that Section 23 of the *ATCSA 2001*, which allows for the indefinite detention without charge or trial of non-British nationals, violated the

detainees' human rights because the provisions were disproportionate and discriminatory. The detainees under this legislation had been held under severely restrictive regimes in high security prisons and in a high security psychiatric hospital. Concern about their mental and physical health was heightened by the findings of a report published on 13 October 2004, and –prepared by 11 Consultant Psychiatrists and one Consultant Clinical Psychologist– about the serious damage to the health of eight of the detainees.

The Law Lords said the measures were incompatible with European human rights standards as incorporated in the Human Rights Act 1998, but the then Home Secretary, Minister of the Interior, Charles Clarke said the men would remain in prison. He said the measures would remain in force until the law was reviewed. On 22 February 2005 the UK Government announced a new policy of control orders, providing for deprivation of liberty for British and foreign nationals, upon an order to be given by the Home Secretary. Apart from the great controversy as to what constitutes a control order versus house arrest, and how the power of house arrest would be administered, controversy surrounded the question of authorization of this new power. The Government insisted on giving itself the authority to order such a deprivation of liberty. Amnesty International commented that the prevention of terrorism bill makes a mockery of human rights and the rule of law and contravened the spirit, if not the letter, of the December 2004 Law Lords' judgment. Furthermore, the introduction of "control orders", or house arrest, without charge or trial required derogations from the European Convention on Human Rights (ECHR) and the International Convention on Civil and Political Rights (ICCPR).

The Government repealed the Part 4 powers under the ATCSA 2001 and replaced them with a system of control orders under the *Prevention of Terrorism Act 2005* (PTA 2005) which received Royal Assent on 11 March 2005. The PTA 2005 gave the Minister power to make control orders against any suspected terrorist, whether a UK national or a non-UK national, whatever the nature of the alleged terrorist activity, international or domestic. The Home Secretary was required by Section 14(1) of the Act to report to Parliament as soon as reasonably possible after the end of the relevant three-month period on how control order powers have been exercised during that time. However, even these powers were believed to be inadequate.

The second reading of the new Prevention of Terrorism Bill on 26 October 2005 revealed a stark contradiction at the heart of the government's proposals[18]. During a 75 minute speech, Charles Clarke was adamant on the broad principle that Britain had pioneered many of the modern world's liberties, but also insisted that Britain would have to "fight for democracy" using unprecedented means to defeat the nihilistic demands of Islamist terrorism[19]. However, in order to bring about his desired victory, his "broad principle" would have to be negated. When he opened the debate the previous day, he used a chilling phrase. He claimed that opponents of his bill would leave Britain fighting terrorism with "one legal hand tied behind our back".

In fact, the strong rope which bound Mr Clarke and his successors is the Human Rights Act 1998, based on the European Convention on Human Rights of 1950. It should be noted that the Convention sets out the basic principles which were considered to be an essential statement of the West's understanding of essential rights in the context of the Cold War.

The Government his new offence of "glorifying terrorism"; he has made it clear that if he cannot get a full 90 days to hold terrorist suspects without charge, then the least he

might settle for is 28 days. This would most certainly violate the Convention and the Act. To our shame, Britain would once more have to derogate from her responsibilities under the Convention.

Charles Clarke's new offence of "glorifying terrorism" has made it a criminal offence to support a "terrorist" movement anywhere in the world. On 11 October, at the Home Affairs Select Committee, he said "I cannot myself think of a situation in the world where violence would be justified to bring about change". Not far away from the spot where Charles Clarke was speaking, there is a statue, sword in hand, his back to the Parliament he defended by force, of Oliver Cromwell.

At the Committee's meeting, Clarke was asked whether he might have been caught by such legislation as a student politician supporting Nelson Mandela's struggle against Apartheid in South Africa. He plainly regarded the question as impertinent. At the second reading debate, John Denham, the Committee's Chairman raised the following question: "If an Uzbek, living in Uzbekistan, supported the destruction of a statue as a symbol of opposition to the tyrannical regime in that country, they would be guilty of an offence" and liable to prosecution and seven years imprisonment should they come to this country". Clarke had no coherent answer.

All the anti-colonial movements, all the 20th Century's movements for national liberation, must now be re-categorised as "terrorist".

In particular, the Act allows the Home Secretary to impose "control orders" on people he suspects of involvement in terrorism, which in some cases may derogate (opt out) from human rights laws. In April 2006, in his judgment in the case of *Re MB*[20], Mr Justice Sullivan issued a declaration under section 4 of the Human Rights Act 1998 that section 3 of the Prevention of Terrorism Act 2005 was incompatible with the right to fair proceedings under article 6 of the European Convention on Human Rights. He held:

> To say that the Act does not give the respondent in this case, against whom a non-derogating control order has been made by the Secretary of State, a fair hearing in the determination of his rights under Article 8 of the Convention would be an understatement. The court would be failing in its duty under the 1998 Act, a duty imposed upon the court by Parliament, if it did not say, loud and clear, that the procedure under the Act whereby the court merely reviews the lawfulness of the Secretary of State's decision to make the order upon the basis of the material available to him at that earlier stage are conspicuously unfair. The thin veneer of legality which is sought to be applied by section 3 of the Act cannot disguise the reality. That controlees' rights under the Convention are being determined not by an independent court in compliance with Article 6.1, but by executive decision-making, untrammelled by any prospect of effective judicial supervision.

I have referred already to the strong probability that further anti-terror legislation will be unveiled in the near future. In particular, the police and some government ministers are agitating for the present police power to hold a suspect for 28 days without charge, itself a violation of Article 5 of the ECHR, to 90 days. But, naturally, critics say a person has the right to freedom until charged with a crime. Nevertheless, the Crown Prosecution Service chief Ken Macdonald told the BBC that the 28 days limit, which replaced the old 14 days limit as a compromise after MPs rejected the 90 days limit, had proved "extremely useful". This also has the support of Gordon Brown, who is likely to be the next Prime Minister.

Human rights consequences at the European level

In the last months there have a number of judicial decisions which appear to nullify the right to procedural guarantees. The problem is as follows: Article 103 of the Charter provides that obligations under the Charter prevail over obligations under any other international agreement. There is no argument that resolutions and decisions of the Security Council are obligations under the Charter. Does this mean that a Security Council resolution can have the effect of "trumping" treaty obligations under human rights treaties?

In a paper for the *European Society of International Law*[21], Noel Birkhäuser raised the following point:

> A more central question is whether the right to a fair trial and access to court prevails over Article 103 UNC. Affected individuals who are unable to challenge Security Council action against them, cannot assert the violation of other human rights. It is therefore essential for them to be able to obtain some kind of effective review of their situation. Since the Security Council action excludes all forms of challenging its measures before some form of independent tribunal that satisfies the standards of the ECHR and the ICCPR, "the very essence of the right of access to court is impaired". Even though Article 14 of the ICCPR is not included in the list of nonderogable rights of Article 4 paragraph 2 of the ICCPR, its core must remain untouchable even to the Security Council. Judicial guarantees relating to due process can even be counted to the *jus cogens*.

On 21 September 2005 the Court of First Instance of the EU's European Court of Justice decided the first two cases on "acts adopted in the fight against terrorism", *Ahmed Ali Yusuf and Al Barakaat International Foundation,* and *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* (ECJ Court of First Instance, Case T-306/01 and Case T-315/01)[22].

The cases concerned UN resolutions aimed at Al-Quaeda, Taliban etc, under which all member states are called on to freeze funds and other financial resources. A UN Sanctions Committee has the task of identifying the persons concerned and of considering requests for exemption. The judgments established a "rule of paramountcy": "According to international law, the obligations of Member States of the UN under the Charter of the UN prevail over any other obligation, including their obligations under the ECHR and under the EC Treaty. This paramountcy extends to decisions of the Security Council".

The CFI dealt expressly with the question of Article 103:

> 233 As regards, second, the relationship between the Charter of the United Nations and international treaty law, that rule of primacy is expressly laid down in Article 103 of the Charter which provides that, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". In accordance with Article 30 of the Vienna Convention on the Law of Treaties, and contrary to the rules usually applicable to successive treaties, that rule holds good in respect of Treaties made earlier as well as later than the Charter of the United Nations. According to the International Court of Justice, all regional, bilateral, and even multilateral, arrangements that the

> parties may have made must be made always subject to the provisions of Article 103 of the Charter of the United Nations (judgment of 26 November 1984, delivered in the case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), *ICJ Reports*, 1984, p. 392, paragraph 107).

The CFI further decided:

> 271 Where, acting pursuant to Chapter VII of the Charter of the United Nations, the Security Council, through its Sanctions Committee, decides that the funds of certain individuals or entities must be frozen, its decision is binding on the members of the United Nations, in accordance with Article 48 of the Charter.
>
> 272 In light of the considerations set out in paragraphs 243 to 254 above, the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of such a decision according to the standard of protection of fundamental rights as recognised by the Community legal order, cannot be justified either on the basis of international law or on the basis of Community law.

The CFI drew a clear distinction between *jus cogens* rights, for example the right not to be tortured or subjected to inhuman or degrading treatment, and other human rights, for example procedural rights, or other fundamental rights.

> 337 In this action for annulment, the Court has moreover held that it has jurisdiction to review the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *jus cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person.
>
> 338 On the other hand, as has already been observed in paragraph 276 above, it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order.

Professor Steve Peers has commented:

> The Court then rules that it cannot examine the legality of Security Council acts from the perspective of EC law, even from the perspective of human rights law. But it can examine the legality of Security Council resolutions to see if they violate *jus cogens,* the rule of international law that there are some international rules so important that they take precedence over every other form of international law. This is believed to be the first time that an EU Court has even referred to the principle of *jus cogens,* never mind applied it to a specific case. Finally, the Court then examines whether any *jus cogens* rules are violated in this case as regards the right to property (with a brief mention of the right to be free from inhuman or degrading treatment), the right to a fair hearing and the right to a judicial remedy. It concludes that such rules have not been broken[23].

The English Court of Appeal summarised the effect of the cases as follows:

> […] the court held (at paras 213-226) that the obligations of the members of the European Union to enforce sanctions required by a Chapter VII UN Security Council resolution prevailed over fundamental rights as protected by the Community legal order or by the principles of that legal order. The court also held that it had no jurisdiction to inquire into the lawfulness of a Security Council resolution other than to check, indirectly, whether it infringed *ius cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible […] [restricted to] aggression, genocide, slavery and racial discrimination, crimes against humanity and torture, and the right to self-determination.

The Court of Appeal case referred to above was the decision, on 29 March 2006, in *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda)* v *Secretary of State for Defence*[24] . The Court of Appeal followed the ECJ in holding that a UN Security Council Resolution, in this case UNSCR 1546 (2004) of 8 June 2004, purporting both to end the occupation and to permit internment, trumps all human rights except *jus cogens*. The Court concluded:

> There is inevitably a conflict between a power to intern for imperative reasons of security during the course of an emergency, and a right to due process by a court in more settled times. In my judgment, Article 103 does give UNSCR 1546 (2004) precedence, in so far as there is a conflict. This is not to say that those whose task it is to determine whether internment is necessary for imperative reasons of security must not approach their duties with all due seriousness, when the right to personal liberty is in question. In particular they should ask themselves whether internment is a proportionate response to the threat to security posed by the internee. It has not been suggested that either of the major-generals who were concerned with the review decisions (see para 10 above) could be faulted in their approach.

Lord Justice Brooke concluded with a chilling Addendum:

> 111 As an addendum to this judgment it is worth noting that in the last great emergency imperilling this nation's legislation was enacted to confer powers of internment similar to those that are in issue in the present case. Section 1 of the Emergency Powers (Defence) Act 1939 created the rule-making power and Regulation 18B(1) of the Defence (General) Regulations 1939, whose terms are set out in a footnote in *Liversidge v Anderson* [1942] AC 206, 207, created the power of detention. Lord Denning describes in The Family Story (Butterworths, 1981) at pp 129-130 how that power was exercised in practice in 1940 and 1941 when in the persona of Alfred Denning QC he was the legal adviser to the regional commissioner for the North-East Region:
>
> > Most of my work in Leeds was to detain people under Regulation 18B. We detained people, without trial, on suspicion that they were a danger. The military authorities used to receive –or collect– information about any person who was suspected: and lay it before me. If it was proper for investigation I used to see the person –and ask him questions– so as to judge for myself if the suspicion was justified. He could not be represented by lawyers.

> 112 The equivalent arrangements, for the purposes of the emergency in Iraq, are described by General Rollo in his witness statement. Apart from the technical matters which the Divisional Court put right there is no challenge to the appropriateness of the procedures adopted for internment in accordance with the Security Council's mandate. The issue is rather that Mr Al-Jedda should be permitted access to a court of law where he could answer a charge against him and test the evidence against him before an independent judicial tribunal. I am satisfied that he has no such entitlement.

The case of Professor Sison

This a particularly striking case of inclusion in the list, and asset-freezing, with respect to an individual. Jose Maria Sison, Founding Chairman of the Communist Party of the Philippines and currently Chief Political Consultant of the National Democratic Front of the Philippines, as since 1987 resided in the Netherlands where he is seeking asylum as a political refugee. He has been placed on "terrorist lists" by the USA, by the Netherlands Government, and finally by the European Union[25]. On 6 February 2003 he applied to the CFI for the following remedy:

> Partial Annulment in regard to the inclusion of Professor Jose Maria Sison of Council Decision of 12 December 2002 (2002/974/EC) implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/848/EC (OJ of the European Communities, n° L 337 of 13/12/2002, p. 85 and 86)[26].

On December 27, 2001, the Council of the European Union adopted Council regulation 2580/2001 on specific restrictive measures against certain persons and entities with a view to combating terrorism (OJ of the European Communities, n°L 344 of the 28/12/2001, p. 70-75). This regulation (in Article 2 thereof) imposes sanctions which includes: freezing of funds and prohibiting the rendering of financial services:

> 1. Except as permitted under Articles 5 and 6:
>
> a) all funds, other financial assets and economic resources belonging to, or owned or held by, a natural or legal person, group or entity included in the list referred to in paragraph 3 shall be frozen;
> b) no funds, other financial assets and economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity included in the list referred to in paragraph 3.
>
> 2. Except as permitted under Articles 5 and 6, it shall be prohibited to provide financial services to, or for the benefit of, a natural or legal person, group or entity included in the list referred to in paragraph 3.

These sanctions are without doubt very serious, since Article 1 of the regulation defines the notions of financial assets and economic resources so broadly. The background is as follows. On 9 August 2002 the US Secretary of State designated the Communist Party of the Philippines/New People's Army (CPP/NPA) as a "foreign terrorist organization". The US Treasury Department, particularly its Office of Foreign Assets Control, listed on 12 August 2002 the CPP/NPA and the applicant as targets for asset freeze. The Dutch Foreign

Minister issued on 13 August 2002 the "sanction regulation against terrorism" listing the NPA/CPP and the applicant as the alleged Armando Liwanag, chairman of the CC of the CPP as subject to sanctions.

On 28 October 2002, the Council adopted the decision 2002/848/EC by which Mr. Jose Maria SISON as a natural person (Article 1, 1.9. "SISON, Jose Maria (aka Armando Liwanag, aka Joma, in charge of NPA) born 8.2.1939 in Cabugao, Philippines" and the New People's Army (NPA), as a group or entity presumed erroneously to be linked to the applicant (Article 1, 2. 13. "New Peoples Army (NPA), Philippines, linked to Sison Jose Maria C. (aka Armando Liwanag, aka Joma, in charge of NPA", were included in the list pertinent to art. 2 § 3 of Regulation 2580/2001. This decision drew up the fourth list adopted under the terms of Regulation 2580/2001. On 12 December 2002, the Council adopted the decision 2002/974/EC repealing the previous decision 2002/848/EC. The new decision mentioned Mr Sison under art. 1, 1.25 and 2.19 in identical terms as the previous decision. This was the act being contested insofar as it included Prof. Jose Maria Sison in the list and thereby allegedly violated his democratic rights and interests. His application listed the following consequences for him of inclusion in the list:

> Such a provision involves the loss of free disposition and a total dispossession of all the financial assets of the applicant. He can no longer make the least use of the entirety of his assets.
>
> Excluding the applicant from all bank and financial services deprives him from the possibility to obtain effective compensation for the violation of his basic human rights by the Marcos regime as granted to him by a US court as well as from the possibility to benefit from an income from lectures and publishing books and articles and from possible regular employment as a teacher.
>
> The freezing of Prof Sison's joint bank account with his wife and the termination of social benefits from the Dutch state agencies deprive him of basic necessities and violate his basic human right to life. The termination of said benefits should never be done for an undefined period of time under the pretext of antiterrorism.
>
> The practical consequences of the decision are extremely harsh and cannot be justified by the avowed objectives of the Regulation to combat the financing of terrorism.

The proceedings, in which Prof Sison is represented by Jan Ferman and other advocates from Belgium and The Netherlands, are continuing. On 26 April 2005, in Joined Cases T-110/03, T-150/03, T-405/03 *Jose Maria Sison v Council*, the CFI dismissed Mr Sison's action for the annulment of three Council decisions refusing him access to the documents underlying the Council's decision to include him on the list of persons subject to specific restrictive measures aimed at the combating of terrorism. Article 2(3) of Regulation (EC) No 2580/2001.

This application has been made alongside his proceedings under Article 230 EC for the partial annulment of Council Decision 2002/974, which retained his name on the list of persons whose assets are to be frozen pursuant to Regulation No 2580/2001 under Article 241 EC – Case no T-47/03. The latest development in Case C-266/05 P *Jose Maria Sison v Council* is the Opinion of Advocate General Geelhoed, delivered on 22 Jun 2006[27]. The Advocate General recommends rejection of Prof Sison's application for disclosure of documents.

The SEGI cases

The fundamental right to judicial review, the procedural right referred to above, has been considered by both the CFI in 2004[28], and by the European Court of Human Rights in 2002[29], in the SEGI case. SEGI was a Basque youth movement, which requested the CFI to award damages for its allegedly illegitimate inclusion in the list annexed to Common Position 2001/931/CFSP, noted above, which implemented UNSC Resolution 1373 (2001). In the first pillar the Common Position initiated concrete measures by the Community, such as the freezing of funds (Articles 2,3). In the third, it called upon Member States to exchange information (Article 4). In Article 1 it provided for a definition of the term "terrorist act", applicable across all three pillars. In its Annex it set out a list of persons to whom the measures applied, including SEGI. A footnote to the list specified that SEGI, among others, should be the subject of Article 4 only. Article 4 was addressed to Member States and called upon them to assist each other through police and judicial cooperation. Thus, Articles 2 and 3 did not apply to SEGI, and the Community was not required to freeze its funds.

The Second Chamber of the CFI rejected SEGI's action on competence grounds only, and did not consider the substance of its grievances. In brief, it had no remedy because it had not been made subject to a Community measure, that is, asset freezing.

As Christina Eckes comments:

> SEGI was left without any legal protection… the… case demonstrates forcefully that being listed as someone supporting terrorism will not in itself open the way to the Courts[30].

She disagrees strongly with the Court's rejection of the argument that the rule of law and fundamental rights, in particular the rights to access to justice enshrined in articles 6 and 13 of the ECHR, require the exercise of judicial control, "even in the absence of a specific competence norm[31]". She points out that "A listing in an anti-terrorist measure constitutes a considerable impairment of the target's right to reputation[32], as well as her property rights[33]".

The European Court of Human Rights also refused to consider the substance of the applications, but dealt with them on the issue of standing. It noted that:

> […] these two common positions are designed to combat terrorism through various measures aimed in particular at blocking the financing of terrorist networks and the harbouring of terrorists. They form part of wider international action undertaken by the United Nations Security Council through its Resolution 1373 (2001), which lays down strategies for combating terrorism, and the financing of terrorism in particular, by every possible means. In that connection, the Court reaffirms the importance of combating terrorism and the legitimate right of democratic societies to protect themselves against the activities of terrorist organisations (see *Zana v. Turkey*, judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2548, § 55, and *Mattei v. France* (dec.), no. 40307/98, 15 May 2001[34]) .

The Court reiterated that

> […] Article 34 of the Convention "requires that an individual applicant should claim to have been actually affected by the violation he alleges" and

> "does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment" (see *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, pp. 17-18, § 33[35]).

It further stated

> Moreover, the applicants have not adduced any evidence to show that any particular measures have been taken against them pursuant to Common Position 2001/931/CFSP. The mere fact that the names of two of the applicants (Segi and Gestoras Pro-Amnistía) appear in the list referred to in that provision as "groups or entities involved in terrorist acts" may be embarrassing, but the link is much too tenuous to justify application of the Convention[36].

Eckes comments that "the Court's conclusions that the listing "*peut être gênant*" amounts to an ironic comment in the light of its effects on the situation, or even the existence, of the applicants[37]". She concludes:

> The CFI […] did not satisfy the fundamental principles upon which the Union is built and which the Courts have upheld in the past. This is deplorable. It not only infringes fundamental rights in the individual case, but it also harms the objective of promoting fundamental rights as such. Additionally, the doubtful factual basis on which the European blacklists are drawn up and the fact that the ECtHR did not show itself ready to grant protection of last resort, render the situation even more alarming[38].

The creation of "suspect communities"

There is a further extremely unfortunate effect of anti-terror legislation. Professor Paddy Hillyard completed a very important research on the effect of the 1974 Act and its successors on the Irish community in Great Britain[39]. He noted that out of 7,052 people who had been arrested or detained in Britain in relation to Northern Ireland affairs between 29 November 1974 and 31 December 1991 under successive Prevention of Terrorism (Temporary Provisions) Acts (PTA), over 6,097 (or 86%) had been released without any action taken against them. His research showed that:

> people are suspects primarily because they are *Irish* and once they are in the police station they are often labelled an Irish suspect, presumably as part of some classification system[40].

He concluded:

> A suspect community has been constructed against a backdrop of anti-Irish racism. This community has suffered widespread violation of their human rights and civil liberties […] At the same time, the PTA has had an invidious impact on the ordinary criminal law. Moreover, it has criminalised and silenced political opposition to Britain's role in Ireland[41].

It is remarkable that the very same thing is now happening to the Muslim community, following 9/11 in New York, 11/3 in Madrid, and 7/7 in London.

Speaking at a conference in May 2005[42], Professor Hillyard reminded his audience that:

> As with the notion of crime, it is important to deconstruct the notion of terrorism. There are numerous threats to our lives from the cradle to the grave from many different quarters. The likelihood of being killed or injured from an act of political violence has always been extremely small in this country and the ordinary criminal justice system is more than able to deal with this threat. The stark reality of life is that we are all much more likely to die or be injured in a road accident, doing DIY or from pollution.

He made four general sociological points about the use of the so-called "Prevention of Terrorism" legislation in relation to the Irish conflict:

1. It led to widespread alienation of the very communities from whom the authorities wished to draw support to deal with the threat.

2. It transformed and I would suggest corrupted the ordinary criminal justice system.

3. It placed the security services above the law on the grounds of national security.

4. Far from preventing terrorism, it sustained and extended it.

He drew a direct comparison between the disastrous effect of internment in Northern Ireland in 1971, which not only led to the condemnation of the UK at the Strasbourg Court for torture, and then inhuman and degrading treatment, but also "suggested to the nationalist population that their demands for a more fair and just society in Northern Ireland could no longer be carried forward through dialogue and persuasion. The rule of law had been abandoned. Practically, it led to hundreds of young men in working class nationalist communities joining the IRA and creating one of the most efficient insurgency forces in the world".

The illegality of the US and UK invasion and occupation of Iraq have a similar effect on respect for the rule of law. Moreover, British soldiers have continued to use in Iraq the methods denounced in Northern Ireland, and Abu Ghraib shows that such methods are systemic and institutional.

It is highly disturbing that, as Hillyard shows, the methods within Great Britain are depressingly similar:

> Since 2000/2001 there has been a 16% increase in England and Wales in the total number of people stopped and searched. However, the stop and search rate for white people has increased by less than 4% compared with 66% for Black people and 75% for Asians. Even larger increases have been experienced by those who are classified by the police as "Other" (90%) and "Not known" (126%). One possible explanation for these huge increases for these last two categories is that the police are increasingly targeting Arabs, and other Muslims, such as Turkish people, who are not easily categorised as "White", "Black" or "Asian"?

Hillyard also pointed out that the new control orders introduced under the Prevention Terrorism Act 2005 were an expanded version of the exclusion orders used in Northern Ireland from the 1970s[43]. Furthermore, the proscriptions under the Terrorism Act 2000 are reminiscent of the bans, including broadcasting bans, which did little or nothing to destroy the terrorist organisations. On the contrary, these were pushed into greater secrecy; the broadcasting ban prevented open and political discussion of their aims and objectives. The criminal justice system was radically transformed in order, it was argued, to deal more effectively with those suspected of political violence[44]. Juries were abolished and the rules of evidence were substantially changed. At the same time, a range of different strategies were used in different periods in the conflict to obtain evidence, ranging from the use of brutal interrogation techniques[45] to the widespread use of supergrasses[46] and informers. In effect, there were two criminal justice systems operating in Northern Ireland: one for those suspected of terrorist activities and another for those suspected of "ordinary decent crime".

Hillyard argues that:

> The development of a separate criminal justice system to deal with political violence then began to corrupt the ordinary criminal justice process in two significant ways. First, powers and procedures, for example, relating to the length of detention under anti-terrorist legislation were subsequently incorporated into the ordinary criminal law. Secondly, anti-terrorism legislation was constantly used to deal with ordinary criminal behaviour.

This is exactly what is happening with the Muslim community today in Britain.

Conclusion

In this paper I have sought to demonstrate first, that the new anti-terror legislation at a UN, EU and national level is strictly speaking unnecessary, since the ordinary criminal law is quite sufficient. The word "terrorist" adds nothing except a greater degree of condemnation. Second, application of the new laws can be devastating for human rights. Finally, the laws themselves can have the –perhaps– unintended consequence of manufacturing whole populations of people who are suspects because of their perceived ethnicity or religious faith. This, in my view is both unacceptable and dangerous.

Notes to the Conference

[1] *Castells v Spain* 11798/85 [1992] ECHR 48 (ECtHR Judgment 23 April 1992).

[2] *Brogan v UK*, ECtHR Judgment 29 November 1988.

[3] *Brannigan and MacBride v UK*, ECtHR, Judgment 26 May 1993.

[4] 5 October 1974, which killed 5 people and injured 65.

[5] 21 November 1974, which killed 21 people.

[6] Dugard is now the UN's Special Rapporteur on the situation the situation of human rights in the occupied Palestinian territories.

[7] Dugard, John (1974), "International terrorism: Problems of Definition", v. 50, n.1, *International Affairs* pp. 67-81.

[8] Text at http://www.ru.ac.za/centenary/lectures/johndugardlecture.doc.

[9] Scheinin, Martin (2006), "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism" UN Doc: E/CN.4/2006/98, 28 December 2005.

[10] McCulloch, Jude and Pickering, Sharon (2005), "Suppressing the Financing of Terrorism: Proliferating State Crime, Eroding Censure and Extending Neo-colonialism", v. 45, *British Journal of Criminology*, pp. 470-486.

[11] Ibid, p. 482.

[12] Warbrick, Colin (2004), "The European Response to Terrorism in an Age of Human Rights", v. 15, n. 5, *European Journal of Human Rights*, pp. 989-1018, at 989.

[13] www.un.org/unitingagainstterrorism/contents.htm.

[14] Fassbender, Bardo (2006), "Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter", Report for CAHDI (Committee of Legal Advisers on Public International Law) Doc. CAHDI (2006) 23, 17 August 2006, commissioned by the UN Office of Legal Affairs–Office of the Legal Counsel, 20 March 2006, at www.un.org/law/counsel/Fassbender_study.pdf.

[15] Appendix 3 to the Decisions of the Committee of Ministers, adopted at their 804th meeting on 11 July 2002, CM/Del/Dec(2002)804 of 15 July 2002. https://wcm.coe.int/ViewDoc.jsp?id=296009&Lang=en.

[16] The Guidelines also contain a paragraph (Paragraph XV) concerning derogations for "[w]hen the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation", i.e. for when Art. 15 of the Convention applies (and is formally invoked: the Guidelines expressly note the duty to notify the competent authorities [in the case of the Convention, the Secretary-General of the Council of Europe).

[17] Andy Tighe, BBC home affairs correspondent "Will latest crime proposals work?", 15 November 2006, http://news.bbc.co.uk/2/hi/uk_news/6151458.stm.

[18] Bill Bowring, "The Present Reaction in Britain: Charles Clarke, the Castlereagh of Today", *Camden New Journal,* 30 October 2005.

[19] Michael White, *The Guardian*, 27 October 2005.

[20] *Re MB* [2006] EWHC Admin 1000; see also *JJ and others v Home Secretary* [2006], EWHC 1623.

[21] Birkhäuser, Noah (2005), "Sanctions of the Security Council Against Individuals. Some Human Rights Problems", *European Society of International Law*, at http://www.esil-sedi.org/english/pdf/Birkhauser.PDF.

[22] Press release at europa.eu.int/cj/en/actu/communiques/cp05/aff/cp050079en.pdf; text of the judgments at http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=T-306/01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100; and http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=T-315/01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100.

[23] http://www.statewatch.org/terrorlists/terrorlists.html.

[24] C1/2005/2251, [2006] EWCA CIV 327.

[25] See http://www.defendsison.be/index.php?menu=1.

[26] The text of his application is to be found at: http://www.defendsison.be/pdf/ApplicationSison.pdf.

[27] See http://www.statewatch.org/news/2006/jun/sison-ecj-ad-gen-opinion.pdf.

[28] T-338/02 *Segi and others v Council*, order of 7 June 2004, [2004] ECR II-01647.

[29] *SEGI and others v 15 Member States (SEGI and Gestoras Pro-Amnistia v Germany and others)* App No. 6422/02, decision of inadmissibility of 23 May 2002.

[30] Eckes, Christine (2006), "How Not Being Sanctioned by a Community Instrument Infringes a Person's Fundamental Rights: The Case of *Segi*", v. 17, n. 1, *Kings College Law Journal* pp. 144-154.

[31] Eckes, Ibid, p. 148.

[32] As in *Bladet Tromso and Stensaas v Norway* Application n.º 21980/93, judgment of 20 May 1999.

[33] Eckes, Ibid, p. 149.

[34] Decision of inadmissibility of 23 May 2002, pp. 7-8.

[35] Decision of inadmissibility of 23 May 2002, p. 6.

[36] Decision of inadmissibility of 23 May 2002, p. 9.

[37] Eckes, Ibid, p. 152.

[38] Eckes, Ibid, p. 154.

[39] Hillyard, Paddy (1993), *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (London: Pluto Press).

[40] Ibid, p. 6-7.

[41] Ibid, p. 273.

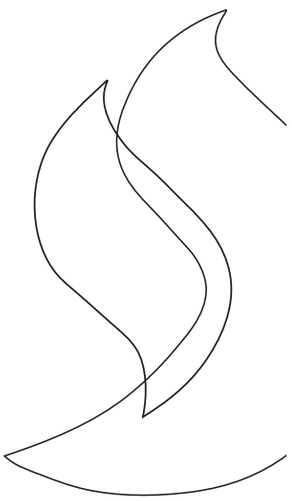
[42] Published in *Suspect Communities: The Real 'War on Terror' in Europe*, Human Rights and Social Justice Research Institute, London Metropolitan University, 2005.

[43] See also on Northern Ireland: Brigid Hadfield (ed) *Northern Ireland: Politics and the Constitution* (1992, Buckingham: Open University Press); Anthony Carty *Was Ireland Conquered? International Law and the Irish Question* (1996, London: Pluto Press); Paul Hill (with Ronan Bennett) *Stolen Years: Before and After Guildford* (1991, Corgi Books, London); Mark Urban *Big Boys' rules: The SAS and the Secret Struggle against the IRA* (1992, Faber: London); Clive Walker *The Prevention of Terrorism in British Law* (1992, 2nd ed, Manchester University Press); Anthony Jennings (ed) *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland* (1990, Pluto Press: London).

[44] Commission, D. (1972) *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* (London: HMSO).

[45] For brutal police methods see: Taylor, P. (1980) *Beating the Terrorists? Interrogation in Omagh, Gough and Castlereagh* (Harmondsworth: Penguin).

[46] Greer, S. (1995) *Supergrasses: A Study in Anti-Terrorist Law Enforcement in Northern Ireland* (London: Clarendon Press).



International terrorism: a new conflict? Parameters for a definition

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Curriculum

Rafael A. Benitez is currently Head of the Counter-Terrorism Task Force at the Directorate General of Legal Affairs of the Council of Europe, where he has worked since 1994.

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Prior his current position he served as Secretary to the Project Group on Administrative Law (CJ-DA), to the Multidisciplinary Group on Corruption (GMC) and to the Multidisciplinary Group on Terrorism (GMT).

He has written extensively on international law, administrative law, public ethics, corruption, and terrorism. He is a visiting lecturer at the Institute of International Relations (ITI-RI) and the International Human Rights Institute (IIDH) in Strasbourg and member of the French Ecole Nationale d'Administration (ENA) 2006 recruitment jury.

Prior to joining the Council of Europe he worked in the private sector, both in a law firm and a business association.

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Summary

Terrorism as a phenomenon has multiple forms which have evolved over decades. For this reason, its definition has long been a topical question which to date has not been resolved.

The academic community has had little difficulty in drawing up a (socio-geo-political) definition of terrorism, while at a political level the United Nations has consistently used language to strongly condemn all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever they are committed.

Although several attempts have been made, there is still no universally agreed definition of terrorism at international level.

However, the international community, as well as law enforcement authorities, have found ways to tackle terrorism over the years despite the absence of such a definition.

This paper explains the factors in this state of affairs and addresses the changing nature of the terrorist phenomenon, looking at the parameters of its transformation at the domestic and international levels from a legal perspective.

International terrorism. A new conflict? Parameters for a definition[1]

The definition of terrorism has been a topical question for a number of decades now. Whether reference is made to "international violence for political motives" or to "international terrorism", makes little difference to the difficulty which the international community faces in devising a definition. No doubt, this difficulty is primarily and for the most part connected with the political motives which inspire the violence in question.

Interestingly, from the outset we find a universal agreement to *unequivocally condemn*[*s*] *all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed*[2].

The academic community has relatively easily come up with a (socio-geo-political) definition of terrorism. For example, terrorism can be defined as an anxiety-inspiring method of repeated violent action, employed by (semi-)clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby –in contrast to assassination– the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat and violence based communication processes between terrorist (organization), (imperilled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought[3].

At political level, in addition to consistently using language s*trongly condemning* all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed as we have seen above, the United Nations (UN) has reiterated that *criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them*[4].

Despite several attempts[5], there is still to date no universally agreed definition of terrorism at an international political level.

However, the international community, as well as law enforcement authorities, have found ways to tackle this phenomenon over the years, even in the absence of such a definition. This can be explained by a number of factors.

The absence of a universally agreed definition of terrorism has not prevented governments from devising a definition at domestic/national level or even internationally. Indeed, the vast majority of countries have definitions of terrorism in their criminal codes. Likewise, some international organisations of a regional character have been able to move ahead and devise a definition.

As mentioned above, at domestic level, it is a fact that the vast majority of countries, not to say all, have a definition of terrorism or terrorist offences in one way or another even if it does not have that title. This is a direct consequence of compliance with UN Security Council Resolution 1373 (2001) *on international co-operation to combat threats to international peace and security caused by terrorist acts*[6] which was adopted under Chapter VII of the UN Charter. This Resolution *call[s] on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism* and asks them to co-operate with each other in the prevention and prosecution of terrorist offences[7]. This is highly unlikely without specific criminalising provisions in their domestic legislation.

Moving beyond the domestic context to the European context, it should be noted that shortly after the attacks of 11 September 2001, the European Union (EU) adopted the *Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism*[8].

In this text, *terrorist act* is defined casuistically, as an intentional act, which, given its nature or its context, may seriously damage a country or an international organisation, and as an offence under national law, where committed with the aim of seriously intimidating a population; unduly compelling a Government or an international organisation to perform or abstain from performing any act; or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.

Moreover, such an act has to be reflected in the following list:

a. Attacks upon a person's life which may cause death.
b. Attacks upon the physical integrity of a person.
c. Kidnapping or hostage taking.
d. Causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss.
e. Seizure of aircraft, ships or other means of public or goods transport.
f. Manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons.
g. Release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life.
h. Interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life.
i. Threatening to commit any of the acts listed under (a) to (h).
j. Directing a terrorist group.
k. Participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

The Common Position also deals with the various human organisations and structures that might be involved in these crimes and defines three distinct categories, namely :

a. *Persons, groups and entities involved in terrorist acts:* persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts; or groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and entities.
b. *Terrorist group:* a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts.
c. *Structured group*: a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

This Common Position, which is primarily of a political nature, was subsequently developed into the *Council Framework Decision of 13 June 2002 on combating terrorism*[9] which urges member states to align their legislation and sets out minimum rules on terrorist offences.

After defining terrorist offences in an identical manner to the Common Position, the Framework Decision lays down the penalties that member states must incorporate in their national legislation.

The Framework Decision is applicable to any terrorist offence committed or prepared with intent in a member state, which may seriously damage a country or an international organisation.

These offences must be committed with the aim of intimidating people and seriously altering or destroying the political, economic or social structure of a country (murder, inflicting bodily injury, hostage taking, extortion, manufacture of weapons, etc. or threatening any of the above).

The offences may be committed by one or more individuals against one or more countries. The Framework Decision defines a terrorist group as a structured organisation consisting of more than two persons, established over a period of time and acting in concert. Moreover, instigating, aiding and abetting the commission of terrorist offences and attempting to commit terrorist offences will also be punishable.

To punish terrorist offences, member states must make provision in their national legislation, on the one hand, for effective, proportionate and dissuasive criminal penalties, which may entail extradition; and, on the other hand, for mitigating circumstances (collaborating with the police and judicial authorities, providing evidence or identifying the other offenders, etc.).

In addition, penalties will be imposed on legal persons where it is shown that the natural person has a power to represent the legal person or authority to exercise control within the legal person.

Finally, the Framework Decision requires member states to establish their jurisdiction with regard to terrorist offences, to extradite their own nationals, and to coordinate their action and determine which of them is to prosecute the offenders with the aim of centralising proceedings in a single member state where several member states are involved.

Since the Framework Decision is mandatory, the EU's 25 member states were required to transpose it into their domestic legislation by the end of 2002. As a result, they have all effectively incorporated one and the same definition into their domestic legal order.

Moving away from the domestic and sub-regional level, a number of international regional organisations have also attempted to agree on a definition of terrorism. Some have had more success than others.

The Organisation of the Islamic Conference (OIC) agreed to a definition and in 1999 adopted the *Convention of the Organisation of the Islamic Conference on combating international terrorism*[10]. This Convention established a distinction between *terrorism* and *terrorist crime*.

On the one hand, *terrorism* is defined as any act of violence or a threat thereof, notwithstanding its motives or intentions, perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperilling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent states.

On the other hand, *terrorist crime* is defined as any crime executed, started or participated in to realize a terrorist objective in any of the Contracting States or against its nationals, assets or interests or foreign facilities and nationals residing in its territory punishable by its internal law. The Convention also assimilates, in principle, the offences provided for in the universal conventions against terrorism[11].

Similarly, a few days after the adoption of the OIC Convention, the Organisation of African Unity (OAU) adopted the *Convention on the Prevention and Combating of Terrorism* on 14 July 1999. Article 1 of this Convention defines "Terrorist act" as "any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:

- intimidate, put in fear, force, coerce or induce any government, body, institution the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
- disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
- create general insurrection in a State.

It further assimilates to terrorist acts the "promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to above."

The Convention requires Parties to criminalise such acts and punish them by appropriate penalties that take into account the grave nature of such offences

It is important to note that both the OIC and the OUA conventions make explicit reference to the right to self determination under very similar formulas.

The OIC refers to "Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law[12]" while the OUA refers to "the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces[13]", which shall not be considered as terrorist acts.

Covering another large region of the world, the Commonwealth of Independent States (CIS) was able to devise its own definition of terrorism in its 1999 *Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism*[14].

Article 1 defines terrorism as "an illegal act punishable under criminal law committed for the purpose of undermining public safety, influencing decision-making by the authorities or terrorizing the population". It further provides a casuistic list of the form which such an act might take, namely:

a. Violence or the threat of violence against natural or juridical persons.
b. Destroying (damaging) or threatening to destroy (damage) property and other material objects so as to endanger people's lives.
c. Causing substantial harm to property or the occurrence of other consequences dangerous to society.
d. Threatening the life of a statesman or public figure for the purpose of putting an end to his State or other public activity or in revenge for such activity.
e. Attacking a representative of a foreign State or an internationally protected staff member of an international organization, as well as the business premises or vehicles of internationally protected persons.
f. Other acts classified as terrorist under the national legislation of the Parties or under universally recognized international legal instruments aimed at combating terrorism.

This Treaty further introduces a distinct concept, *technological terrorism*, which is defined as the use or threat of the use of nuclear, radiological, chemical or bacteriological (biological) weapons or their components, pathogenic microorganisms, radioactive substances or other substances harmful to human health, including the seizure, putting out of operation or destruction of nuclear, chemical or other facilities posing an increased technological danger to the environment and the utility systems of towns and other inhabited localities, if these acts are committed for the purpose of undermining public safety, terrorizing the population or influencing the decisions of the authorities in order to achieve political, mercenary or any other ends, as well as attempts to commit one of the crimes listed above for the same purposes and leading, financing or acting as the instigator, accessory or accomplice of a person who commits or attempts to commit such a crime.

The Convention requires Parties to co-operate in preventing, uncovering, halting and investigating acts of terrorism *in accordance with the Treaty, their national legislation and their international obligations*[15].

As we have seen, a number of regional and sub-regional organisations have effectively managed to devise a definition of terrorism. Other regional organisations have not attempted to define terrorism but have rather looked at ways and means to reinforce international co-operation on the basis of the universal conventions against terrorism.

The *Inter-American Convention against Terrorism*[16] of 3 June 2002 elaborated by the Organisation of American States (OAS), which entered into force on 7 October 2003, does not contain a definition as such. Rather, it uses a system, already used by the Council of Europe in 1977, which consists in relying on the definition of the offences provided for in the universal conventions against terrorism, namely:

a. Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970.
b. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal on September 23, 1971.
c. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973.
d. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979.
e. Convention on the Physical Protection of Nuclear Material, signed in Vienna on March 3, 1980.
f. Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal on February 24, 1988.
g. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988.
h. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988.
i. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997.
j. International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on December 9, 1999.

Thus, the Convention requires Parties, *in accordance with the provisions of its Constitution* to *endeavour* to become a party to the above-listed universal conventions and to adopt the necessary measures to effectively implement such instruments, including establishing, in its domestic legislation, penalties for the offences described therein[17].

It should be noted at this point that the list of international conventions against terrorism in the OIC convention (see above) does not coincide with that of the OAS. Furthermore, rather than attempting to provide a definition of terrorism as such, the OAS approach is to promote the effective implementation of the international conventions against terrorism.

A similar system was also used by the South Asian Association for Regional Cooperation (SAARC) in its 1987 *Regional Convention on Suppression of Terrorism*[18], signed in Kathmandu on 4 November 1987. This Convention excluded the political character of terrorist offences for the purposes of extradition.

Back to the European continent, the Council of Europe (CoE) whose membership goes beyond that of the EU to cover forty-six member states, has also moved away from the attempts to define terrorism, even recently[19].

The CoE has focused on removing the political character of terrorist offences for the purposes of extradition, effectively addressing this problem as early as 1977 in its pioneer *European Convention on the Suppression of Terrorism*[20]. The above-mentioned OAS and SAARC Conventions followed that example.

However, as late as 2004, it was still not able to devise a definition of terrorism, despite the developments in the EU and despite the fact that all the member states of the EU are members of the CoE[21].

The absence of a definition of terrorism has not been an obstacle to the exclusion of its political character for the purposes of international co-operation.

The European Convention uses a system based on universal treaties, i.e.: the offences within the scope of the universal conventions against terrorism and as defined therein cannot be considered as political offences for the purposes of refusing extradition or mutual assistance. The same system that the OIC –to some extent–, the OAS and the SAARC would rely on later in their respective conventions.

The system was considered satisfactory and reinstated on the occasion of the updating of the European Convention in its 2003 *Amending Protocol*[22].

The Protocol introduces a number of significant changes: the list of offences which may never be regarded as political or politically motivated has been substantially extended and now includes all the offences covered by all the UN antiterrorist conventions; a simplified amendment procedure has also been introduced allowing new offences to be added to the list; the Convention has been opened to observer states, and the Committee of Ministers may decide to open it to other non-member states; the possibility of refusing to extradite offenders to countries where they risk being exposed to the death penalty, torture or life imprisonment without parole; possibilities to refuse extradition on the basis of reservations to the Convention have been significantly reduced and such refusal will be subject to a specific follow up procedure, which will also apply to the follow up of any obligation under the Convention as amended.

The 2005 *Council of Europe Convention on the Prevention of Terrorism*[23] effectively breaks new ground by tackling the terrorist phenomena before acts of terrorism are actually committed.

It concerns the delicate aspect of the prevention of terrorism, and aims at covering some of the existing lacunae in international law and action against terrorism, as they were identified by independent studies and by the Committee of Experts which was entrusted with its elaboration.

The Convention was drafted in pursuance of international commitments, such as the above-mentioned UN Security Council Resolution 1373 (2001) which in its operative paragraph 5 declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.

The purpose of the Convention is to enhance the efforts of States Parties in preventing terrorism and its negative effects on the full enjoyment of human rights and in particular the right to life, both by measures to be taken at national level and through international co-operation, with due regard to the existing applicable multilateral or bilateral treaties or arrangements between the States Parties as it is explicitly stated in Article 2.

The Convention purports to achieve this objective, on the one hand, by establishing as criminal offences certain acts that may lead to the commission of acts of terrorism including public provocation, recruitment and training, and, on the other hand, by reinforcing cooperation for prevention both internally, in the context of the definition of national prevention policies, and internationally by means of supplementing and, where necessary, modifying existing extradition and mutual assistance arrangements concluded between the Parties and providing for additional means, such as spontaneous information, together with obligations relating to law enforcement, such as the duty to investigate, obligations relating to sanctions and measures, liability of legal entities in addition to that of individuals, or the obligation to prosecute where extradition is refused.

It was felt that the climate of mutual confidence among like-minded states, namely the member and observer states of the Council of Europe –their democratic nature and their respect for human rights– justified moving forward with the criminalisation of certain behaviour which until now had not been dealt with at the international level.

The Convention as such does not define new terrorist offences in addition to those included in the international conventions against terrorism (see above). Rather, it defines three new principal offences (public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism, coupled with a provision on accessory crimes, providing for the criminalisation of aiding and abetting with regard to the commission of the three principal offences and the attempted commission of the last two principal offences) which are considered to be terrorist offences in so far as they are connected with the possible perpetration of the offences included in the international conventions against terrorism.

The Convention contains several provisions concerning the protection of human rights and fundamental freedoms, both in terms of reinforcing cooperation internally and internationally (including grounds for refusal of extradition and mutual assistance) and implementing the new offences in the form of conditions and safeguards. This is a crucial aspect of the Convention, given that it deals with issues which are on the border between the legitimate exercise of freedoms, such as freedom of speech, association or religion, and criminal behaviour.

No doubt one of its most interesting features is the establishment of *public provocation to commit a terrorist offence* as a criminal offence. The negotiation of this provision did not prove easy at all and therefore, deserves particular attention.

The Convention defines it as the distribution, or otherwise making available, of a message to the public[24], with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed and further requires Parties to criminalise it in domestic law when committed unlawfully and intentionally[25].

Like the other core offences of the Convention, which have been mentioned above, public provocation to commit a terrorist offence is considered to be a criminal offence of a serious nature related to terrorist offences as it has the potential to lead to the commission of the offences established by the international antiterrorist conventions. However, it does not require that a terrorist offence be committed.

The absence of such a requirement is explicitly affirmed in the Convention: for an act to constitute an offence as set forth in the Convention, it shall not be necessary that a terrorist offence be actually committed[26]. By the same token, the place where the terrorist offence might be committed is irrelevant for the purposes of the application of the Convention.

Also, like the above-mentioned offences, it must be committed unlawfully and intentionally.

On the one hand, the requirement of unlawfulness reflects the insight that the conduct described may be legal or justified not only in cases where classical legal defences are applicable but also where other principles or interests lead to the exclusion of criminal liability, for example for law enforcement purposes.

On the other hand, the expression "unlawfully derives" its meaning from the context in which it is used. Thus, it may refer to conduct undertaken without authority (whether legislative, executive, administrative, judicial, contractual or consensual) or conduct that is otherwise not covered by established legal defences or relevant principles under domestic law. The Convention, therefore, leaves unaffected conduct undertaken pursuant to lawful government authority.

Furthermore, the offence must be committed intentionally for criminal liability to apply. In certain cases an additional specific intentional element forms part of the offence.

Article 5 resulted from thorough discussions and deep considerations, first by a working party of the Council of Europe Committee of Experts on Terrorism, the CODEXTER, which was called upon to carry out a survey of the situation in member and observer States and to consider an independent expert report prepared on this basis. The Working Party concluded in favour of focusing on public expressions of support for terrorist offences and/or groups; causality links –direct or indirect– with the perpetration of a terrorist offence; and temporal connections –*ex ante* or *ex post*– with the perpetration of a terrorist offence.

The CODEXTER then focused on the recruitment of terrorists and the creation of new terrorist groups; the instigation of ethnic and religious tensions which can provide a basis for terrorism; the dissemination of "hate speech" and the promotion of ideologies favourable to terrorism, while paying particular attention to the case-law of the European Court of Human Rights (ECtHR) concerning freedom of expression[27], and to the experience of states in the implementation of their national provisions on *apologie du terrorisme* and/or *incitement to terrorism* in order to carefully analyse the potential risk of a restriction of fundamental freedoms.

Freedom of expression is one of the essential foundations of a democratic society. However, in contrast to certain fundamental rights which are absolute rights and therefore admit no restrictions, such as the prohibition of torture and inhuman and degrading treatment or punishment, interference with, or restrictions on freedom of expression may be allowed in highly specific circumstances[28].

Thus, for instance, incitement to racial hatred cannot be considered admissible on the grounds of the right to freedom of expression[29]. The same goes for incitement to violent terrorist offences[30]. The question is where the boundary lies between indirect incitement to commit terrorist offences and the legitimate voicing of criticism, and this is the question that the Council of Europe addressed.

The resulting provision is construed on the basis of the Additional Protocol to the Cybercrime Convention concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS 198[31]).

It uses a generic formula as opposed to a more casuistic one[32] and requires Parties to criminalise the distributing or otherwise making available of a message to the public advocating terrorist offences. Whether this is done directly or indirectly is irrelevant for the application of this provision.

While direct provocation does not raise any particular problems in so far as it is already a criminal offence, in one form or another, in most legal systems, the aim of making indirect provocation a criminal offence was to remedy the existing lacunae in international law and/or action in this area.

At the same time, because of its generic approach, the provision allows States a certain amount of discretion with respect to the definition of the offence and its implementation. For instance, presenting a terrorist offence as necessary and justified may constitute the offence of indirect incitement. However, its application requires that several conditions be met:

There has to be a specific intent to incite the commission of a terrorist offence.

The provocation has to be committed unlawfully and intentionally.

The result of such an act must be to cause a danger that such an offence might be committed, and when considering whether such danger is caused, the nature of the author and of the addressee of the message, as well as the context in which the offence is committed shall be taken into account.

This offence, newly defined in international law, exists in a few countries in one way or another[33] while other countries are considering its introduction[34].

Following the adoption of the Council of Europe Convention, the UN Security Council, acting under Chapter VI of the UN Charter, moved to ban the incitement (*apologie*) of terrorism and adopted Resolution 1624[35] on 14 September 2005.

It is therefore very likely that this will become the subject of greater attention and scrutiny by the international community in the months and years to come.

Returning to the question of a definition of terrorism, at universal level, it is a fact that there is no single definition of "terrorism". International opinion has deplored terrorism in all its forms and, to a certain extent, disregarded its political motivation, yet the international community has never agreed on what exactly constitutes terrorism.

As a result, over the last half a century, international law has instead chosen to address specific forms of terrorism and to introduce measures to ensure international cooperation to combat and investigate terrorist incidents.

For example, four UN conventions address aircraft and airport seizure or sabotage (1963, 1970, 1971, 1988); one addresses crimes against internationally protected persons (1973) and another hostages (1979); two address maritime safety (both of 1988); two address nuclear terrorism (1980 and 2005) and the most recent ones (notwithstanding the above-mentioned recently adopted Convention on nuclear terrorism) dating respectively from 1997 and 1999 have an overreaching scope of application, despite formally relating to terrorist bombings and the financing of terrorism[36].

The international conventions against terrorism are:

a. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.
b. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.

c. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.
d. International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.
e. International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005.
f. Convention on Offences and Certain Other Acts Committed on Board Aircraft signed in Tokyo on 14 September 1963.
g. Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970.
h. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal on 23 September 1971.
i. Convention on the Physical Protection of Nuclear Material, signed in Vienna on 3 March 1980.
j. Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal on 24 February 1988.
k. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done in Rome on 10 March 1988.
l. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done in Rome on 10 March 1988; and
m. Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed in Montreal on 1 March 1991.

Two of the above-mentioned conventions are particularly interesting for the purposes of our discussion on a definition of terrorism, the *International Convention for the Suppression of Terrorist Bombings* (the Bombings Convention) and the International *Convention for the Suppression of the Financing of Terrorism* (the Financing Convention). The reason is that both are relatively recent conventions and both, despite their titles, seem to cover the whole scope of the terrorist phenomenon.

Both Conventions also include the so-called *international requirement* by stating in their respective Article 3 that they will not apply where the offence is committed within a single state, the alleged offender is a national of that state and is present in the territory of that state and no other state has a basis under the respective provisions of the Convention to exercise jurisdiction, notwithstanding the application of other provisions relating to international cooperation.

Finally, both Conventions include in their scope of application the attempt to commit any of the principal offences[37] as well as the accessory crimes, namely: participation as an accomplice, organising or directing others to commit the offence; intentional contribution to the commission of one or more of the offences by a group of persons acting with a common purpose either with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of the offence; or in the knowledge of the intention of the group to commit one such offence[38].

The *Bombings Convention* provides that a person commits an offence within the meaning of the Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a state or government facility, a public transportation system or an infrastructure facility: (a)

With the intent to cause death or bodily injury; or (b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss[39].

Logically, the Convention's scope of application focuses on the use of "Explosive or other lethal devices". Interestingly, this expression is quite largely defined as meaning "(a) An explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage; or (b) A weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material[40]".

Thus, in addition to explosives it could cover other devices and also encompass bio-terrorism. Some even argue that the use of fire-arms could also be covered since the use of these arms invariable involves a detonation.

The *Financing Convention* provides, that a person commits an offence within the meaning of the Convention if that person by any means, directly or indirectly, unlawfully and wilfully[41], provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex[42]; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act[43].

While this Convention obviously focuses on the financing aspects, what is most interesting is the reference to the so-called *terrorist motivation* i.e.: *the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act*, which is one of the keys, if not *the* key to a definition of terrorism.

Finally, it should also be noted that in the *Financing Convention*, the offence is completed regardless of whether funds were actually used to carry out the offence referred to in the Convention. This runs parallel to the system used in the *Council of Europe Convention on the Prevention of Terrorism,* as mentioned above.

Many in the international community would like to see one definition and law supplant the thirteen conventions and protocols governing the various manifestations of terrorism. Without a law defining terrorism, there can be no enforcement of the would-be law.

Thus, the UN has been negotiating a draft comprehensive convention on terrorism since 1996[44].

The idea of a comprehensive convention aims at creating an "umbrella" to encompass the so called *sectorial conventions* listed above. A comprehensive convention would include areas that are not covered in the existing international counter terrorism instruments, or, in other words, fill the gaps in the existing legal regime of the fight against international terrorism.

The progress made on the draft comprehensive convention, particularly in the aftermath of the events of September 11, has slowed down considerably in recent years. Although most

of the articles have been agreed upon, the negotiators have not yet been able to finalise the draft comprehensive convention because of continuing differences of opinion among states on certain key provisions. While there is a general understanding that the mandate of the negotiating Committee is to develop a technical definition of terrorist acts appropriate for a criminal law instrument and while there has been a consensus on the draft provision, which defines the acts that would be covered by the convention; recently a delegation proposed the addition in that provision of an additional paragraph intended to include acts by those who are in a position of control of the armed forces of a state[45].

The draft convention itself addresses the relationship between the draft comprehensive convention and the existing sectorial conventions[46] in the sense that the comprehensive convention would preserve and build upon the *aquis* of the previously developed instruments, and would clarify the applicable legal regime. In the event of a conflict between other international counter-terrorism instrument and the comprehensive convention.

Most importantly, there is also general understanding that the above-mentioned provisions are closely linked with the provisions of Article 18, and that they should be considered together as part of an overall package. Article 18 deals with exceptions from the scope of application of the draft comprehensive convention and also deals implicitly with delimitation between the situations governed by international humanitarian law and the legal regime to be established by the comprehensive convention.

On this point, the negotiators are faced with a number of key issues, which are the ones which have prevented the finalisation and adoption of the convention. These issues lie at the very heart of the problem of the definition of terrorism at international level and therefore merit special attention.

The first issue concerns the exercise of the right of peoples to self-determination, or rather the question of whether or how to address these situations in the draft convention[47].

The second issue relates to the exclusion from the scope of the convention of the activities of "armed forces" in an armed conflict[48]. While some argue that the term "armed forces" is well-defined under international humanitarian law and therefore is suitable for inclusion in a criminal law instrument, others propose to replace these terms with a broader term, "parties"[49] on grounds that armed forces should not be given preferential treatment compared with other subjects whose activities during armed conflict are governed by international humanitarian law.

Connected with the above, the third issue refers to another very controversial issue, namely "situations of foreign occupation". This reference is seen by some as superfluous, while others consider its addition a necessary clarification consistent with international humanitarian law.

Finally, the fourth contentious issue concerns the exclusion from the scope of application of the convention of the activities of military forces in peace time[50]. While some support such exclusion on the understanding that they are governed by other rules of international law, others make this exclusion conditional on the conformity of military activities with international law.

The negotiation continues, yet it is not clear in which fashion or even less what its prospects are[51].

Returning to the definition in this draft, it is stated that any person commits an offence within the meaning of the convention if that person, by any means, unlawfully and intentionally, causes:

a) Death or serious bodily injury to any person; or
b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

The draft further assimilates to such offences *credible and serious threats* to commit any of the above[52].

However, the efforts of the international community have encountered serious difficulties in conciliating the *no gap* approach in the fight against terrorism with the right to self-determination and independence, which, as the UN General Assembly has held, can include struggles against colonial, racist, and other *alien domination*. It has been consistently observed that to a country engaged in revolution or conflict, this definition might turn a respected *freedom fighter* into a wanted international criminal.

The negotiation continues in the UN and the jury is still out on whether it will succeed for the benefit of the whole of the international community. The recent adoption, 13 April 2005, of a new International Convention for the Suppression of Acts of Nuclear Terrorism brings some hope for the success and is reassuring in so far as it indicates that the value of multilateralism is still recognised.

Against this background, as we have seen, some regions of world have been able to move ahead in devising a definition while others have not. It is precisely the combination of efforts at the domestic, international (regional and/or sub-regional) and especially universal level which effectively covers the gaps in international law and action against terrorism, despite the pressing need for a universally agreed definition. This definition will only have a sense if it is truly universally shared and agreed upon and not imposed by one part of the World on another, for it is in international consensus that the success of the struggle against terrorism lies.

Definitions of terrorism and terrorist acts in international instruments

European Union

Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).

Article 1

Terrorist offences and fundamental rights and principles

1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

   seriously intimidating a population, or
   unduly compelling a Government or international organisation to perform or abstain from performing any act, or
   seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

Shall be deemed to be terrorist offences:

a. attacks upon a person's life which may cause death;
b. attacks upon the physical integrity of a person;
c. kidnapping or hostage taking;
d. causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
e. seizure of aircraft, ships or other means of public or goods transport;
f. manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
g. release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
h. interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
i. threatening to commit any of the acts listed in (a) to (h).

2. This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Article 2

Offences relating to a terrorist group

1. For the purposes of this Framework Decision, «terrorist group» shall mean: a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. «Structured group» shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

Organisation of the Islamic Conference

Convention of the Organization of the Islamic Conference on Combating International Terrorism, adopted at Ouagadougou on 1 July 1999.

Article I

For the purposes of this Convention:

[…]

2. "Terrorism" means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling their lives, honor, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.

3. "Terrorist Crime" means any crime executed, started or participated in to realize a terrorist objective in any of the Contracting States or against its nationals, assets or interests or foreign facilities and nationals residing in its territory punishable by its internal law.

4. Crimes stipulated in the following conventions are also considered terrorist crimes with the exception of those excluded by the legislations of Contracting States or those who have not ratified them:

a. Convention on "Offences and Other Acts Committed on Board of Aircrafts" (Tokyo, 14.9.1963).
b. Convention on "Suppression of Unlawful Seizure of Aircraft" (The Hague, 16.12.1970).
c. Convention on "Suppression of Unlawful Acts against the Safety of Civil Aviation" signed in Montreal on 23.9.1971 and its Protocol (Montreal, 10.12.1984).
d. Convention on the "Prevention and Punishment of Crimes against Persons Enjoying International Immunity, Including Diplomatic Agents" (New York, 14.12.1973).
e. International Convention against the Taking of Hostages (New York, 1979).
f. The United Nations Law of the Sea Convention of 1982 and its related provisions on piracy at sea.
g. Convention on the "Physical Protection of Nuclear Material" (Vienna, 1979).
h. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation-Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 1988).
i. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf (Rome, 1988).
j. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 1988).
k. International Convention for the Suppression of Terrorist Bombings (New York, 1997).
l. Convention on the Marking of Plastic Explosives for the purposes of Detection (Montreal, 1991).

Organisation of the African Unity

Convention on the Prevention and Combating of Terrorism, adopted at Algiers on 14 July 1999.

Article 1

For the purposes of this Convention:

[…]

3. "Terrorist act" means:

a) any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:

- intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
- disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
- create general insurrection in a State;

b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to (iii).

Commonwealth of Independent States

Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, done at Minsk on 4 June 1999.

Article 1

For purposes of this Treaty, the terms used in it mean:

"Terrorism", an illegal act punishable under criminal law committed for the purpose of undermining public safety, influencing decision-making by the authorities or terrorizing the population, and taking the form of:

> Violence or the threat of violence against natural or juridical persons.
> Destroying (damaging) or threatening to destroy (damage) property and other material objects so as to endanger people's lives.
> Causing substantial harm to property or the occurrence of other consequences dangerous to society.
> Threatening the life of a statesman or public figure for the purpose of putting an end to his State or other public activity or in revenge for such activity.
> Attacking a representative of a foreign State or an internationally protected staff member of an international organization, as well as the business premises or vehicles of internationally protected persons.

Other acts classified as terrorist under the national legislation of the Parties or under universally recognized international legal instruments aimed at combating terrorism.

"Technological terrorism", the use or threat of the use of nuclear, radiological, chemical or bacteriological (biological) weapons or their components, pathogenic micro-organisms, radioactive substances or other substances harmful to human health, including the seizure, putting out of operation or destruction of nuclear, chemical or other facilities posing an increased technological and environmental danger and the utility systems of towns and other inhabited localities, if these acts are committed for the purpose of undermining public safety, terrorizing the population or influencing the decisions of the authorities in order to achieve political, mercenary or any other ends, as well as attempts to commit one of the crimes listed above for the same purposes and leading, financing or acting as the instigator, accessory or accomplice of a person who commits or attempts to commit such a crime.

United Nations

Draft comprehensive convention on international terrorism (under negotiation).

Article 2

1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:

   a. Death or serious bodily injury to any person; or
   b. Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
   c. Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of this article.

3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

4. Any person also commits an offence if that person:

   a. Participates as an accomplice in an offence as set forth in paragraph 1, 2 or 3 of this article;
   b. Organizes or directs others to commit an offence as set forth in paragraph 1, 2 or 3 of this article; or
   c. Contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

      • Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or
      • Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

Notes to the conference

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[2] See for instance UN Security Council Resolution 1269(1999) or more recently, General Assembly Resolution A/RES/60/288 which used the following terms *reiterating its strong condemnation of terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes,* […]. See these texts are at http://www.un.org/terrorism/res.htm.

[3] See Schmid, A. P., *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature*, New York: North-Holland Publishing Co., 1988 [1983]. See also http://www.askasia.org/teachers/Instructional_Resources/FEATURES/AmericasCrisis/BG1/whatisterrorism.htm, for a compilation of proposed definitions.

[4] See for instance, UN General Assembly Resolution A/RES/51/210 on *Measures to eliminate international terrorism*; the text of the Resolution is available at http://www.un.org/terrorism/res.htm, together with a list of relevant resolutions.

[5] A first attempt to arrive at an internationally acceptable definition was made under the League of Nations, but the convention drafted in 1937 never came into existence. The draft defined terrorism as "all criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public".

[6] The text of the Resolution is available at: http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf. For a complete list of UN Security Council Resolutions relating to terrorism see http://www.un.org/terrorism/sc.htm.

[7] Un Security Council Resolution 1373 (2001). See for instance operative paragraph 1 (a) and (b) relating specifically to terrorist financing offences, and more generally, operative paragraph 2 (a), (b), (e) regarding judgement.

[8] 2001/931/CFSP, Official Journal (OJ) L 57, 27.2.2001.

[9] 2002/475/JHA, OJ L 164, 22.06.2002.

[10] The text of the Convention is available at http://www.oic-oci.org/english/conventions/terrorism_convention.htm.

[11] The Convention contains the following list in its Article 1, paragraph 4:

a. Convention on "Offences and Other Acts Committed on Board of Aircrafts" (Tokyo, 14.9.1963).
b. Convention on "Suppression of Unlawful Seizure of Aircraft" (The Hague,16.12.1970).
c. Convention on "Suppression of Unlawful Acts against the Safety of Civil Aviation" signed at Montreal on 23.9.1971 and its Protocol (Montreal, 10.12.1984).
d. Convention on the "Prevention and Punishment of Crimes against Persons Enjoying International Immunity, Including Diplomatic Agents" (New York, 14.12.1973).
e. International Convention against the Taking of Hostages (New York, 1979).
f. The United Nations Law of the Sea Convention of 1982 and its related provisions on piracy at sea.
g. Convention on the "Physical Protection of Nuclear Material" (Vienna, 1979).

h. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation-Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 1988).
i. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf (Rome, 1988).
j. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 1988).
k. International Convention for the Suppression of Terrorist Bombings (New York, 1997).
l. Convention on the Marking of Plastic Explosives for the purposes of Detection (Montreal, 1991).

[12] Article 2, a.

[13] Article 3, 1.

[14] Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, done at Minsk on 4 June 1999, deposited with the Secretariat of the CIS; the text is available at http://untreaty.un.org/English/Terrorism/csi_e.pdf.

[15] Art. 2.

[16] AG/RES. 1840 (XXXII-O/02), 3 June 2002. The text of the Convention is available at http://www.oas.org/juridico/english/treaties/a-66.htm and the state of signatures and ratifications at http://www.oas.org/juridico/english/sigs/a-66.html.

[17] Art. 3.

[18] SAARC Regional Convention on Suppression of Terrorism, signed at Kathmandu on 4 November 1987; deposited with the Secretary-General of the SAARC; the text is available at http://untreaty.un.org/English/Terrorism/Conv18.pdf.

[19] See for instance Benitez, Rafael A., *Evolución normativa en la lucha contra el terrorismo en Europa: parámetros de una transformación* in *Revista electrónica de relaciones internacionales, e-boletín No. 1 de la Fundación para las Relaciones Internacionales y el Diálogo Exterior* (FRIDE), October 2004, text available at http://www.fride.org/Publications/publication.aspx?item=612.

[20] Information about the Convention, including the text, explanatory report and state of signatures and ratifications, is available at http://conventions.coe.int/Treaty/en/Treaties/Html/090.htm.

[21] See Benitez, Rafael A. *Un nuevo convenio anti-terrorista para Europa* in *Revista Electrónica de Estudios Internacionales*, No. 7/2003; the text of the article is available at http://www.reei.org/reei7/articulos7.htm.

[22] Information about the Amending Protocol, including the text, explanatory report and state of signatures and ratifications, is available at http://conventions.coe.int/Treaty/en/Treaties/Html/190.htm.

[23] Information about the Convention, including the text, explanatory report and state of signatures and ratifications, is available at http://conventions.coe.int/Treaty/en/Treaties/Html/196.htm.

[24] The sense of certain terms used in the definition of the offence is developed in the Explanatory Report to the Convention, which provides that the term "distribution" refers to the active dissemination of a message advocating terrorism, while the expression "making available" refers to providing that message in a way that is easily accessible to the public, for instance, by placing it on the Internet or by creating or compiling hyperlinks in order to facilitate access to it. Moreover, the term "to the public" makes it clear that private communications fall outside the scope of this provision. The Explanatory Report

further provides that "in order to make a message available to the public, a variety of means and techniques may be used. For instance, printed publications or speeches delivered at places accessible to others, the use of mass media or electronic facilities, in particular the Internet, which provides for the dissemination of messages by e-mail or for possibilities such as the exchange of materials in chat rooms, newsgroups or discussion fora".

[25] Art.5.

[26] Art. 8.

[27] See for instance the ECtHR decision in the *Lingens v. Austria* judgment of 8 July 1986, HUDOC REF 000000108.

[28] Article 10, paragraph 2 of the ECHR lays down the conditions under which restrictions on, or interference with, the exercise of freedom of expression are admissible under the ECHR, while Article 15 of the ECHR provides for possible derogations in time of emergency. For a collection of relevant case-law of the ECtHR see document CODEXTER (2004)19 available at www.coe.int/gmt.

[29] See Article 9, paragraph 2 of the Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965.

[30] See ECtHR decision in *Hogefeld v. Germany*, 20 January 2000, HUDOC REF 00005340.

[31] See Article 3. The text of the Convention is available at: http://conventions.coe.int/Treaty/EN/Treaties/HTML/189.htm.

[32] Which was supported *inter alia* by the Commissioner for Human Rights of the Council of Europe in his Opinion on the draft Convention (document BcommDH (2005) 1, paragraph 30 *in fine*). The Commissionner suggested that such a provision could cover "the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or other similar behaviour" which could constitute indirect provocation to terrorist violence.

[33] See for instance in Spain, Art. 578 of the Penal Code (Organic Law 10/1995, of 23 November, Oficial Journal (B.O.E.) No. 281, 24 November 1995 and No. 54, 2 March 1996; in France, Ar. 24, para. 4 of Law of 29 July 1981 in relation to Art. 421, para. 1-422, para. 7 of the Penal Code. See also "Apologie du terrorisme" and "Incitement to terrorism" ISNB 92-871-5468-6, Council of Europe Publishing, 2004, a study of the situation in member and observer States of the Council of Europe.

[34] See for instance developments in the United Kingdom, *Draft Terrorism Bill*, Part 1. *Offences, Encouragement etc. of terrorism* which provides for two new offences entitled "Encouragement of terrorism" and "Dissemination of terrorist publications" (see text of the Terrorism Bill, as amended in the Committee by the House of Commons to be printed on 3rd November 2005 on http://www.publications.parliament.uk/pa/cm200506/cmbills/077/2006077.htm as of 04/11/2005.

[35] The text of the Resolution is available at: http://www.un.org/terrorism/sc.htm. The Resolution "*Condem[s]* in the strongest terms the incitement of terrorist acts and *repudiate[s]* attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts" and expressed "deep concern" about the fact that "incitement of terrorist acts motivated by extremism and intolerance poses a serious and growing danger to the enjoyment of human rights, threatens the social and economic development of all States, undermines global stability and prosperity, and must be addressed urgently and proactively by the United Nations and all States, and *emphasizing* the need to take all necessary and appropriate measures in accordance with international law at the national and international level to protect the right to life". In its operative paragraph 1, the Resolution "*Calls upon* all States to adopt such measures as may be necessary and appropriate and in accordance with

their obligations under international law to: (a) Prohibit by law incitement to commit a terrorist act or acts; (b) Prevent such conduct; […]".

[36] The complete list of universal (international) conventions against terrorism and their texts are available at http://untreaty.un.org/English/Terrorism.asp.

[37] Respectively Art. 2, para. 2 and Art. 2, para.4 of the Bombings Convention and of the Financing Convention.

[38] Respectively Art. 2, para. 3 and Art. 2, para. 5. A small *nuance* should, however, be noted between the two Conventions in so far as the Bombings Convention refers to contribution "in any other way" (Art. 2, para. 3, (c)) while such terms are absent in the Financing Convention (Art. 2, para. 5, (c)).

[39] Art. 2.

[40] International Convention for the Suppression of Terrorist Bombings, New York (1997), Art. 1.

[41] The Bombings Convention uses the expression "intentionally".

[42] These are the international conventions against terrorism to which reference has largely been made earlier on in this paper. However, the Convention provides in para. 2 of this same Article the possibility for the Parties to exclude any of the treaties in the annex provided it is not or ceases to be a Party to it. Also note the use of the same system used in the Council of Europe and Organisation of American States conventions, as indicated earlier on in this paper.

[43] Art. 2

[44] The current draft has been developed on the basis of the proposal initially submitted by India (A/C.6/51/6). It is alternatively discussed in the *ad hoc* Committee established by General Assembly resolution 51/210 of 17 December 1996, which has been regularly reconvened now for a couple of years, and in the Working Group of the Sixth Committee which has thus far been regularly re-established during the fall sessions of the General Assembly. The most recent meeting of the *ad hoc* Committee was held in New York from 27 February to 3 March 2006.

[45] See draft Article 2 and document A/60/37, annex IIIA.

[46] See draft Article 2*bis*.

[47] On this point, let us note that in order to prompt a compromise on this issue, an idea emerged to add a new preambular paragraph to the Convention which would refer to a number of treaties that have reaffirmed the people's right to self-determination.

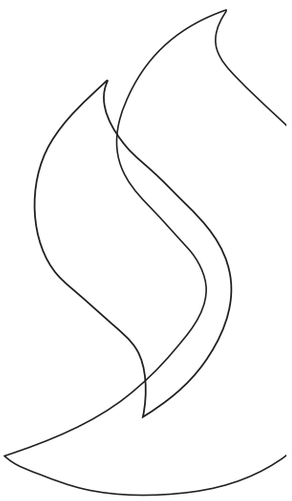
[48] Cf. paragraph 2 of Article 18 mentioned above.

[49] In this respect it should be noted that the 1977 Additional Protocol I to 1947 Geneva Conventions, uses the term "parties".

[50] Cf. paragraph 3 of Article 18 mentioned above.

[51] In this connection, it should be noted that the *ad hoc* Committee was not able to finalise the draft comprehensive convention in its last session and did not make any explicit recommendation in its report aiming at the re-establishment of the Working Group of the Sixth Committee during the 61st session of the General Assembly. This will inevitably bring the question of how to further continue with the draft comprehensive convention to the centre of the debate of the Sixth Committee.

[52] Interestingly enough, the proposed definition runs parallel to the EU definition which we have seen before. See the attached table.



The place of "difference" in nation building. Lessons from post-TRC politics in South Africa

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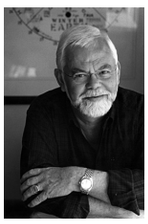


Curriculum

Dr. Charles Villa-Vicencio is executive director of the Institute for Justice and Reconciliation, based in Cape Town. He was formerly the National Research Director in the Truth and Reconciliation Commission, in which capacity he was responsible for the five-volume report of the Commission handed to President Mandela in October 1998.

A regular contributor to debate in South Africa, his present work is largely in the area of transitional justice and social transformation in South Africa. He works closely with universities, research institutes and the corporate sector in South Africa and other parts of Africa.

His books include: *The Spirit of Freedom: South African Leaders on Religion and Politics; Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission in South Africa; Pieces of the Puzzle: Notes on Reconciliation and Transitional Justice; and Building Nations: Transition in the African Great Lakes Countries.*

Summary

The South African Truth and Reconciliation Commission (TRC) was tasked, *inter alia*, to "promote national unity and reconciliation" and to uncover the "causes, nature and extent" of gross violations of human rights committed during the Apartheid era.

Since closure of the Commission there have been ten similar commissions in other parts of the world, six of them in Africa with five additional countries exploring such possibilities. There are also gacaca courts in Rwanda and formal ritualistic healing initiatives in Cambodia and elsewhere. These initiatives suggest that countries divided by long periods of political conflict, human rights abuse and violence recognise a need for an alternative to impunity on the one hand and extensive political trails on the other while at the same time seeking to uncover the essential causes and motivations of political strife and conflict.

The South African TRC is often more readily lauded elsewhere in the world than at home. This paper provides a brief overview of South African nation-building initiatives since the transition to democracy in 1994. It also addresses some of the challenges that continue to trouble the nation. These include racial, ethnic and class factors.

The paper further shows that similar factors often tear at the social cohesion of countries elsewhere in the world recognising that the overwhelming majority of such conflicts are between communities within national states rather than between national states. Most of these conflicts are at least partially rooted in the failure of ethnic, cultural and religious communities to coexist peacefully. It is at the same time noted that ethnic, cultural and religious conflict is almost invariably intertwined with some form of material deprivation and/or political exclusion. It is essentially when individuals and groups experience a sense of exclusion from the body politic and its material benefits that they draw on identity concerns to drive and legitimate their political and material agendas.

An attempt is made to suggest ways of enabling states to reflect the diversity of people who are required to coexist within their borders. At the heart of this challenge is the importance of recognising and respecting difference, while affirming the importance of national unity.

The place of "difference" nation building. Lessons from post-TRC politics in South Africa*

The world remains fascinated by the South African transition, of which the Truth and Reconciliation Commission (TRC) was an integral part. Nations that experience internal division and conflict are especially intrigued that South Africans, divided by 300 years of colonialism and 50 years of statutory Apartheid, could avert the bloodbath predicted in the 1980s.

I have often been asked what the TRC did for South Africa. Perhaps most importantly, it has produced a milieu within which no one, black or white, can ever again deny the gross violations of human rights of the past or say they did not know that they happened. The TRC has contributed to the healing of the nation at least to the extent that it broke the silence about the past. The media coverage of the work of the Commission and its interaction with a cross section of South African society has ensured that the underlying issues of the past and ways in which to move forward are subjects of public debate. We do not all agree on how to reconcile, but we publicly acknowledge our problems and seek to deal with them.

There was a joke doing the rounds in South African at the height of our conflict which suggested South Africans faced two options a realistic and a miraculous one. The realistic option was to fall on our knees evoking God to send a band of angels to sort out the conflict. The miraculous one was for enemies to talk. We chose the latter of which the TRC was a part.

In what follows I will:

1. Suggest what generically a TRC can and cannot achieve within the context of international law.
2. Identify some limitations of the South African TRC as a mechanism of transition.
3. Speak about the way in which 'difference' is being addressed in South Africa, providing a case study for consideration in relation to the challenges facing modern states elsewhere in the world.

Truth Commissions[1]

The South African TRC is the one transitional mechanism that most commentators cite as legitimate under international law. Speaking on the relationship between the prosecutorial mandate of the International Criminal Court (ICC) and the amnesty administered by the South African TRC, the General Secretary of the United Nations Organisation observed:

> The purpose of the clause in the Statute [which allows the Court to intervene where the state is 'unwilling or unable' to exercise jurisdiction] is to ensure that mass-murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order. No one should imagine that it would apply to

> a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgment for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future[2].

To merit international legitimacy, a TRC needs at a minimum to incorporate the following:

> Convincing evidence that the majority of citizens endorse the TRC as a mechanism of transitional justice.
> The disclosure of as much truth as possible concerning gross violations of human rights.
> Accountability of those responsible for gross violations of human rights, recognising that this need not be in the form of retributive sentencing by the state.
> Reparations to those victims whose rights are encroached upon by any amnesty provision.
> The suspension of prosecutions in a transitionary situation should not be a pretext for the abrogation of other requirements of international law.
> A forum in which victims and survivors may tell their stories and question perpetrators.
> Prosecutions should remain an option both during and after the TRC against those perpetrators who do not adequately participate in the process.

In addition to satisfying the above minimum criteria for *international* legitimacy, a TRC should also be created and operated transparently in order to sustain democratic legitimacy. Citizen involvement in the creation of a TRC, and an openness to media coverage of its operations, are necessary to ensure *domestic* legitimacy.

Limitations on what TRCs can achieve

Unreasonable expectations for any mechanism of transition may undercut its more modest, but nevertheless important, accomplishments. Significantly, the legislation establishing the South African TRC was entitled the "*Promotion* of National Unity and Reconciliation Act", [emphasis added] and not the "*Achievement* of National Unity and Reconciliation Act". TRCs should not be viewed as a panacea for dealing with all the challenges of transition. At best they are one part of a far more complex process that involves numerous institutions, initiatives, and reforms operating over an extended period of time. Accordingly, there are certain things a TRC cannot achieve:

> Imposing punishment commensurate to the crime committed.
> Ensuring remorse from perpetrators and their rehabilitation.
> Ensuring that victims will be reconciled with or forgive their perpetrators.
> Addressing comprehensively all aspects of past oppression.
> Uncovering of the whole truth about an atrocity or answering all outstanding questions in an investigation.
> Allowing *all* victims to tell their stories.
> Ensuring that all victims experience closure as a result of the process.
> Providing adequate forms of reconstruction and reparations.
> Correcting the imbalance between benefactors and those exploited by the former regime.

Ensuring that those dissatisfied with amnesties or the nature or extent of the amount of 'truth' revealed will make no further demand for punishment or revenge.

Realistic goals for a TRC

While TRCs by themselves cannot satisfy the above goals, they can contribute to their achievement. Specifically, TRCs can:

Break the silence on past gross violations of human rights.
Counter the denial of such violations and thus provide official acknowledgement of the nature and extent of human suffering.
Provide a basis for the emergence of a common memory that takes into account a multitude of diverse experiences.
Help create a culture of accountability.
Provide a safe space within which victims can engage their feelings and emotions through the telling of personal stories, without the evidentiary and procedural constraints of the courtroom.
Bring communities, institutions and systems under moral scrutiny.
Contribute to uncovering the causes, motives and perspectives of past atrocities.
Provide important symbolic forms of memorialisation and reparation.
Initiate and support processes of reconciliation, recognising that it will take time and political will for these to be realised.
Provide a public space within which to address the issues that thrust the country into conflict.
Consider ways of promoting restorative justice and social reconstruction.

A difficult balance

A TRC process, located as it is within the scope of restorative justice, must necessarily promote the beneficence of victims and survivors, as well as ensure that perpetrators are drawn into the restorative process. These requirements place a premium on reaching agreement over a viable package of reparations, a restoration that seeks to rebuild human dignity and the promotion of the material well-being of victims. At the same time, a TRC needs to promote the participation of victims in the emerging new regime politically, economically, culturally and spiritually. This necessarily involves more than a one-off monetary payment to victims. It requires the transformation of the ethos that sustained the unjust state prior to transition. Effective reparations require sustainable peace, economic growth and political stability.

Debate for and against truth commissions continues. Not all victims of gross violations of human rights desire prosecutions, while the precise nature of reparations being sought is not clear. The causal relationships between amnesties, social stability, and the rule of law are also unclear. It is difficult to say whether protection from prosecution for the perpetrators of gross violatons of human rights facilitates long-term social stability or whether the demand for prosecutions will at some future time resurface to undermine the desired stability. Certainly the recent history of Argentina and Chile indicate that an amnesty which makes no provision for accountability can return later to disrupt a nation. There is, on the other hand, no clear evidence that the obligation to prosecute will necessarily lead to fewer human rights abuses or provide an enduring process of good governance and the rule of law.

Some limitations of the South African TRC

The South African TRC consisted of three committees[3].

An *Amnesty Committee*, whose task it was to consider amnesty applications for gross violations of human rights, narrowly defined as 'killing, abduction, torture or severe ill-treatment'. These hearings, unless exceptional circumstances prevailed, were held in public under cross-examination in accordance with the conditions prescribed in the TRC legislation[4]. Of the 7 116 applications, 1 167 were granted full amnesty[5].

Those who were refused amnesty and the many who failed to apply for amnesty became subject to prosecution. Few prosecutions have, however, occurred and the National Prosecution Authority has recently proposed a set of guidelines indicating that criteria ranging from "public interest" to "the interests of the victim and the broader community", "the circumstances of the offender" and the cooperation of perpetrators in the disclosure of truth be taken into account before acting against perpetrators. This is seen by many as yet a further bite at the amnesty cherry, this time behind closed doors.

A *Gross Violations of Human Rights Committee* tasked with the responsibility to hear testimony from victims and survivors of gross violations of human rights. 21.300 people chose voluntarily to make statements to the Commission and 2.000 were selected as a sample to give public evidence of the gross violations of human rights which they experienced.

A Reparations and Rehabilitation Committee whose task it was to propose a reparations policy aimed at restoring human dignity of victims and survivors. In addition to communal reparations of different kinds, the Commission recommended the payment of between R 17.029 and R 23.023 per victim based on median annual household incomes in South Africa in 1998. The decision of government, delayed until 2003, was to make a one-off payment of R 30.000 to designated victims. Regarded as inadequate by many victims' groups, the quest for reparations continues a spin-off of which is the New York-based Alien Tort Statute cases in the United States brought by Apartheid victims against companies that did business in South Africa during the Apartheid era (a case which, interestingly, is opposed by the South African government).

The TRC's mandate was a narrow one. Its impact, by definition, could also only be limited as indicated in the above analysis of what a TRC process can and cannot achieve. Govan Mbeki, a veteran leader in the South African struggle and father of President Mbeki, spoke with me shortly before his death in 2001 of the need to balance "having and belonging" in the nation building process, posing the question whether the South African TRC had adequately addressed this need. "For the South African transition to endure, the economy needs to be restructured in such a way that the poor and excluded begin to share in the benefits of the nation's wealth," he insisted. "People, all people, black and white, also need to feel in other ways that they are part of the emerging new nation. If some do not feel welcome or at home in the new South Africa they will not only be reluctant to work for the common good, they can also cause political trouble". In am suggesting that the South African TRC did not/could not adequately address the deep and entrenched fissures of race, culture, identity, class and social privilege that undermine the creation of an inclusive society. In brief, "having and belonging" the essence of the post TRC challenges facing the nation. They also constitute a reminder to the world of the importance economic and identity inclusion in the nation building process.

Differently and more generally stated, the limitations and oversights of the transitional justice debate (in South Africa and elsewhere) is often its failure to address transformation concerns in an inclusive and holistic manner. Focussing on the standard and equally important issues of prosecution, amnesty, reparation and related concerns, transitional initiatives frequently fail to give sufficient attention to such material concerns as land distribution, impediments to the empowerment of excluded sectors of society and structural economic inequality, as well as cultural and subjective concerns grounded in issues of identity, language, ethnicity, race and other forms of social privilege.

Adam Habib provides an important critique of contemporary models of transitional justice, and more specifically the South African transition with regard to economic redistribution. He contends that to exclude or minimise the impact of socio-economic justice from the main agenda of democratisation often eases a breakthrough in negotiations from authoritarian rule to the beginning of democracy. The danger is that this often leads to the undermining of long-term prospects for democratic consolidation[6]. The demand for economic justice, he suggests, is more than an irritant to political reconciliation.

The failure to readdress economic injustice in most deeply divided societies invariably returns to haunt the political terrain in one form or another. In Zimbabwe the failure to adequately address the land question has returned to bedevil that nation, and in South Africa the failure to address adequately the economic disparities of the past in the negotiation process is challenging the South African settlement with new vigour.

A business person recently told me that all we need to do in South Africa is create jobs and control crime. Reconciliation, he suggested, will easily follow. "Just grow the economy", he insisted. However, a milieu conducive to economic growth, no less than reconciliation itself, requires that we respect one another despite the other person's status or location in life and that we entrench this into our everyday dealing with contentious and other concerns. Above all, it requires the fullest participation by all sectors of the community in the nation-building process ensuring that the public square is conducive to the participation of all the communities whose cultures and identities need to be reflected in the ethos of the nation.

It is this need for recognition and acceptance that links issues of identity so closely to economic growth and inclusion. It is this that persuaded those engaged in the South African negotiated settlement to recognise that white South Africans who controlled the economy needed to be drawn into the new political dispensation and that the most effective way to do so was to enable them to experience the kind of belonging and well-being that provides a vested interest in the future of the nation. Equally important is the need to draw black entrepreneurs, through black economic empowerment (BEE), into the driving centre of the economy. It is even more important to ensure that the poor, who can realistically only look longingly at the privilege of those (both black and white) who benefit from the wealth of the nation, are persuaded that their material needs and aspirations can be met within the emerging economy. In the words of President Mbeki: "It's a very delicate thing to handle the relationship between these two elements [transformation and reconciliation]. It's not a mathematical thing; it's an art … If you handle the transformation in a way that doesn't change a good part of the status quo, those who are disadvantaged will rebel, and then goodbye reconciliation". The subjective and the material are two sides of the same coin.

Differently put, an essential ingredient of the quest to limit intra-state conflict, ethnic-based exclusivism and political violence and more positively, to promote inclusive nation-

building involves both challenge and invitation. The *challenge* (above all in countries emerging from periods of oppressive rule) involves dealing creatively and in a pro-active manner with economic and other factors that for historic and structural reasons exclude particular groups from sharing in the economic benefits of society. The *invitation* is to build a society that favours racial, cultural and identity inclusivity.

If WEB du Bois was correct in defining the problem of the twentieth century as the problem of the colour-line, the problem of the twenty-first century may well be the century of ethnicity, a factor that necessarily involves more than observable characteristics, such as colour and appearances. It includes memory and history, language and culture, world-views, ideologies, religions, and related self-images. These are issues that South Africa faces in its post-TRC period. These are issues also faced by other countries around the world.

The challenge of 'difference' in nation-building

The vast majority of notable conflicts around the world today are between communities *within* national states, rather than *between* national states. These conflicts, rooted in the failure of ethnic, cultural and religious communities to coexist peacefully are also almost invariably intertwined with some form of material deprivation and/or political exclusion. It is essentially when individuals and groups experience a sense of exclusion from the body politic and its material benefits that they draw on identity concerns to drive and legitimate their political and material agendas.

The long list of communities caught up in religious and ethnic identity concerns include the Roman Catholics in Northern Ireland, Serbs, Muslims and Croats in the Balkans, the Kurds in Iran and Iraq, the Sikhs in Northern India and Kashmir, and Tamils in Sri Lanka, West Papua and Aceh communities in Indonesia, the concerns of Tibetans and, of course, the Basque communities in Spain. In African countries there are states ranging from Rwanda, Burundi and the DRC in the African Great Lakes region, to the Sudan and other countries of the Greater Horn, West Africa and in the southern African region that face similar challenges. Add to these examples the sense of exclusion experienced by Pakistanis in Britain, Hispanics in the USA, aborigines in Australia, Maoris in New Zealand, the Inuit in Canada, the French in Quebec, and the Khoi-San and Afrikaner groups in South Africa and the extent of the identity issues in nation-building processes is obvious across the globe.

International instruments on group and minority rights, beginning with the recommendation of the UN sub-committee on the Prevention of Discrimination and the Protection of Minority Rights as early as 1954, signal an increasing awareness by the international community that groups excluded from the dominant culture of their environment on the basis of ethnicity, religion and language constitute a threat to national and regional stability. This underlines the need to include in the nation-building process all those who have the capacity to undermine peacemaking and democracy, without allowing them to jeopardise or delay the emergence of an equitable and just new order through the promotion of some form of divisive ethnic politics.

Differently stated, there is an increasing global awareness that nations, especially nations seeking to rise above periods of oppressive rule grounded in ethnic and cultural exclusion, that fail to address the problem of exclusion in a subsequent period of reconstruction do so at their own peril. The necessary balance required in this regard is a delicate one. To delay the creation of a shared and inclusive culture is to allow dissident groups to perpetuate the old order. To proceed too quickly is, on the other hand, to promote resentment and potential destabilisation. The question on how to build an inclusive state in situations of deep

historical, cultural, religious and material divisions gives expression to a political challenge for emerging democracies that the academy, politicians and all sound-minded citizens would do well to heed. It concerns what seems to be a deep and abiding ontological or meta-reality that underlies the often asocial and politically destructive behaviour of dissident groups. It takes more than the strong arm of the law, as important as this may be, to control or include those who feel their identity is threatened by an emerging new order.

In culturally heterogeneous nations, which means most if not all modern nations, the challenge of political pluralism is at the forefront of nation-building. Political leaders who seek to merge all individuality, all corporate differences and the energies of all national groups into one common enterprise, threaten the very fabric of democratic participation[7]. A state that seeks to neutralise or exclude, to absorb or to expel those whose national or tribal origins differ from that of the majority or ruling minority ultimately destroys its own vitality. The question is how to create and establish a process by which different groups can drink from their own wells in contributing to a greater whole that is inclusive, tolerant, open and better than its component parts.

Three options suggest a way beyond the monolith of statism, national chauvinism and cultural domination:

Liberalism

The dominant model of nation-building in the modern world, despite protest in some circles to the contrary, continues to be that of liberalism. It is a model that suggests that under its mantle there is room for all to participate on the basis of the affirmation of individual human rights. Writing in the South African situation, Neville Alexander at the same time argues that "liberalism is a greater danger in the long run to the struggle for the oppressed than fascism[8]". He does so reminding us that not all liberals are white. It is also clear that contemporary notions of liberalism are no longer always liberal!

In brief, liberals suggest that where individual rights are in place, culture is less of an issue. Liberalism at the same time plays down issues of language, religion, culture and other "thick" sources of belonging such as memory, ethnicity, race, class and gender. It implies that potentially contentious issues such as race, gender and class –those very things that some would argue constitute the essential ingredients of what it means to be human– ought not to determine the political and legal policies of a nation. The liberal ideal presupposes difference-blind inclusivity. The problem is that all too often excluded voices are simply not heard because of the assumption that the dominant voice is the voice not only of all reason but of all reasonable people, including those who cling to the margins of society. South African poet, Antjie Krog, reflecting on the bitter struggle for inclusion by various groups in the long history of her native land, ponders the question: "How long does it take/for a voice /to reach another?[9]" How long, we may ask, for a voice politically suppressed, culturally ignored or economically excluded to be heard. While the voice is ignored "in the distance the drums continue to beat", suggests Ghanaian novelist Chinua Achebe[10].

Liberals are, of course, ready to receive those of different complexion and identity into the public square. People who wear an African shirt, a taub, a scarf or a yarmulke add credence to the difference-blind, room-for-all image of the liberal society. What those who accentuate substantive difference may not do is challenge such principles of governance that all too often carry a cultural imposition of language, symbol, ritual and policy that is less culturally free than its staunchest supporters are ready to admit.

It is marvellously easy for those who dominate the square to regard *their* particular culture and tradition as being of universal benefit given for the benefit of the entire human race. It takes those who do not share those presuppositions to falsify this perception. That, apart from all else, is why we need to listen most attentively to those who occupy the margins of the public square. It is the marginalised and alienated members of society who see the fault lines of the square more clearly than those most comfortably at home within it.

It is because those excluded from the dominant culture see the liberal model lend itself to the concealment of substantive difference that a multicultural alternative is explored as an alternative model of social existence.

Multiculturalism

Apartheid was, of course, built on multiculturalism of a particular kind that entrenched group difference. Still today the Afrikaner *boerestaat* politics and Zulu nationalism, in different ways, continue to affirm the right to be different. To build a society in which different cultures and ethnic groups live side by side, rather than explore the possibilities of engaging one another, clearly has its own set of problems. Human nature and politics being what it is, the affirmation of exclusive identities lends itself to the likelihood of nationalistic or group narcissism.

Again it is the South African context that illustrates the extent to which multiculturalism fails to address the ambiguities of identity. No particular grouping in South Africa, whether Afrikaner, Khoi-San or Griqua, is homogeneous. Each group includes the wealthy, the poor, intellectuals, men, women, workers and management. These different groupings, whether workers, management, women or youth often have more in common across cultural and ethnic lines than they have with others within their own particular group.

Cultures are invariably evolving. They are dynamic realities, not least in the border zones where cultures engage both voluntarily and involuntarily. The stories of South African townships, such as Soweto, Mamelodi, Gugulethu and Kwa-Mashu illustrate the point. These urban centres receive workers from the Eastern Cape, Venda, rural Kwa-Zulu Natal and Qwa Qwa who encounter urbanised neighbours and people from other ethnic groups, including lawful and unlawful immigrants from the Congo, Zimbabwe, Nigeria and Malawi. There are established and emerging entrepreneurs, gangsters, thieves, frightened people and aspirant middle class new arrivals in the city. These township dwellers often need to speak Afrikaans to clinch a job, English to get their kids into school, tsotsi-taal in the *shebeens*, and deep Xhosa, Venda or Zulu to mama back home. These are cultures in the making that transcend and belie the rigidities of the cultural purists who like to place traditional cultures side by side on a neat multi-cultural continuum. This suggests that multicultural engagement soon gives way to cultural evolution. Individuals and cultures are formed in interaction with other individuals and cultures. These are complex processes that create a space for freedom, although never without restraint and limitation, where social change is possible and new identifies begin to emerge.

Different situations demand different solutions. Spain is not South Africa, any more than Rwanda is Iceland. It is clear, however, that a sense of multiculturalism that fails to address the integration and evolution of identities is ultimately little more than a veneer over the struggle of one culture to dominate another. Multiculturalism in effect seeks to counter liberalism's "unity *over* diversity", with "unity *in* or *through* diversity" but often fails to explore trajectories beyond separate identities. At worst, it can be little more than

a ruse for living with subtle but entrenched separation, what South Africa once defined as "separate but equal" identities. The challenge is how to engage difference, while allowing for difference, cultural change and integration.

Cultural openness

Max Weber reminds us that culture is more than a light coat that rests on our shoulders to be discarded at will[11]. It is story, memory, symbol, language and place within which we live, move and have our being. To quote Frantz Fanon, culture is "the action through which a people has created itself and keeps itself in existence[12]". In this sense, culture is the ordinary. It is inherited and it is taught. It evolves through encounter and dialogue. It is imposed and it is free choice. Ironically it is when we try to protect and defend our culture that it is most vulnerable. When we allow it to be, finding itself in relation to other cultures, it comes into its own. In South Africa, the Afrikaans language is stronger today than it ever was under the chauvinistic days of protectionism and imposition. And yet it is different, as all languages are different.

The importance of difference is to create space for South Africans rooted in different languages and cultures to participate in the public square. It is at the same time important to ensure that by default or design no one group either dominates others or undermines the inclusivity of the public square. This requires a realisation by all participants in the nation-building process that for culture to free and awaken a people –in Fanon's words "to compose the sentence which expresses the heart of the people and to become the mouthpiece of a new reality in action[13]"–, it must be open to what it means to be Afrikaner, Xhosa, Zulu, Kurd, Basque or Khoi-San in relation to other ethnic groups. Cultural openness is about exploring the future rather than protecting the past or entrenching the present. It is about pondering what tomorrow may hold, rather than trying to prevent the inevitable.

Consider contemporary South African politics. As unpalatable as it was for many South Africans on all sides of the political divide, the merger between the *New National Party* (NNP), as the home of many Afrikaans speaking South Africans, with the *African National Congress* required the ANC as the dominant partner to face again the implications of cultural inclusivity as captured in the South African Constitution. Suffice it to say, if further white participation in the ANC government is to happen, debate on cultural inclusivity in the public square is likely to intensify. This debate, which is too often left to a few intellectuals and to those who feel most offended by a sense of exclusion, is one for which the structures are in place in South Africa: there is constitutional recognition of diversity; equal status of eleven official languages; the representation of minority parties in the national assembly on the basis of as little as 0.25% of the national vote. All of this provides space for participation in the nation-building project. These structures need to be employed and exploited to give increasing evidence of an open public square that, for its own sake, cannot afford to exclude.

Yet South Africans have made a somewhat laissez-faire start, rather than a principled and directed one on the issue of national symbols, names of cities and towns, landmarks and statues although this is beginning to be addressed. Some who visit South Africa, not least from other African countries, are intrigued to find that a statute of the Boer leader, General Louis Botha on his horse, still presides over the entrance to the presidential offices in Cape Town, that streets are still named after Verwoerd and other icons of Apartheid, and that there is still a city called Pretoria that is struggling to rename itself Tswane. We

have not torn down monuments, statues and symbols of the past. The question is where to go from here. How does one include, complement and capture a new vision that reaches beyond the past to an inclusive future. John Ruskin once said, "Great nations write their autobiographies in three manuscripts, the book of deeds, the book of words and the book of art. Not one of these books can be understood unless we read the two others, but of the three the only trustworthy one is the last[14]". He goes on to suggest that it is primarily the actual buildings, monuments and memorials built within a particular nation at a particular time that capture the true ethos of the time. If this be so, who or what then is the contemporary South African nation?

A cultural conclusion

Allow me to conclude with six one sentence observations on culture: 1) culture comes from the Latin word *cultura,* a word for farming that involves the complex process whereby nature is intentionally interfered with in an attempt to create a better product. 2) we are all born into our culture, it is there waiting for us. 3) everyone's culture is in flux; we share in the changing process. 4) cultural groups are never homogeneous; we all differ from our closest kinsfolk. 5) no one finds it particularly easy to change culture; most of us are culturally a bit reactionary. 6) a dynamic culture that includes through dialogue and encounter can be a liberating but fearful adventure.

South Africans have decidedly not found the answer to the quest for inclusive nation-building. What we have done is reinforce the need to address issues of inclusivity. When President Mandela came to the end of his presidential term, he suggested that the marginalisation of South African minorities from the nation-building project could result in national disaster. Other countries that face divisive pasts and conflictual contemporary challenges of their own may wish to heed this word.

Notes to the conference

[*] Dr Villa-Vicencio is Executive Director of the Institute for Justice and Reconciliation, based in Cape Town, South Africa.

[1] See also "Truth Commissions," in Charles Villa-Vicencio and Erik Doxtader, *Pieces of the Puzzle*: *Keywords on Reconciliation and Transitional Justice* (Cape Town: Institute for Justice and Reconciliation, 2004).

[2] Kofi Annan, Speech delivered at the University of the Witwatersrand Graduation Ceremony (1 September, 1998).

[3] The Promotion of National Unity and Reconciliation Act, No.34 of 1995.

[4] Section 20 of the Act stipulated that amnesty could be granted on the following conditions:

a) Applicants were required to apply for amnesty for each offence committed.

b) Applications had to be made within the time frame laid down in the legislation.

c) Perpetrators were required to make full disclosure of their crimes in order to qualify for amnesty.

d) Amnesty hearings involving gross violations of human rights were to take place in public, save in exceptional circumstances.

e) Amnesty had to be granted on the basis of a set of objective criteria.

f) Amnesty could not be automatic; it would not be granted for certain heinous crimes.

g) The name of the persons to whom amnesty had been granted, together with information relating to the crimes for which they were granted amnesty, would be published in the Government Gazette and in the report of the Commission.

h) The amnesty provisions in the Act required applicants to declare the nature of their offences effectively acknowledging their culpability. In cases where amnesty applications were not made or were unsuccessful, the way was left open for conventional criminal trials, where the prosecuting authority decided that there were sufficient grounds for prosecution.

[5]

Decision	Total
Amnesty granted	1167
Amnesty granted for certain incidents but refused for other incidents	139
Amnesty granted for certain incidents, application withdrawn for others	6
Amnesty refused, after hearing	362
Amnesty refused, administratively	5143
Application for amnesty withdrawn	258
Duplicate applications	40
Amnesty not applicable, applicant acquitted	1
Total	7116

[6] Adam Habib, "Economic Policy and Power Relations in South Africa's Transition to Democracy," *World Development*, vol. 28, nº. 2, 2000, 28.

[7] Bernard Crick, *In Defence of Politics* (Harmondsworth: Penguin Books, 1984), 54.

[8] Neville Alexander, "Black Consciousness: A Reactionary Tendency," N Barney Pityana, Mamphela Ramphele, Malusi Mpumlwana and Lindy Wilson, eds., *Bounds of Possibility: The Legacy of Steve Biko and Black Consciousness* (Cape Town: David Philip, 1991), 238-52.

[9] Antjie Krog in her poem "Country of Grief and Grace," in Down to My Last Skin (Johannesburg: Random House, 2000), 95.

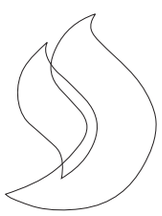
[10] Chinua Achebe, *Things Fall Apart* (New York: Anchor Books, 1986), 32.

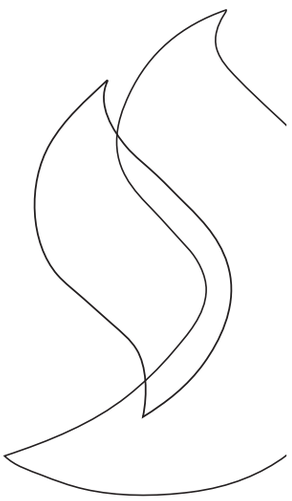
[11] Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (New York: Scribner's 1976).

[12] Frantz Fanon, *Wretched of the Earth* (New York: Grove Press, 1963), 188.

[13] Ibid., 178.

[14] Kenneth Clark, *Civilisation* (New York: Harper and Row, 1969), 1.





Las Madres de Plaza de Mayo: the struggle against institutional violence in Argentina

Mrs. Nora Irma Morales de Cortiñas
Cofounder of the Madres de Plaza de Mayo Movement. Argentina

Curriculum

Children:
Carlos Gustavo Cortiñas: Detained-Disappeared on 15th April 1977. Student of Economics University of Morón. Faculty of Economics of the University of Buenos Aires. Political Militant Peronist Youth Movement. Marcelo Horacio Cortiñas.

Human Rights Militant.
Social Psychologist. 1993. Cap. Fed. GOECRO Dr. Lucía Mascialino. Cofounder of the Madres de Plaza de Mayo Movement. 30-04-77. Cofounder of Madres de Plaza de Mayo-Línea Fundadora (Founding Line). 16-01-86.

Member of FEDEFAM, Latin-American Federation of Associations for Relatives of the Detained Disappeared. Head of the Department "Economic Power and Human Rights" of the Faculty of Economics at the University of Buenos Aires. 1998.

Activities:
Attendance at Congresses on Human Rights.
Attendance at Women's Congress.
Courses given: Participation in Debate Tables.
Participant in National and International Seminars

Attendance and participation in OAS and United Nations Commission on Human Rights.

Attendance at courses and seminar in: Argentina, United States, Canada, Sweden, Norway, Switzerland, Holland, Belgium, France, Italy, Spain, Russia, Brazil, Mexico, Bolivia, Chile, Uruguay, Haiti, Dominican Republic, Costa Rica, Cuba, Colombia, Venezuela, Nicaragua.

Courses given at Universities, Secondary Schools, Colleges and Associations of Professionals, and Civil, Trade Union and Neighbourhood Organisations.

Title of Honorary Doctor
The Free University of Brussels granted her the title of Honorary Doctor, 2000.
National University of Salta, Argentina, 2003.

Summary

In the 20th century, Argentina experienced a long record of profound processes of institutional violence, which became evident in both institutional governments and *de facto* governments. In the non-civil authoritarian regimes, as instances of citizen representations are banned, institutional violence is implemented as the only method of social control and discipline in conflicts.

The last Coup (1976-1983) was the bloodiest in Argentinean history. It is very difficult to summarise the reasons which lead to the implementation of such extreme institutional violence as the genocide that took place, precisely due to the complexity of the situations which occurred at that time in history, both in the national and international contexts.

The Military Coup institutionalised State Terrorism, by perfecting even further the methodology to spread the terror, the forced disappearances and death, which were previously implemented by the Triple A (Argentinean Anticommunist Alliance). The Armed Forces acted as an army of occupation in their own country.

The impunity of the repressive state generated terror and defencelessness in society. Under the priority of the enforcement of social discipline, a climate of terror was established with the collective participation of the so-called security forces: the three armed forces together with the police.

For this purpose, they found their doctrinal references in the theory of national security, which has a long history of prestige in the military ranks.

Even though hundreds of people started to disappear during the third Peronist Government, it was after the 1976 Coup that this situation became more pronounced and the disappearances became a systematic, every day occurrence.

The forced disappearance of persons is not only practiced in Argentina, but also in other countries with Military and/or Authoritarian Governments in Latin America.

The totalitarian regime of 1976 attempted to "militarise" society both in its public and private scope through the introduction of terror and systematic repression, by aiming to close the channels of collective participation and social protest and by introducing the anomie and atomisation of the citizens.

In this context, the human rights movement interweaves a space for participation, contention and resistance to state terrorism.

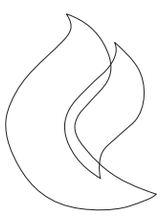
From this very broad range of expressions of the human rights movement, the Madres de Plaza de Mayo (Mothers of Plaza de Mayo) was created for the struggle against injustice and institutional violence. It emerged due to that great tragedy, and it is that same tragedy that is the origin of our political movement, which will cross frontiers.

The Madres de Plaza de Mayo movement was created as a spontaneous, visceral, horizontal, heterogeneous, pluralist space as regards conditions of class and political, cultural and religious positions. We are brought together by the need to condemn and the proposal to struggle against the emergence of a new, previously unheard of violation of human rights: the forced disappearance of persons.

The civic-military dictatorship not only left a terrible balance of murdered and tortured persons, political prisoners and missing and exiled persons, it also established the basis of the exclusive socio-economic model which later continued in Argentina.

With this last government, the Mothers obtained important achievements in their struggle for human rights, re-opening the way against impunity, and we continue our course to ensure that our children's dream, and that of our people as a whole, to fight for social justice against famine, poverty, exclusion and discrimination is achieved.

We are opposed to war.
We do not accept the death sentence.
We back the free self-determination of persons.
We are convinced that through our struggle we are collaborating with the consolidation of democracy and peace.



Las Madres de Plaza de Mayo: the struggle against institutional violence in Argentina

XX century Argentina went through a long, profound process of institutional violence, both in the form of institutional governments and provisional military governments. In authoritarian, non-civilian regimes, as citizen representation applications were closed, institutional violence was implemented as the only method of social disciplinary control in conflicts.

The last military coup to take place (1976-1983) brought more bloodshed than any other in the history of Argentina. It would be very difficult to try to synthesize the possible reasons that led to the implementing of such extreme institutional violence, for example the genocide produced, precisely due to the complexity of the situations enclosed in these historic moments, on both a national and international context.

On 24 March 1976, President María E. Martínez de Perón was overthrown by the armed forces. The military Committee that replaced her included General Jorge R. Videla, Admiral Emilio Massera and Brigadier Ramón Agosti. The Committee was registered in the middle of a new continental military trend that simultaneously brought into practice certain similar forms of violence in an important number of Latin-American countries (e.g. Operación Cóndor).

The intention they expressed was to re-found their country. Their promises were based on closing the historical cycle that had begun with Peronism in the decade of the 40's, presenting a new model for the state of welfare. At the same time, a compromise was arrived at to produce a new model, applying a new formula: neo-liberalism in economical issues together with conservative policies in political issues.

The military coup institutionalised state terrorism, perfecting even more the methodology for inducing terror, forced disappearances and death, implemented in previous times by the Triple A (Argentina anticommunist alliance). The armed forces acted as occupation army in their own country. The impunity of the repressive state generated terror and defencelessness among the society.

Based on the mentioned ideological frameworks, the provisional military government of 1976 implemented unpopular social and economical policies. Furthermore, all functions of political, trade or cultural institutions were abolished.

A climate of terror was established under the priority of social disciplining, counting on the collective participation of the so-called security forces: the three armed forces and the police force. Their doctrinal references can be found in the theory for national security, which counts with a long history of prestige in military lines.

Even though hundreds of people began to disappear during the third Peron government, it is as from the military coup in 1976 that the situation worsens and people begin to disappear on a daily, systematic basis. This manifests that it is not an isolated matter or an excess of police or military repression, but a plan organised by those in power. These actions were carried out

by the armed forces and endorsed by the important economical sectors, both national and international. A silent complicity was received from the leaders of the trade-union bureaucracy, the majority of the most important political party leaders, the hierarchy of the Catholic Church and a large part of the citizens.

The forced disappearance of people was not only practiced in Argentina, it was also established in other Latin American countries with military or authoritarian governments.

The totalitarian government established in de 1976 tried to militarise society in both its public and private scope, through the implementation of systematic terror and repression. They were heading towards the abolishment of all channels of collective participation or social protests, and the establishment of anomies and automated citizens. In this context, the movement for human rights webs a space for participation, to restrain and resist state terrorism.

From this wide range of expressions in the human rights movement, the Mothers of Plaza de Mayo emerge, to work towards the struggle against injustice and institutional violence. We emerge because of this great tragedy, the same tragedy that originated our political movement. This political movement has crossed and has yet to cross many frontiers. The Mothers of Plaza de Mayo movement was established in a spontaneous way, as a visceral space, horizontal, heterogenic and pluralist in class conditions and religious, cultural or political positions. We are overcome by the necessity to denounce and also by the proposal to fight against the arising of a new form of violation of human rights never known before: Forced disappearance of people.

In its beginnings, the movement was minimised by the civil-military dictatorship, based on the idea that, as it was formed by women and housewives in its majority, we would soon become bored and return to our household duties. We believed that our role as mothers would protect us against the repression, until Azucena Villaflor, inspirer of the Mothers movement, Ester Careaga, Mary Ponce de Bianco, two French nuns and a group of relatives were kidnapped between the 8 and 10 December in 1977, while a petition was being organised to denounce the kidnapping and disappearing of people.

The Mothers of Plaza de Mayo movement suddenly erupts into the political area, adopting a position where the need for fighting and time for action is proposed, entering terrain until then reserved only for men. At first, we didn't believe that what we were doing was political. As the years passed, we began to accept this other role that we had unexpectedly assumed. Leaving aside our home, our children and grand children, we commenced a fight that began to bring the real terror we were living in our country out of its tragic darkness, even though we did not achieve our initial aims: to find our sons and daughters alive. Our sons and daughters had been kidnapped, forcefully taken from their homes, places of work, schools or from the streets. We then began our desperate search throughout public administration offices, army and police headquarters and churches.

We asked: Where are they? What have you done with them? But the authorities gave no answer; they were not in prisons, the department of justice did not know and the Habeas Corpus remained unanswered.

Together with the rest of their belongings, the sons and daughters of the people that disappeared became part of the war booty. Pregnant women were arrested and left alive long enough to give birth in the framework of a sinister appropriation mechanism, through which the disappeared peoples sons and daughters were kidnapped and forced to live with a false identity, their origin concealed. Many times, they were forced to live with their repressors. A large number of these children still live with their appropriators. It is possible to find them, and they must be found. This is the task that the Grandmothers of Plaza de Mayo have undertaken.

Nowadays, many young people that realise they have been adopted go out in search of their real identity. The civil-military dictatorship not only left a terrible number of murders, tortures, political prisoners, disappearances and exiles, it also lay the foundations of the excluding social and economical model that later continued in Argentina.

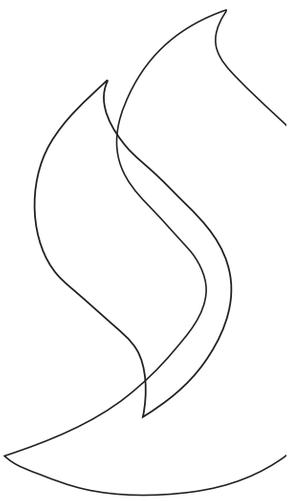
The Mothers meet every Thursday at 15:30 pm, in the Plaza de Mayo, completing the route around the Pirámide de Mayo, an emblematic moment in freedom, in front of the Government building, the Metropolitan Cathedral and the Town Council.

One week in the month of December, on the anniversary of the Universal Declaration of Human Rights, we continue carrying out the March of Resistance, and presenting our demands:

> Thorough and exhaustive investigation and the provision of information on the destiny of every one of the people arrested or made to disappear.
> Trial and conviction for all of those guilty of state terrorism.
> The orders for pardon that completed the impunity process must be declared null.
> Re-establishment of the identity of all the children, now young adults, kidnapped during the period of state terrorism.
> Unwavering battle in defence of all the human rights.

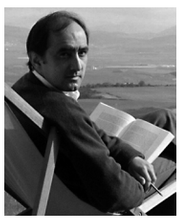
The Mothers achieved important objectives with the last government in the fight for human rights, and measures against impunity have been restored. We continue in search of the dream of our sons and daughters and of our people in general, to fight for social justice against hunger, exclusion and discrimination.

> We are opposed to war.
> We do not accept the death penalty.
> We support free self-determination of the nations.
> We are certain that with our fight we are collaborating with the development of democracy and peace.



The politics of remembrance in the Basque Country: accepting, reconciliation relating, recalling

Mr. Daniel Innerarity
Professor of philosophy at the University of Zaragoza. National Essay Prize



Curriculum

Daniel Innerarity was born in Bilbao in 1959 and is currently professor of Philosophy in the University of Zaragoza. A Doctor of Philosophy he broadened his studies in Germany (with a scholarship from the Foundation Alexander von Humboldt), Switzerland and Italy.

Among his latest books it is worth mentioning *Ética de la hospitalidad, La transformación de la política* (III Essay Prize Miguel de Unamuno and National Prize for Literature in Essay format 2003), *La sociedad invisible* (Espasa Essay Prize 2004) and *El nuevo espacio público.* Some of his books have been translated in France, Portugal, Italy and Canada.

He is a regular opinion commentator for the newspapers El Correo and El País, as well as the magazine Claves de razón práctica.

At the present time, proposed by the Senate, he is a member of the University Coordination Council

Summary

The solution to violent political conflicts gives rise to a series of discussions on the reconstruction of the past that are, at times, as intense as the conflict itself. It seems that once the main item has been resolved, the most difficult still remains to be dealt with: everything that is in any way related to reconstructing the past. Then it is confirmed that conflicts are, essentially, conflicts of interpretations, stories about the past that legitimate and condemn, that establish certain determined obligations of memory and forgetfulness. Any policy related to victims and reconciliation calls for a reflection on what can be understood as "fair memory" (Paul Ricoeur), how we can relate to our past if we want to build a future in which what we are trying to overcome does not happen again.

The politics of remembrance in the Basque Country: accepting, reconciliation relating, recalling

> "Obey time; do every day what each day demands; do not be obstinate maintaining that which is sinking, nor feel too under pressure to establish that which seems to be announcing itself; be faithful to justice, which appears in all epochs; respect freedom, which prepares all that is good; accept that the things which surround you develop without you, and leave the past to defend itself and the future to come true on its own."
>
> Benjamin Constant, *L'esprit de conquête et de l'usurpation* (Paris, Flammarion, 1986), p. 252

If some time in the future, while explaining to our sons and daughters what has occurred in the Basque Country throughout these years, they find it difficult to understand that here, people were killed for their political beliefs, that people were murdered and tortured, that there were deliberate strategies for imposition and exclusion, if this were literally something unbelievable for them, this would mean that things have gone well, that the principle of no political project justifying the assassination of innocent people has been accepted in our society. A society cannot overcome violence simply by forgetting its existence, nor by constantly recalling it, but by turning violence into something totally incomprehensible. This could be the key to social de-legitimisation of terrorism: when a society finds it impossible to come to terms with the ideas that connect violence to a pattern that can justify it, acts of violence become speechless, senseless, incomprehensible. The end of the process turns it into something hitherto unheard of, something difficult to believe.

But we do not find ourselves in that moment of time, but in another, much closer to events that are imploring to us from our recent past and still loom over us like a possible threat. It is not convenient to belittle these dramatic events, or to try to avoid the responsibilities that affect all of us, albeit in different ways. Those of us that have witnessed this tragedy cannot let it fall into oblivion without asking ourselves what we could have done better and, above all, how we should remember the events to prevent them from occurring again in the future.

The film *Ararat*, by Atom Egoyan, tells of the campaign of genocide against Armenian people carried out by the state of Turkey (an action that is still today denied by Turkey) and includes the account of a German woman that has witnessed firsthand how the Turkish soldiers committed unbelievably cruel acts against Armenian women. This witness ends her account with the words: "Now, what am I going to do with my eyes?" This is precisely the fundamental ethical question after an episode of violence. From now on, how should we look, remember and tell what has happened in a way that the victims can be distinguished, that violence can be de-legitimised and that a future reconciliation can be seen? Peace requires us to find another way of focusing on the past, present and future. When peace is achieved, the most difficult part is still left: the overcoming of hate and sectarianism,

the building of trust and elimination of terror, the re-construction of respect of the laws and the eradication of their interested manipulation. Above all, the problem of a "just remembrance" (Ricoeur) remains, how to digest the atrocities of the past and how to help the victims to regain hope.

Four principle problems are posed. I wish to contribute with my reflections on these problems: the recognition of the victims, the reconciliation of the society, telling our story and remembering those who are gone.

1. The recognition of the victims

For an adequate recognition of the victims, to be able to understand what this recognition should involve, the first thing that should be done is to bear in mind the kind of damage they have had to support. Reyes Mate (2006) synthesizes this claiming that the victims have suffered in three ways: personal suffering (physical and mental), political suffering (for having been excluded of citizenship) and a suffering that stems from the fracturing of society as a whole. To do justice towards the victims would repair these three forms of suffering: repairing personal suffering in as far as it is possible, recognition of the citizenship of the victims and reconciliation. This does not mean that we all have to agree on everything, but that a political co-habitation is constructed, notwithstanding normal democratic antagonism based on the principles of equality, plurality and inclusion.

There are many common or misunderstood areas about what the true meaning of recognition is. I think it was Paul Ricoeur (2004) who best succeeded in establishing its true dimension in both public and political aspects. Recognition is found in a dimension that exceeds formal justice but must not be confused with friendship, as it is profoundly registered in the political sphere. At the same time, a symbolic dimension is included, that is not gathered in mere procedural or material concepts of rights.

The idea of recognition is fundamental when trying to reconstruct the character of active political subjects who have been violently deprived of this capacity. The experience of being a victim certainly includes a physical suffering, but it also includes an unjustified scorn consisting in a reduction or annihilation of the capacity of acting; violence annihilates the victim's character as a political subject. Being a victim means not only damage to one's physical integrity but also being robbed of civil rights and political position. This is the situation that must be overcome. "Recognition makes equal what the offence had made unequal" (Ricoeur 2004, 268). To recognise is to re-establish in others the right to act as a political subject. We are not therefore faced with a re-distribution problem among people whose quality as members of a society with full rights is assured. What is really needed is that certain people regain the quality of co-actors for the construction of our collective destiny. If distributive justice tries to establish equivalence, the perspective of recognition stages an approval. The profound feeling of recognition could be resumed in the following statement: "I approve of your existence". I don't approve of your differences nor in our common humanity but in your differences and in your equality with me. I not only accept your existence but I assume you are necessary for me to be able to call myself me. Accepting others means considering them as necessary for the construction of one's own identity.

From this perspective one understands what one of the forms of scorn that loom over the victims consists of, in moments of resolution of conflicts. This could help us to understand why victims then often feel a new threat and how to make this fear subside. This could be called "the threat of symmetry". The philosopher Hans Jonas formulated it as a

fear of goodness and infamy ending ex aequo in immortality. What can result even more indignant for the victim is the opposite of recognition; the symmetry that some people try to establish between them and their aggressors. A war or a conflict between different communities can end like this, but in the Basque Country there has been neither one nor the other. Not even the violent episodes of state violence can justify a symmetrical pattern, in a way that the guilt could be equally shared. Violence has never been inevitable, nor can it be justified as an adequate response to violence previously suffered.

There is certainly suffering on all parts in conflicts, but not everyone that suffers is a victim (Reyes Mate). Of course that even the most relentless aggressor has inalienable rights. Furthermore, humanity demands that we relieve all sufferings in as much as is possible, but without forgetting that an innocent victim is not the same as an executioner that suffers. These two realities can not be compared, even though both require attention. As Claudio Magris stated: Equality of the victims –all are deserving of memory and mercy– is not equal in the causes for which they have died (2005). One can not invoke general suffering to dilute responsibilities and dissolve innocence in an equally shared guilt. It would be radically unjust to carry out an indifferent recognition of the victims that does not distinguish between victims and the person responsible for the victim's suffering. An error of this kind was committed a few years ago by the President of Italy, who considered the fascists and their victims on the same level. This error has been often repeated in other places (Luzzato 2004). This comparison between the two parts stems from the easy prejudice of thinking that, paying homage to the memory of all those that have suffered on both sides of a conflict, the institutions should not pronounce themselves as to the values and motivations of their acts.

In the specific case of the acts of violence in the Basque Country, we have the ethical and political obligation of not establishing or resolving the process in a way that would validate the conception that ETA has on this conflict. This would, in a way, lead to legitimisation, a posthumous victory, if we put an end to these tragic events conceding that, in spite of their fiasco, ETA was right. This is what we would be doing if we accepted that the resort of violence was inevitable and not that it was the greatest obstacle for the free decision of the Basque people; if we stopped maintaining that ETA is not the necessary answer to the political conflict but its perversion and stagnation; if we established a solution based on a warlike symmetry instead of making an effort to reach an agreement between the Basque people with varied and legitimate identifications; if we sacrifice pluralism and accept the simplified interpretation pattern that ETA has tried to impose on us… They must renounce to violence without our having to renounce to justice. We must offer them this opportunity but without saying that they are right.

2. Reconciliation and agreements

How the issue of reconciliation should be understood is a particularly controversial point in any peace process; which is the solution that corresponds to the damage caused by terrorism to the social network? On many occasions, the idea of forgivingness and reconciliation have been used as ideological justification to omit urgent amends in issues of justice, concealing truths and abolishing the victim's opportunity to speak. There are many eloquent cases in Latin-America on this subject, and through these errors we can learn a few lessons. Remembrance can not be neutral, as reconciliation is not an agreement between aggressors and victims of aggressions to try to find an intermediate meeting point between violence and democracy. Reconciliation means restoring a relationship of mutual recognition. Nevertheless, this obligation to recognise the opposite part, although directed

at all the actors, does not pose the same demands on those who have practiced violence as on those that have not. This symmetry cannot be accepted on these terms, either. We all have the same obligations but we do not all have to travel along the same paths to get there. The symmetrical pattern would be valid for what is generally called *transitional societies* in political science, to denominate those who have just left behind long processes of war or dictatorships. This was valid for the Basque society at the end of the 1970s (which justified the amnesty declared in that period), but the same can not be said thirty years later. The issue is now to retrieve those who were incapable of understanding that all forms of violence lack justification, but not to offer them undeserved legitimisation.

The other delicate issue when talking of reconciliation has to do with establishing the appropriate moment. One of the experts in the South African conflict warned against the "error of thinking that we are speaking about something that already exists at present" (Boraine 2000, 378) –probable because on this point things hadn't gone too well–. After any long conflict, it is more important not to pass too quickly onto the next stage than to rush things, and above all not to invert the order of the issues: peace, normalisation of political relationships, reconciliation. Normalisation can never be a condition for peace. There is no sense in inviting to take part in a reconciliation process when the definite reality of peace has not yet been obtained. Reconciliation is a desirable achievement. Peace may be reached without effective reconciliation, it may never come or it may come in different stages. It is possible to negotiate for peace without having obtained reconciliation, or with a very limited reconciliation, if the interests are conveniently overlapped. In any case, it would be naïve to hope for a quick start in the talks. This was the error committed after the Camp David negotiations by the Israelis. To deceive one's self with false hopes, thinking that the first steps taken have changed everything can lead to the generation of disproportionate expectations that may even endanger the preliminary agreements, causing mistrust and disappointment. It is convenient to remember that when one talks of reconciliation, a superhuman effort is being asked of many people to shape, together with other people, a future to be shared with their aggressors.

I believe that the best form of recognition towards the victims, and the best form of reconciliation, is the achievement of an ample and integrating political agreement. It is true that there must always be a difference between peace and politics. It is not legitimate to connect the end of violence with possible political agreements between the representatives. But there is a point where both paths join, and the abandoning of violence demands a certain type of political agreement that refers us to the character of the victims and their political significance. The role that the victims should play in a process to reach the elimination of all acts of violence should be outlined before those who claim that the treatment given to the victims is a technical or private issue, that it can be settled with an economical compensation or with individual affection and solidarity. It should also be made clear for those who think that the victims should be the ones that dictate the political future for all the society, as if democratic representation did not exist. What do we mean when we state that the victims deserve political recognition in the resolution of the conflict? In what way can the victims be the nucleus of the solution? Does this statement convert them into political agents of the same status as the rest or into substitutes for the current political representatives?

It is clear that the issue of the victims is not a question of private feelings but of public recognition and of a political constitution of reality. To refer to them as an inevitable misfortune, as collateral damage, is the same as treating them as trivial or preventing a real and just solution to the conflict. But their interested manipulation by political parties does

not lessen their pain, it increases it. If a victim has been used as a means, the best way to help them to regain their dignity is by rejecting their use in this way. Treating the victims as a triviality or using them in any way is a similar process that perpetuates the interested manipulation that originates their position as victims.

How should we then act or how do we interpret their real demands? What is outstanding and respectable about the victims is not what they have to say, nor is it the political party they belong to, it is having been forced into the position of victim (Reyes Mate). For this reason, the way the terrorists single out their victims does not favour any specific political party nowadays. The major ideology among the victims is therefore not a priority issue. In this way, the victims would be led into grounds they had not chosen to visit and it would be the same as granting ETA the right to establish, –albeit ex negativo– the course of the political events. If the victims are essential in the process for the solution, they are so because of their position as victim, not because of the political party they belong to. Recognition does not mean one has to do exactly what the victims say, but to do exactly the opposite of what their aggressors have done. What does this mean?

Terrorists do not take part in normal political debating. What they do is brutally exclude some of the interlocutors. Through acts of murder or intimidation, these interlocutors are deprived of the possibility of acting as a political subject. For this reason, the best reconciliation method does not consist so much in favouring the opinions of those that have been excluded, as in assuring that there will not be any more people excluded. If the objective is to help the victims regain their position as political subjects, the best recognition would be for the future agreement for cohabitation to be designed in a way that no-one can be denied their position as political subjects, enabling them help decide and define the common future for our society. Those that were declared an obstacle in obtaining certain political objectives must be made to feel that they are essential in the process of designing our future. The political agreement that will close this conflict must be based on the opposite principles to those that turned them into victims: where there was imposing and exclusion there must now be the opposite, that is to say, agreements and inclusion. It would also be a posthumous success for terrorism if we determine our political future imposing upon ourselves the prohibition of manipulating the conflicts and antagonisms in benefit of a peace that is understood as the elimination of discrepancy. We are obliged to assure that the procedures do not imply cancelling any political subjects, and this does not involve weakening one of the concepts that nourish all forms of healthy political life: the possibility of disagreeing.

The most advanced concepts in law currently mention reconstructive justice: this is not based on punishing the guilty party, but on repairing the damage caused and renewing a relationship that violence had destroyed (Garapon 2001). Law points out that, "what violence has separated must be newly joined" (Bland 1996, 11). The vision of the political future that emerges from the political agreement may be of great influence on the type of reconciliation process that will develop. It would be improper to ask the victims of violence to forget everything. It would be more reasonable and respectful to create conditions that would allow them to forget. It is true that forgetting forms part of remembering. The task is to determine the how, when, why and what for behind the need to forget. There is a very big difference between their being forgotten due to omission or imposition, submission or resignation, and being forgotten as a result of a true agreement and genuine overcoming of certain events.

Finally, reconciliation is not an objective that can be valued according to the agreements that have been reached. It is more a long and unpredictable process requiring a complete change of attitude, conduct, political culture, structures and institutions. This applies to all

levels of society, and society will be responsible for the process of reconciliation, although the institutions will have the task of promoting it.

3. Telling our story: how this story will be told

The relationship with one's own past is one of the most complex and disturbing problems that diverse political communities have faced in the second half of the 20th Century. How do societies that have just freed themselves from extreme repression or emerged from an era of situations of violence relate to their past? How do they propose to close this period of the past so that it results irreversible? How to do this and not legitimise violence at the same time? The long process for resolving violent political conflicts can give way to a series of discussions on the reconstruction of the past that are sometimes as intense as the conflict itself. It seems as if, once the main issue is resolved, the most difficult part remains to be done: all the issued involved in reconstructing our past. This is when we realise that conflicts are essentially conflicts of interpretation, stories of the past that legitimise and condemn, that establish certain rights in remembering and forgetting. And we can see that Epicteto was right when he said that what terrifies mankind is not these violent actions in themselves, but the purpose of these actions. What is the reason for the existence of this intensified controversy that always seems to accompany the moments of greatest hope?

The final stages of violence are moments that produce confusion, processes in which one verifies to what point Nietzsche's theory is correct in that it is not the events that exist, but only their interpretation. There is more acting out, feigning, gesticulating and concealing than usual, more that we are prepared to decipher. The sphere of objectivity usually remains half-hidden by the overlapping sphere where the interpretations are combating. This confrontation is transformed into a symbolic fight. It seems as if the battle is now how to impose the definite interpretation. From then on, the winner would be him who manages to impose their own vision of the events. It is convenient to accept that this parallel registering exists, and to learn to tell the difference between facts and interpretations, reality and fiction. Those who mix both issues will not be able to understand and will remain defenceless before the emotional currents that they try to transmit, in line with the different parts: fear or indignation, frustration or euphoria.

All ending of violent processes transform into battles to impose a certain version of the events, or at least to impose a version that exonerates one's own faction. There is no way out if this is not achieved. All are preparing themselves to be recorded in history in a way that will not leave them looking too bad. It is a good sign when the debate is at this stage, as it indicates that violence has become a thing of the past.

On the subject of remembrance, one must not forget that everyone is free to tell their own story, that remembrance is plural. This freedom applies both to historians and to society in general. People or social groups may organise complex events, which have involved heavy emotional strain, in many diverse ways, often contradictory. In this way, opposite interpretations of the same events coexist in one same society (Ross 2002, 303). The stories we tell to explain or justify specific events invoke the past to provide a meaning to the present. The sense of meaning and identification conveyed by this connection with the past is more important than being historically exact. Many British unionists, for example, believed that King William of Orange saved British democracy and protestant supremacy in the Battle of Boyne in 1690, in spite of the fact that William was Dutch, that he received aid from the pope and that Great Britain was not a democracy in those times.

There are occasions in which policies for remembrance are manufactured as if the state power wished to establish a definite meaning to the events, forgetting that the past is always a controversial issue. In democracy, history can only be written in a plural framework, under the watchful and critical eye of the diverse parallel memories being portrayed. It is not the work of the legislators to establish, in an authoritarian manner, rules for the interpretation of the past. Establishing the way to interpret the past is a problematic issue, a never-ending task. The obligations for remembrance must go side by side with acceptance of our historical complexity. Political and judicial truth is not alike, neither is the truth of historians. They do not always coincide, nor do they need to, which allows an occasion for certain movement and adaptation.

A basic principle in the resolving of conflicts advises on the following: The losers must never be forced to say that the winner was right. Determination to do so will endanger an adequate conclusion to the process. The difficulties consist of finding a way to balance out the need for the ending of violence and the need for refusing to be forced to accept just any justification. It would be possible to demand the maximum from those who abandon violence, but this would place difficulties on their withdrawal and allow harder members to become stronger after what they may consider an act of humiliation; at the other extreme there would be those willing to totally agree with the terrorists, if this were a means bringing for their existence to an end. Is it possible to find a position that would be both prudent and just at the same time? Would it be advisable to ease the way for the conclusion of acts of violence without giving up anything essential?

Firstly, it would be convenient to start off bearing in mind what we have learnt through experience about the way humans fight and how that fighting stops. One would not expect, nor would it be desirable, that societies that have gone through a long and profound conflict could bring a peace process to an end with a common version on the events. In my opinion, this should not be considered an objective in the process. When there are large differences in the interpretation of historical events, it is more important that those differences be accepted than pretend to absorb them into one single story that includes all the possible issues. In the Basque Country, my opinion is that nothing can surpass the document named "Plan Ardanza" (1998) that could become a feasible and dignified way out of the conflict. It already appeared clear in those days that the passing of time and the way the events evolved had surpassed the moment of choosing between making terrorists desist and giving in to make them stop killing. The aim was to offer them an apology that could lead towards the ceasing of violence, the same aim that exists now (Ibarra 2005, 210). The Plan Ardanza spoke of "something that they could interpret as a political incentive that could justify their future acts before their followers". We cannot forget that the problem we are trying to solve was generated by those that have not been capable of accepting the will of the majority of the Basque Country, through the democratic legitimacy of our institutions. We must also bear in mind that our decisions must not be aimed at correcting a situation of supposed lack of legitimacy. The mentioned document formulated the question as follows: "we do not ask ourselves what democracy should do to correct its possible deficits, we ask ourselves what it can and wishes to do to overcome the impossibility to integrate that the Basque society suffers. The democratic legitimacy of the system is not questioned". The idea of offering an apology complies with the functioning that permits some to justify their acts before others while allowing the others democratic dignity.

Nevertheless, it is one thing to tolerate an apology and another to say they were right. The official state version and above all, the principles on which our political framework will be based, and its procedures for modifications, must not legitimise the resource of violence.

It is not the same to be flexible and to decree that, on the subject of fundamental principles for cohabitation, the truth is at a half way point. The just account of the past, even though difficult, is never a half way point between victims and aggressors. The point is not to impose an "official truth" but to establish a dialogue based on our past and bearing in mind the democratic principles of respect, plurality, de-legitimisation of violence and recognition of the victims. This is what Habermas called "public use of history": debates in Germany, Italy and Spain on their fascist pasts, French debates on the Vichy regime and their colonial past, Argentinian and Chilean debates based on military dictatorships, European and American debates on slavery… to which we can now add the debate on the end to the violence of ETA and its historical judgement. They are all discussions that include a certain dimension that goes beyond the barriers of historical investigation. They are situated in the public sphere and appeal to our present, just as they will continue to do. There will always be historians that argue and people will relate the events in many different ways, even to extravagance, but our story on which our institutions will be based should include the ethical and political principles without which democratic cohabitation would be impossible.

4. Remembrance: the memory of the nations

When talking about historical memory, one must bear in mind something that usually passes unnoticed when we highlight its beneficial character and its possibilities in the reconciliation process. I am referring to the unchangeable character of the past we wish to recall and the limits of one's memory. Not even the best memory could recall what we should all really be wishing for: to recover lost lives, eliminate suffering and heal social fractures produced by long periods of violence, without leaving scars. The fact that we are all losers, albeit for different reasons and with different intensities, is what makes the discussions on winners and losers so irrelevant, compared with the brutal reality so harshly imposed on us: those absent and the wounds that still remain irreparable.

Nevertheless, our memory is capable of significant tasks, breaking with the inertia of the inevitable past and offering something new. We can carry out something with much symbolical force and, in as far as is possible, capable of repairing the historical damage caused: telling the version from the victims' point of view. Why should the most realistic perspective be that of the winners or the aggressors (that generally coincide) and not that of the absolute losers that the victims always are? The point is not only refute the rhetoric of redeeming violence, but also to replace the nation's heroic memories with a type of memory that tries to see history from the victim's point of view, avoiding triumphant tales and favouring a critical vision of one's own past. The main transforming force for memory consists in replacing the narrative of gestures with the narrative of the patient. In this sense, the rhetoric that often accompanies the victim's account should also be avoided, which seems to ignore the fact that they are precisely victims, and not heroes, two completely different realities.

The main contribution from a policy for remembrance would therefore consist in avoiding unilateral nationalist narrative, complementing it with a sceptical look towards the past. A new conception of history could emerge, where there are no communities with a destiny forged by heroic actions. A just remembrance would then be the inclusion of the suffering of the others (Levy/Sznaider, (2001). Elazar Barkan called this "the new guilt of the nations" (2000), esteeming a new moral that would include the characteristic of the different nations' disposition to accept one's own guilt and while not accusing others.

All nations have been constructed on certain events of injustice, as shown by the colonial experiences, the exclusions carried out during the creation of modern states, exterminations and impositions from one group to another or any of the other diverse forms of violence generally used by national movements for freedom. With this historical background, the nations cannot insist on maintaining a non-critical image of themselves and the memory they are constructing, but above all, they cannot allow themselves to forget the victims of their own history (Assmann 2006). This does not mean that all the nations, or nationalists, are to blame, or at least in the same amounts, but that, accepting that the nations have often served to victimise, we should propose to design them in a much more inclusive manner in the future.

That the nations should examine their past with a critical point of view does not mean that their reality or their Project is necessarily illegitimate. The fact that nationalist objectives have often been pursued, on some occasions with acts of violence, does not make null their rights as nationalists; what is, of course, invalidated is the process of imposition, but also the concept that the objectives legitimise the use of violence to obtain it. I declare this before those who believe the acts of violence were coincidental and are not conscious that their existence obliges to critically examine our history and, above all, to formulate identities in a more open manner. But this principle is also valid for those who frivolously declare aspirations that may nominally coincide with the aims of ETA are illegitimate. One thing is terrorist objectives and another the objective of the terrorists. What has been disqualified is the project of ETA, and those that coincide with the wish to impose, but not the Nationalist Project in general, if it is presented in a democratic manner. But at the same time, democratic nationalism is especially obliged to differentiate itself from ETA, not only in the means used, but also in issues referring to the formulation of the conflict we wish to resolve.

Nations are not so intrinsically perverse, but their mythical conceptions, abstract and totalitarian, are. No nation is worth so much as to liquidate the opposites or to exclude those that do not identify with them. This conviction is the great collective lesson that the end of violence offers. The ability of the Basque society to totally interiorize depends on being able to talk about a true reconciliation.

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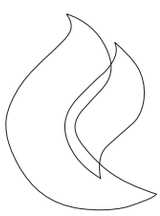

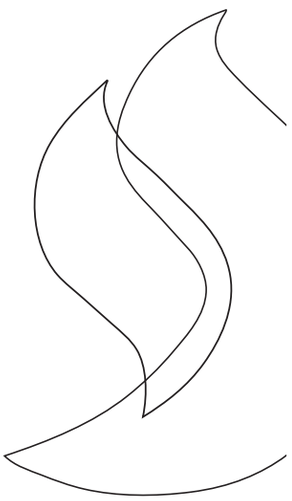

Justice and Reconciliation

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Summary

This document analyses the false contradiction between the objectives of justice and reconciliation in the context of State policies developed by societies which need to move on from dictatorships or armed conflicts but which have been dogged by a legacy of mass, systematic violations of human rights or the laws of war. There is tension between the demands of the victims and those of civil society to investigate the violations and prosecute and punish those to blame and the need to overcome the conflicts in the heart of society, conflicts which at the time gave rise to the same violations. However, this tension is not an insurmountable contradiction, and the effort to give priority to one over another is often an excuse to propitiate the impunity of crimes against people's rights. In these cases, there is a deliberate intension to present a false dilemma to the emerging democracies: if they want democratic stability they must renounce the rule of law and equality in the eyes of the law. In the interests of "reconciliation" ordered by the authority as a concession to the antidemocratic forces which call for their own impunity, is getting off to a bad start as regards democracy and peace.

Nevertheless, it is necessary to recognise that the dilemma is real, at least for those who, in good faith, attempt to develop both justice and national reconciliation. Furthermore, when the conflict has had ethnic, racial or religious dimensions –to such an extent that it has led to confrontation between communities defined as such within the State– the efforts to restore justice will not be sufficient to permanently eradicate the threat of violence. In these cases, it will also be necessary to develop specific initiatives aimed at promoting the reconciliation between confronted communities and to banish the hate and resentment.

In any case, these reconciliation initiatives will not be successful on their own; they must be accompanied by initiatives of justice, truth, reconstruction and reform of the institutions (the series of mechanisms known as "transitional justice") as it is necessary to separate those to blame for the mass, systematic abuse of the groups they claim to represent and in whose name they committed atrocities. In this way, it will prevent the sins of today being assigned to the members of those communities in the future, and it will, therefore, break the recurring cycle of violence.

Justice and Reconciliation*

Abstract

This essay studies the false contradiction between the objectives of justice and reconciliation within the context of state policy developed by societies that strive to leave behind dictatorships or armed conflict, while at the same time sustaining a legacy of massive and systematic violations of human rights and war law. On one hand, there is tension between the demands made by the victims and civilians to investigate said violations and punish the guilty parties and, on the other, the need to overcome conflict in society, conflicts that originally gave rise to these violations. This tension, however, is not an insurmountable contradiction and any attempt to place priority on some of these violations over others is often merely an excuse to grant impunity to human rights crimes. In such cases, there is a deliberate intention to present a false dilemma in emerging democracies: if a stable democracy is to be attained, it is necessary to renounce the rule of law and the concept of equality. In the interest of "reconciliation", decreed from the parties in power as a concession to the anti-democratic agents that claim their own impunity, this is a false first step in the construction of democracy and the road to peace.

At any rate, it is important to understand that the dilemma is real, at least for those that in good faith strive towards justice and national reconciliation. Moreover, when the conflict involves ethnic, racial or religious differences –in such a way that it confronts defined communities with the State– all efforts to restore justice will not be enough to fully eradicate the threat of violence. In such cases, specific initiatives will also be required to foster reconciliation among affected communities and to rid society of hate and resentment. However, these initiatives for reconciliation will not succeed in themselves; they must be implemented concurrently with initiatives of justice, truth, reparation and institutional reform (the set of mechanisms that we call "transitional justice") because it is necessary to separate the parties that are guilty of widespread and systematic abuse from the collectives that they claim to represent and in whose name they committed the atrocities. In this way, it will be possible to avoid designating today's guilt to the future members of the community and thus break the recurring cycle of violence.

I. Introduction

Societies that emerge from a dictatorship or armed conflict are often faced with the challenge of seeking a positive balance after a legacy of widespread and systematic violations of human rights. The victims and their family members form a part of the society and their suffering is an open wound in the social fabric that needs to be cured. In many cases in the past, the attempt to restore democracy and the rule of law was conceived as a sufficient reparation in itself and no other measures were taken; what is worse, it was thought that if the victims or their claims were honored in any way, this would put the stability of the new democratic regime at risk. During the last twenty years, however (and regardless of the value

judgment made on processes that deliberately ignored these legacies of atrocities), there are no cases of transitions that have not put forth solutions to the problems of their recent past. This has been the case around the globe and it has been applied in both transitions from dictatorship to democracy and from armed conflict to peace. From all of these experiences, a specific field of human rights has arisen and it is referred to as "transitional justice". This social and political praxis has also helped to improve the interpretation of international human rights law, to the point of generating affirmative obligations for states in these circumstances.

The notion of transitional justice arose in response to the confluence and competition among values that needed to be restored and fulfilled in the construction of fairer and more humane societies. On one hand, the victims of human rights violations have a right to justice, truth, reparations for suffering and the erection of institutions that can protect them from the abuse of power in the future. On the other hand, particularly in societies with a firm resolve to leave behind all traces of fratricidal conflict, a framework must be set for ceasefire and a return to politics as a solution to ideological differences. In all cases, a delicate balance must be found between the realization of justice and the creation of conditions leading to peace. National reconciliation arises as the primary objective in the transition, along with an ultimate acknowledgement: the atrocities that were committed were within the context of a conflict that needs to be resolved to prevent further tragedy in the society. In atmospheres of conflict resolution, it is often declared that the insistence on truth, justice, memory of the recent past and resistance to forgetting are barriers on the road to reconciliation between old enemies.

The urgency involved in stopping the gunfire and initiating a peace process often leads mediators to place peace above justice and to hush down claims for truth and historical memory because such efforts create a setting that may provoke parties that are used to negotiating with guns to continue doing so. In other scenarios, "alternatives" to justice are put forth as a disguise for impunity. These policies are based on the premise that a peaceful atmosphere is more favorable to human rights than a context of war. However, in reducing the debate to a formula that says that peace shall always prevail over justice, the process fails to take heed of the high –and unjust– price that is paid by innocent victims. As well, it usually constitutes a dangerous simplification that fails to lead to a lasting peace because peace without justice normally recreates situations for renewed conflict.

II. Meanings of the term "Reconciliation"

In Latin America, reconciliation has been employed as a euphemism for impunity, something that civilian organizations, understandably, refuse to accept under any circumstances. It is particularly offensive to use the pretext of reconciliation to oppose any attempts to recover justice, truth or historical memory, especially when it is simply limited to impose conditions on the recently restored democracy. As has often been the case in the Southern Cone, since transitions took place when there was no more armed conflict, then it was not considered necessary to convince any of the armed parties to put down their weapons. In these circumstances, the invocation of reconciliation as an objection to all policies of truth and justice have simply been a threat to democracy and blackmail to those brave enough to exercise it to its fullest extent, including the exercise of its attributes by legal authorities, which is an essential condition for a state with rule of law. Some elected governments directly participated in undermining democratic authority and were the main proponents of this type of reconciliation that was invoked top down, without consulting any of the victims to determine whether or not they felt reconciled.

Fortunately, since the 1980s, there have been more transitions and some of the circumstances have changed. Some of these cases have helped to give a new meaning to the concept of reconciliation and to confirm that it has a definite role in the construction of a more just society. This does not imply, however, the resigned acceptance of the contraposition between reconciliation and justice, as if they were irreconcilable concepts. Above all it is important to make some distinctions that can help to view reconciliation in a more constructive manner in the Southern Cone. Above all, national reconciliation cannot be deemed as an abstract notion; that is, by not referring to the specific conflicts that are trying to be overcome. Thus, reconciliation between political or ideological adversaries, who until now have resolved their differences with gunfire, is a legitimate aim in the development of society. The same can be said about reconciliation between ethnic or religious groups, particularly when the identity of the group has been dominated with violence. In both cases, it is of utmost importance to overcome the conflict and strive towards the mutual respect of ideas, identities and community membership.

However, these cases should be clearly differentiated from the intended reconciliation between the victims and the attacker. The defenders of impunity, in essence, declare that there were no innocent victims in the conflict and that those who were victims of torture, arbitrary arrests, disappearances and selective murder and massacre were in some way guilty of an undefined sin or crime and that, consequently, these violations should be forgiven and forgotten. This is a historical error and, even worse, a biased and false interpretation of the general context in which crimes against humanity were committed. Repression has never been so selective and caused as many innocent victims as in contemporary conflicts; the results show that in today's conflicts, a great majority of the casualties are civilians and therefore, innocent. This does not mean to say that only one side should be punished for its violations. On the contrary, it simply means that the rights of innocent victims must be respected, regardless of who their attackers were.

Ultimately, in cases where reconciliation should be a part of state policy and conceived as an end to the legacy of human rights violations, certain conditions must be met. If these conditions are not met, then reconciliation is nothing but a cover for impunity. The most important condition is that the agents of human rights abuse should be obligated to take part in an act of contrition or regret. The victims cannot be expected to forgive unless there is a prior demonstration of remorse whereby the agent admits the error and accepts responsibility. This reparation must begin by contributing to the disclosure of a full account of the facts. Once again, the victim will be more willing to forgive if all of the circumstances surrounding the facts are clearly known, including the accountability of all the persons that, by action or omission, participated in the events. In cases where there were multiple participants in the criminal act, the agent or agents that seek forgiveness must be willing to testify against those that deny their responsibility in the actions. In this sense, the impunity granted by the Truth and Reconciliation Commission in South Africa was a great step forward when compared to Latin American amnesties, because impunity was conditioned by specific actions and gestures made by the potential beneficiaries of amnesty[1].

III. Emerging Norms and International Human Rights Law

Social experiences involving transitional justice have given rise to practices that are repeated, with significant variations, in countries that are burdened with a legacy of war crimes and crimes against humanity. In all cases, this is done honestly and with the hope of making these incidents a thing of the past, although the desire to seek justice and avoid impunity has been marred with

objections and obstacles, both legal and *de facto*. As a result, the struggle to overcome these obstacles has yielded an abundance of jurisprudence for the international courts and human rights watchdogs, in their role as authorized observers and interpreters of international human rights treaties[2]. This intellectual heritage and in particular, its binding role in the decisions made by international courts, has helped to generate a series of emerging norms of international human rights law that confers States with affirmative obligations when dealing with a legacy of war crimes and human rights infractions. These affirmative obligations refer to Truth, Justice, Reparations and Institutional Reform, as mechanisms to prevent the repetition of said atrocities in the future.

More specifically, the State is obligated to investigate, process and punish the parties guilty of these crimes, discover and disclose the truth about the circumstances in which they took place, offer reparations to the victims and carry out the institutional reform necessary to secure and protect the rights of its citizens, while disqualifying and excluding those parties that have abused the power of state institutions[3].

These emerging norms have been accepted by the United Nations and other international agencies as a normative framework in which initiatives of the international community can be made in favor of societies that suffer from the consequences of armed conflict or are being rebuilt after a conflictive episode. They are conceived as guidelines for mediators, as well as for functionaries and organisms that support the restructuring of these societies[4].

The existence of these emerging norms does not imply that States are obligated to follow a single program in matters of transitional justice; on the contrary, these norms simply set forth generic obligations that are globally valid, while admitting a broad range of experimentation and adaptation to very different contexts. In essence, they are obligations of means and not of results and thus, the fundamental criteria is that of good faith: the objectives of truth, justice, reparation and institutional reform should be pursued wholeheartedly in the specific context. Similarly, the emerging norms are not conceived as a menu of options that the State can choose from; each of the objectives must be pursued in an autonomous manner without hindering the fulfillment of the rest of the objectives[5].

This normative framework, in practice, attempts to set limits to the discretion that is exercised by States in their path to transition. In this way, any policy aimed at ignoring the past or burying the truth is deemed contrary to the international obligations of that State in matters of human rights.

Similarly, this normative framework also represents a limit to the discretion exercised by the parties involved in the armed conflict, all of whom are usually directly involved in the peace negotiation process. There is no doubt that this normative framework limits the possibilities of granting broad and unconditional amnesty in exchange for a ceasefire and specialists in armed conflict resolution often reject this imposition because, and in part they are correct, they insist that the road to peace should not be subordinated to other objectives, particularly when they can be considered a negative incentive to a ceasefire.

IV. Amnesties

It is important to clarify that not all amnesties infringe international law. In fact, there are amnesties that are actually required by international law: for example, in situations of non-international armed conflict, Protocol II of the Geneva Convention establishes that at the end of the conflict the authorities should grant the "broadest possible amnesty" to the

parties involved in the conflict or that have lost their freedom for its cause[6]. It is clear, nevertheless, that this amnesty refers to crimes of treason, rebellion or sedition; that is, domestic crimes committed precisely while participating in an armed conflict against the State and, possibly (at any rate), to minor crimes related to counterinsurgency and committed by the security forces of said State. However, it is not applicable to war crimes committed by members of the insurgency or security forces in the context of armed conflict.

As indicated above, amnesties that are aimed at covering up crimes more serious than sedition, but in exchange for pledges of a certain conduct by the beneficiaries of the amnesty, regarding the restoration of truth and justice surrounding the events they participated in, are, generally, in conformance with international law of States[7]. In such cases, it would be necessary to thoroughly analyze how each amnesty is granted, since on the surface it may appear to be legitimate, but in its application, it may be in violation of the obligations imposed on the State by the emerging norms of international human rights law[8].

What can be said without any doubt at all is that amnesties with the specific legal effect of preventing further investigation, processing and punishment of parties responsible for war crimes and crimes against humanity are in violation of international law, just as are amnesties that prevent or slow down the process of investigation conceived to discover and disclose the truth.

It must be admitted that this normative framework can restrict the possibilities for peace negotiations. However, if this is the case, then it is for constructive reasons in that it requires all involved parties and mediators to explore solutions that respect the rights and needs of all those persons that are affected by the war and by the subsequent peace, instead of reducing the framework to the decisions adopted by the belligerent parties. It is clear that in the same way that war is too important to be left in the hands of the generals, peace is too important to be left only in the hands of the adversarial parties. In all human conflict, innocent victims among the civilian populace have the right to be consulted and their voice must be heard in the peace process. If this is achieved, then the peace that is attained has a better chance of being a lasting peace, since it does not leave behind persons that are alienated, hostile or resentful of their repeated victimization: first by the violence and then by the disregard of their dignity and rights after the conflict[9].

V. Reconciliation

Since the early discussions on transitional justice in the 1980s, it has been said that reconciliation should be the ultimate goal of all policies involved with the review of past events and within the context of renewed democracy and rule of law[10]. It is agreed that the mechanisms of transitional justice should be designed and implemented with the aim of reconciling adversaries and ending disputes that have led to tragic human loss. In fact, it would be irresponsible to pursue truth and justice under circumstances in which such efforts could lead to the renewed violation of human rights. Yet, we should not automatically assume that this strategy will unavoidably lead to renewed hatred, since we would then fall victim to the blackmail of those who do not seek a true reconciliation, but instead one on its own terms and that assures impunity of the crimes that have been committed. As a safeguard, we propose a specific treatment in each context to clarify the circumstances of each situation and for each historic moment and determine whether or not the proposed measures truly contribute to reconciliation.

Moreover, it is impossible to predict the outcome in each case. Because of this, and because the values of truth, justice and the respect of the rights of the victims have an intrinsic value that cannot be subordinated to others, reconciliation must not be interpreted as a "critical norm" that determines the legitimacy or illegitimacy of this type of process. In other words, it is not fair to judge the merits of processes of transitional justice based on their degree of contribution to reconciliation, since the outcome of reconciliation depends on factors and behaviors that are not under the control of the victims or of civilians, not even of judges, attorneys or other authorities that are called upon to reestablish the rule of law in a transition.

In recent times, it has been argued that criminal law is what invariably prevents reconciliation and that another type of "non-retributive" justice is not only possible, but also more conducive to reconciliation. In this same context, mention is made of "restorative justice" as being morally and politically superior to justice, in terms of criminal law. Obviously, justice, as a concept, has many meanings and interpretations, but in this essay, we wish to clarify that justice, in its strictest sense, ("retributive", if one prefers) should play a role in all transitional justice policies. We do not believe that the investigation, processing and punishment of the responsible parties, conducted in strict conformance with due process and fair trial, is always a deterrent to reconciliation. It is important to note that the notion of "restorative justice" has been borrowed from criminal law in its application to intra-family or neighbor-to-neighbor crimes and, by extension, applicable to crimes comparatively less severe than war crimes or crimes against humanity. Any effort to extrapolate the concept of restorative justice, without a clear indication of what mechanisms are being referred to, is nothing short of granting impunity to the responsible parties. This does not imply that traditional modes of conflict resolution, such as negotiation and arbitration, do not have a place in transitional justice. These strategies are necessary, particularly when dealing with intercommunity conflicts, but their effectiveness will of course depend on the clear separation of the murderers and torturers that were the self-appointed representatives of the community when the crimes were committed.

There is no doubt that local customs and traditional justice can play a major role in resolving interethnic or intercommunity differences. For example, in the current conflict in Darfur, Sudan, it is difficult to imagine a lasting solution that fails to use specific mechanisms for reconciliation between communities that are "African" and "Arab". The peace talks will necessarily address issues of land restitution, use of water and grazing grounds, preferential herding routes and other issues in a way that the livelihood of one community is not a threat to the other. In the mean time, other measures, such as criminal investigations made by the International Criminal Court, humanitarian aid and the orderly return of displaced citizens and refugees to their places of origin will only have a palliative effect until adequate formulas for reconciliation are applied to resolve, once and for all, the ethnic tensions. And yet, the opposite is also true: serious peace talks between the communities are impossible if the members of government and *janjaweed* remain at large with lobbying power and who, in representation of their tribes, committed and continue to commit widespread atrocities, which have made the humanitarian crisis at Darfur the most alarming contemporary manifestation of human despair.

VI. Conclusion

Justice and reconciliation are not antagonistic concepts, although in many cases, they are presented as such. This contraposition is often biased because it creates false dilemmas. Sometimes the dilemmas are real and the contraposition of justice and reconciliation (or between justice and peace) becomes an anchor in the process for negotiating parties and the mediators. Even in these situations, however, a stable and lasting peace, combined with genuine reconciliation, will only be feasible if the right of the victims to truth, justice, reparation and institutional reform is not completely sacrificed. Evidently, all of the interested parties must be prepared to make concessions, because otherwise the full attainment of justice will not be within anyone's grasp. But it would be a serious error to start the process by requesting that all of the concessions be made by the parties that have suffered the consequences of the conflict without having actually participated in the conflict. The dynamics of war excluded them from society and delegated them to the status of second rate citizens. In the ensuing dynamics of peace, a way must be found to respect their dignity as human beings and restore their full rights as citizens.

Notes to the conference

[*] President, the International Center for Transitional Justice (New York); Special Advisor to the Secretary General (UN) for the Prevention of Genocide.

[1] A detailed analysis of the virtues and defects of the Truth and Reconciliation process in South Africa is beyond the scope of this essay. It will suffice to say that although, initially, conditional immunity was adjusted to international standards for human rights, the lack of an active policy for punishing those who rejected this policy exposed the organic weakness of this process that, in other aspects, was indeed a noteworthy paradigm. Please refer to Garth Meintjes and Juan E Méndez, *Reconciling Amnesties with Universal Jurisdiction*, International Law Forum, The Review of the International Law Association, The Hague, Kluwer, vol. 2, No. 2, 2000.

[2] For an analysis of the main faults, resolutions of organs of treaties and reports by special reporters of the United Nations, please refer to Juan E Méndez, *Accountability for Past Abuses*, Human Rights Quarterly, vol. 19, No. 2, Mayo 1997, in particular, the quoted sources in footnote 6.

[3] Ibid.

[4] Kofi Anan, *Rule of Law and Transitional Justice in Conflict and Post Conflict Societies,* United Nations, August 2004. Please reefer also to Directives for Mediators adopted by the United Nations, Department of Political Affairs, in 1999, unpublished.

[5] These emergent norms do not refer to reconciliation practices or mechanisms. However, as expressed elsewhere in the present essay, in some cases, specially designed policies will be required to attain reconciliation between antagonists and communities in conflict.

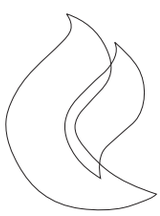
[6] Art. 6, comment 5, Additional Protocol (II) of the Geneva Convention, August 12, 1948, Relative to the Protection of Victims during Non-International Armed Conflict, June 8, 1977.

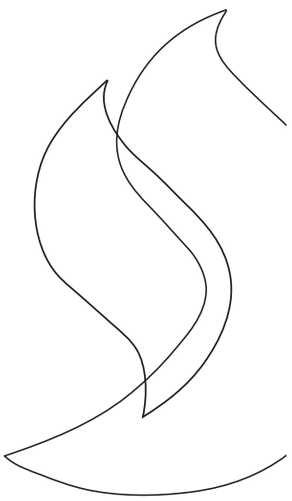
[7] John Dugard, *Reconciliation and Justice: The South African Experience,* 8 Transnational Law and Contemporary Problems 277-301, Autumn 1998.

[8] Meintjes and Méndez, cit., with some examples of the South African experience.

[9] Juan E. Méndez, *National Reconciliation, Transitional Justice and the International Criminal Court,* Ethics & International Affairs (Review of the Carnegie Council on International Affairs), vol. 15, No 1, 2001.

[10] José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in State Crimes: Punishment and Pardon, Aspen Institute, 1989.





Debate session

Nora Irma Morales de Cortiñas
Rafael Benitez
Bill Bowring
Charles Villa-Vicencio
John P. Linstroth
Carlos Martín Beristain

Nora Irma Morales de Cortiñas

I am going to break protocol, technically, because I would like to say that only a few hours ago I became great-grandmother to Julieta and I learnt that I was a great-grandmother here in the Basque Country, so I am very happy.

By the way, I am showing a photo of someone who disappeared two months ago in Argentina. He was a witness (after having previously 'disappeared') in a court case to condemn the genocide which tortured him thirty years ago. But when he testified to condemn someone who was responsible for this genocide, he was made to disappear again. We have had no news from Julio López for two months.

After listening to many tales recounting very serious situations these last few days, I thought that something fundamental was also missing over here, which involves talking about State terrorism. In Argentina we had State terrorism. In Argentina the armed forces were the occupying army in its own country. They used a notoriously cruel methodology, which involved the forced disappearance of people, which is the crime of all crimes, which is when a person goes from existing to not existing. It is similar to the mist and night Nazi methodology. This methodology was learnt and passed to our continent from Algeria and Indochina in the forties and fifties. Afterwards it was perfected in the Americas School, firstly in Panama and then in Georgia. There they taught around one hundred thousand soldiers from southern countries about torture, following this terrible methodology.

And us, the mothers, at first, when we started to get together, we looked each other in the eye, we wondered and we said 'Why are their taking our children?' And as each mother told her story, we found out: because they were militants, social, political, trade union militants, militants for life, for a country with social justice. Some time passed and we wondered 'What have they taken them for?' And with a tiny bit more experience gleaned from the streets, we found out that it was to implement a total neoliberal economic system; that they had already started to use it in 1955 when the soldiers, with civilians, bombed the Plaza de Mayo, where there were thousands of people holding a demonstration, and it was there that they determined the end of the welfare state in Argentina, a welfare state which

had been built up in the 40s and 50s, with the workers' support and efforts. This welfare state already existed wherever there was work, simple, isn't it? The welfare state works when there is work, because the towns are made up of workers and we don't want to live as beggars with what we're given – a quota to live on and not complain and not really live in this situation which raises pity and which nobody wants. We want there to be work, because women and men who want to work to maintain their homes have this right, the right to work. The right to work also respects the right to health, education, housing, the land. And this is where the story of our sons and daughters comes in. What did they want? They wanted a country with social justice. They wanted a country which was for everyone and not for a sector, such as neo-liberalism, which we still have, which is a lot for very few and very little –or sometimes nothing– for a lot of people. And this was their fight.

And they implemented State terrorism which started before 24th March 1976, when the civil-military dictatorship started. And listen, I say "civil-military dictatorship" because it was not only the military; they were also civilians (businessmen, bankers, this economic power) and also almost all the leaders from the Argentinean catholic church. All on their own, the soldiers couldn't run State terrorism. But it started with a constitutional government. In addition to the bombing of the Plaza de Mayo there were other repression movements every time the people raised their voice in protest. The "Cordobazo", the "Rosariaso", and this other great killing which was the Trelew massacre, where a group of political militants were massacred making it all look like an escape. It is true that some wanted to escape, to go to Chile and some got there, but they were later massacred in an airport in the province of Chubut. This is the story of this terrorism.

The other we knew about many years ago. We, the mothers, continue to be mothers, although we are no longer private mothers, we are also public mothers. We have to go out into the street everyday. Our life is programmed. At night, when we get home the answer machine tells us what we have to do the next day. But we find a lot of strength to do it. We do it for our sons and daughters and our people, for those who were left, those who continued fighting, from where they could, those who continue even now, those who were prisoners, those who had to go into exile. The exile was on the outside and the inside, which is even crueller than the outside, because it means moving house, telling your children not to mention your name and that they can't bring friends home. They had to get used to it, often with a new face, to save their life and their family's lives.

And in the midst of this slog and ingenuity, we started to wonder about some other issues. How did this start? What happened? Later, meeting up with other mothers, from other neighbouring countries, we started to find out that it was part of an extermination plan, programmed from the United States State Department. They sent Mr Kissinger. They gave him the Nobel Prize. It seemed that it was permitted to sow death and torture. One day this is going to stop. We're going to grab this Nobel Prize back. He went to organise the dictatorships in the Southern Cone of Latin America. Not only Argentina lived through this State terrorism. They also spread death and torture throughout Bolivia, Paraguay, Chile, Uruguay, Brazil (the Latin American Southern Cone). And this was complete torture. Because they also kidnapped – took away and kept –babies from pregnant women who were kidnapped and they handed them out to soldiers and civilians. There are still 400 of these children who are now thirty years old, who have not yet managed to recover their identity. And the grandmothers from the Plaza de Mayo are still looking for them. But, this crime – stealing babies' identities – only added to the torture, when they were so enraged, that, for example, they put a metal spoon in the vagina of a pregnant woman and they put the electric cattle prod on this spoon. For this reason, when we talk about forgiving and reconciliation, I say to myself:

Do any of you think that these facts were ever justified in any situation? No. They have to be punished so that no one ever does them again. What's more, they took this torture one step further; they would torture people and whilst they were still alive, they would take them on death flights and throw them into the river or the sea, alive. What for? Once we asked ourselves: What was this for? A German sailor told us it was so that fish could devour them. That was why they threw people in who were still alive. It was maximum cruelty.

I have been listening to all the horror in these stories and maybe it has made me harder, because everything that happened was so serious!! I've heard people talking about terrorism, terrorism. What about State terrorism? Today I listened to the man who said that they were taking Rumsfeld to trial. It seemed to me that something had to be done. That the real terrorists cannot be allowed to go free, who go killing and torturing people in all countries, who want to take over – because what is going in Iraq and Afghanistan is not a war, they are invasions to take over the land and the wealth of these people. We did not change (the story) because we are going to continue dressing it up and later there will be no way back. If we antagonise history, we will not be able to go back. We have to start by thinking who we are going to punish for this notorious terrorism which the State causes and arms.

This is just a small part of Argentinean history. And within this fight against terrorism I am going to tell you about the scene which I experienced when I came to Spain. In the plane, in my row, there was a young Bolivian woman, with her 17 year old nephew. We all got off the plane. They were coming here to Bilbao as well and I lost track of them because I was a bit distracted and I went to the bus station because I was getting a bus here. I lost this woman with her nephew. When I found the nephew again –an hour and a half later– I said to him: "What about your aunt?" "I lost her" "What do you mean you lost her?" "I was in a queue, an immigration line. I went first. I went forward. I was waiting for her. I didn't see her again. She disappeared from the queue. I didn't see her again." "What do you mean you didn't see her again? "She's just not there" I said to him: "OK, let's go and look for her." We went to see the Guardia Civil and the very gentlemanly agent who was there took us to Immigration. They had stopped the woman. Two hours in a tiny room to interrogate her. Of course, she had dark skin. She had all the paperwork in order, everything by the book. She also came to Spain with an invitation. She produced the invitation, everything in order. That kid was so scared that he'd lost his aunt!

These are just anecdotes which we can tell, but they worry us. In that situation I acted like a mother from the Plaza de Mayo. I said to him "What do you mean! No, this can't be happening, let's go and talk to the ambassador." And the policeman looked at me as if he wanted to say: "How can a person disappear who is inside here?" And afterwards he said to me: "You can rest assured lady that nobody has been arrested."

Our sons and daughters in this period when they disappeared were subversives. Now they would be called "terrorists" for what they did, for fighting for social justice, for fighting for a country for everyone, for wishing to express their support for their people and all people; because our children looked out for other people. They had a light guiding their path, Che Guevara. This has to be said because he lit up their history. And today they would say that they are terrorists. And this is what is happening in the world, thanks to the greatest terrorist who imposes laws and spreads them all over the world. Let's take, for example, the invasion of Haiti. Who programmed it? It was programmed by the United States. They made a resolution in the United Nations: "All countries who want Good must follow me." And so they go to Haiti, the poorest country on the continent, to take away the little food and water that they have. And there are around 14 countries pointing their guns at the people there all day long.

I was at two or three missions with Adolfo Pérez Esquivel and other people and we saw it and we have photos. They go round pointing guns at everyone (who they call the "terrorists"). It's something incomprehensible, but I am not going to go down this road because we have heard enough here.

But I also want to say that we have made breakthroughs lately in Argentina. Because in Argentina, after this brutal State terrorism (and here in the room I have with me one of my spiritual children, Juan Méndez, and another son, Juan Vandeleer, but Juan is from Gustavo's time of militancy and I believe that he understands what I am saying. He was a political prisoner and shared many moments of fighting and emotions with us) the mothers came out into the street and we got together in the Plaza de Mayo because it is the Republic's main square, where the shouts of freedom went up and popular fighting took place. And there we started to go out into the street in this search which has lasted almost 30 years. Thirty years that we have been going every Thursday, that we continue in this march of resistance (which Eva de Bonafine says that she won't do anymore, because it seems that life has adapted to her). We don't know what happened to each and every one of the arrestees who disappeared. Justice is very slow because there were two impunity laws: "Punto Final / Full Stop" and "Obediencia Debida / Due Obedience", reprieves for the people responsible for the genocides and it was hard for us to break them down, a lot of street mobilisation, a lot of demands and protests. We thought we would never get rid of them. They seemed to be immovable. However, popular protest tore them down. And today trials are being re-opened. It's taken twenty years of unmoving, sleeping justice, it has been so difficult! And look, the first two trials, after declaring these impunity laws null and void, López disappears because he stood as a witness, for condemning someone responsible for genocide. It is so difficult!

I am going to tell you that we, the Mothers, the families, the grandmothers, we do not want to reconcile ourselves with the people responsible for the genocides, with the murderers; we want justice, we want them to go to prison so that it never happens again because we are already reconciled - with the people. We walk with the people, we respect the people and they respect us and this is the path – the path of truth, justice, memory but not reconciliation. Although I recognise here that elsewhere, in the Basque Country, like in South Africa, and in other countries, another method could work. I remember when apartheid finished in South Africa, some members of parliament came to speak to the mothers to see what we thought about the path they were going to follow. We told them that what we wanted was truth and justice. When they told us that they were going to use the method there where the people responsible for the genocides, the repressors, the victimisers were going to sit down opposite the person who was tortured and they were going to reconcile their differences, we thought that it wouldn't work. But then they told us what happened in South Africa: there are a million victims, a million victimisers. Later maybe our colleague from South Africa will answer to explain what is different in each country. For us it was State terrorism with a notorious and criminal methodology. I still don't know what happened to Gustavo. I have nothing, no news at all. There are archives in the Argentinean Republic but whilst the people responsible for the genocides (soldiers and civilians) continue to walk free among the people, they continue to make excuses for State terrorism. There are journalists, from what is known as popular journalism who have time and again excused what was really State terrorism. The soldiers do not want to be brought to trial and condemned. They want to live in impunity. They are not going to get away with it because whilst there are still mothers, fathers, children, brothers and friends who feel this pain which they caused us, none of them can remain in impunity. So that it does not happen again to your children and grandchildren.

And this is why we're here, to continue fighting and to claim back all the days of fighting from our sons and daughters, everyday vindicating this fight for social justice which still does not exist. In Argentina, a country which is currently in economic recovery, due to neo-liberalism there is still more money for the rich and less money for the poor. We have to change this, because when we vindicate our sons and our daughters we are saying that we want to be told what happened to all of them, we want to recover the identity of the babies who were taken, and we want there to be social justice in the country, redistribution of wealth, because is the way to vindicate them. Argentina today has a surplus. Because they are going to put together (money) just to pay off an external debt, which is not ours, which is not the people's. The external debt in Argentina has a human cost of 30,000 people disappeared and arrested – women and men -, 10,000 political prisoners from this period, thousands of people in exile and more than 100 children still dying everyday of hunger or curable diseases. Look and see if we have to still keep fighting. How can we, the mothers, grow old? Who said that? We have to continue. We have to continue, with your help. And elsewhere, in this country, people also fighting for peace, elsewhere in countries which need peace, but not the peace of the cemeteries. They want peace to live in a population which is happy. This is the peace which we want. When a population fights, they fight for what is fair, so that this population is respected. And that's what we want.

Rafael Sainz de Rosas

Obviously it would be ostentatious of me to add a single word after this testimony to life and very lucid political analysis.

The question is that some topics for analysis have been raised around what was said by Mr Bowring, Mr Benítez and Mr Villa-Vicencio, as well as following the proposal by Mrs Nora Morales Cortiñas. In any case, I would give priority to the reflections or the questions which you want to raise.

Ramón Salinas Erkiaga

I am a member of the National Eusko Alkartasuna Organisation. Above all, I would like to thank the Basque Government and particularly the Department of Justice for organising this congress. It is very interesting to have listened to all of you.

I would like to ask two questions. One would be to comment on the question of torture and another on the right to self-determination. All this applied in this case to the Basque Country, Euskal Herria, in resolving conflicts and in the peace process.

I am going to start with the question of torture. Considering human rights as a fundamental value in a rule of law and the right to life being one of its basic pillars, I would like to enter into the torturous debate on torture, so widely practised by so many governments in several countries over history. I am going to refer to some important documents which condemn torture –forgive me for going on about it but I consider it to be very important– , among which we have the Universal Declaration of Human Rights, in its point five; then we have the Geneva Conventions, particularly article three of the three Geneva conventions and article 99 of the third Geneva convention. We have the International Covenant on Civil and Political Rights, in its seventh article; the European Convention for the Protection of Human Rights and Fundamental Freedoms in article three; the American Convention on Human Rights, in article 5, section 2; the African Charter on Human and People's Rights,

in article five; we have the Convention Against Torture and other cruel, inhumane or degrading treatment or punishment. They all totally condemn this "tool" of torture. I am going on about this because…"What can I say?", for example, it makes me furious that the Spanish Government often rejects the idea that there is torture in Spain, particularly related to ETA prisoners and also with people from the izquierda abertzale who are arrested. The Spanish government often, or almost always, alleges that ETA has rule for its people to say that they are systematically tortured. This question can be refuted perfectly, and proof of this is that there are various reporters, for example, from the United Nations organisation, from the Human Rights Commission, among whom I am going to particularly quote Ted Bamboen. Ted Banboen, in his resolution dated 06/02/2004 recommended several matters to the Spanish government. In one of them he said that, when taking people from ETA's environment or from the izquierda abertzale, they should avoid denying their right to communication. Denying communication is a terrible thing and we know that it is a large part of torture. He said that this non communication would have to be ruled out, that their practices would have to be made visible. For example, he gave some recommendations: that they would have to make known the names of the people in the interrogations, they would have to be seen and the interrogations would have to be recorded. Manfred Novak, the latest reporter, said the same. I think that this is a very important fact and it should be clarified.

Rafael Sainz de Rosa

Moving the questions to the speakers with one aside: Manfred Novak, in his report dated March 2006, not only remarked on the Spanish government's monitoring and lack of compliance with recommendations but he also remarked on the monitoring and lack of compliance with the recommendations which were made by the Basque Government and the Ertzaintza. We should put it in its global context, because this is also related to the idea of peace, the idea of reconciliation, the idea of looking at ourselves to see what we can improve to move forwards. Anybody want to answer?

Nora Irma Morales de Cortiñas

I would like to say that, of course, we reject all torture, in Spain and in any country where it is still practised.

Rafael Benitez

As far as the European Council is concerned, of course prohibition of torture is absolute; there is no possible restriction, or any circumstances which can justify torture. From there I should conclude that, for example, whether lack of communication is torture is another different question. As far as the European Council is concerned, on the one hand there is the European Court of Human Rights, which has already tackled this question in a series of decisions and on the other hand there is the Torture Prevention Committee which regularly visits detention centres in member states and examines the situation. But, as far as prohibiting torture is concerned, it is absolute and there is no situation where it can be justified, so I think there is no doubt there. Unfortunately, although there is an international agreement and a consensus that torture is unjustified in all circumstances and that there is no possibility of delaying this absolute prohibition, it continues to be carried out throughout the world. Of course this is a fight which we must join in. Regarding what our "madre de mayo" has said, I think that it is a fight which still unfortunately continues in the world and we have to join forces and keep on fighting.

Bill Bowring

I only wanted to add that I come from a country which has been condemned by the European Court of Human Rights and criticised both by Ted Bamboen and by Manfred Novak and I think that this is an important issue in many countries in Europe. I also wanted to say that the European Association of Lawyers for Democracy and Human Rights, which I am president of, is very proud to work closely with Julen Arzuaga and his colleagues at Beatokia, the Basque Human Rights Observatory. We follow the issues that they cover closely through the work that they run.

John P. Linstroth

I have two comments which refer to the nebulous which exists around the general definition of terrorism. During the Reagan Administration the definition changed. In this United States Administration, George Washington, the first President of the United States would have been considered a terrorist. To relate this to another comment: I recently attended a lunch with at a University in England with my Irish friends. Also attending the lunch was the University Bursar who just happened to be ex-military and he said something along the lines of "all IRA members are common delinquents" and so my Irish friend said: "common delinquents don't go on a hunger strike and die for their political ideas." I would simply like to know what comments you would make to this statement.

Afterwards, I also have a question for Rafael, returning to the idea of defining terrorism which, as we known, can be very hazy. It can mark a clear difference between international terrorism and liberation movements but without really covering State terrorism as the last speaker showed us. One of the best books recently published on the matter is entitled Good Muslim bad Muslim by Mahmood Mamdani, lecturer at the University of Columbia. He talks about how Al-Qaeda is really a product of the cold war, of what happened with the Mujaidins in Afghanistan. There is also another book, a pretty good collection entitled Death Squad on the politics of State terrorism. Maybe someone would like to make a comment on this.

Bill Bowring

I agree with everything you've just said. In my presentation, I already mentioned the comments made by our former Home Secretary, Charles Clarke, which seemed totally extraordinary to me and even more so coming from a former empire where, over the last century there were a series of anti-colonial fights, which would now be qualified as terrorists. I would like to add that, on the Dutch-American side of my family, one of my forefathers fought with George Washington against the British in the American War of Independence and therefore it is almost certain that I have descended from a 'terrorist' even if I am not one myself.

Rafael Benitez

I think that it is no coincidence that the international community has so many difficulties resolving this matter. An ordinary crime is differentiated from terrorism by political motivation; if not, we would not need any type of barriers. It really is political motivation. The difficulty for the international communities and I believe that they have managed to agree on this, is that there are things which cannot be tolerated, not even in the name of a political

cause. The death of innocent civilians, for example, is something which cannot be tolerated, not even in the name of a political cause, and I think that the distinction revolves around this point. Of course, with this background, the difficulty lies in how to conciliate this with meeting certain legitimate objectives, such as fighting against oppression or other causes. Up to now there has been a doctrine in international legislation on people's rights to self-determination. It was already there, it's nothing new, it did not emerge on September 11th, it dates back a long time, and it is tied to the decolonisation process. But today the balance mainly consists of saying that certain types of violence, murdering people, indiscriminately destroying property, kidnapping people… things like that cannot be justified by any reason. Even if these are very important considerations politically, not even this can justify them, and it is interesting to know that there is an agreement – and I mentioned this in my presentation – which dates from the 1990s to say that there is no justification and this agreement comes from the UN. It is not a text adopted by the Security Council, it is a text adopted by the General Assembly which is maybe the most democratic organ within the United Nations system and we all know that the UN is not perfect, but it's what we've got and within the UN system, the General Assembly is doubtlessly the most democratic organ: one country, one vote. So, the United Nations General Assembly has condemned any act or practice of terrorism qualifying it as criminal and unjustifiable, independently of its motivation, how it is done, or what is expressed by a person, independently of the place where this act is committed and independently of their relationship with terrorism. So there is an agreement.

So then, the question which we could raise is as follows: Do we need a definition of terrorism today to be able to effectively tackle some of the expressions, maybe the greatest expressions of terrorism? The answer is no. We can tackle the vast majority of these expressions without needing a prior definition. What will a definition give us? It would provide a little more clarity on the current situation; it would provide a little more justice, because it would also tackle some of the problems. Unfortunately, we are in no position today to solve some of these problems and I believe that this is what explains the current state of things.

In my own personal experience, when we are dealing with radical Muslim terrorism, I have reached the conclusion that many of non radical people's perceptions of the fundamental causes of these forms of terrorism are linked to a sincere feeling of injustice. Out there, there is a feeling that the world is not a fair place, that people do not have the same opportunities, that in general there is a lack of justice in the world. And as some people do not have any perspective of the future, the 'best weapon' they have is to blow themselves up. Some people might think that this comes from a lack of culture or a lack of understanding. Call it what you want.

But it is true, and it is my own personal experience, that a vast majority of the international community think that there is a lot of injustice in the world today and this is the reason why we are seeing a change which tends to tackle the root causes of terrorism instead of simply centring on repression or suppression, which are clearly necessary, because you can't just stand back and watch them destroy buildings and watch thousands of innocents die, but I believe that a greater effort should be made to promote a culture of tolerance and to promote culture and inter-religion dialogue. This will not bring short term results but it is clearly the only way out.

Before, I finished my presentation by quoting the Secretary General. The worst thing that could happen to the international community is that in the name of defending the values we believe in, whether referring to human rights or the rule of law, we end up renouncing them. And some of the things we have seen, such as secret detention centres, flights over

European soil, are clearly not the path to take. These methods are not only morally condemnable but they are also very dangerous for the sustainability of the international community's joint fight against international terrorism.

Charles Villa-Vicencio

Very quickly. What my experience clearly demonstrates to me, after having been very involved in the South African situation and having worked in other conflict situations, mainly in Africa, it is that out there, there are very few psychopathic terrorists. Terrorists believe in themselves, and we have already mentioned this. What defines a terrorist? The ruling classes are those who define and make limits. Therefore, whilst it is important to talk about definitions and debate around this issue (given that I think that it is very important), I would like to make two comments. Firstly, it is true that in many situations in which I have participated, it is the terrorists who manage to get peace. If you don't talk to the soldiers, if you don't sit down with the 'terrorists' you won't get an agreement. And when you sit down with these people, you begin to discover what maybe leads them to behave this way. The second comment is that I suppose that people who forge peace are the people who decide to do that. Once again, excuse me, but returning to the situation in South Africa, when Mr Mandela was asked who he was going to negotiate with, he said: "It is not my job to tell the other side who has to sit down at the negotiating table." So then they said: "Would you negotiate with P. W. Boetha, a 'terrorist', a State terrorist?" Mandela answered: "I will negotiate with whoever wishes to construct peace. Let's forget the word terrorist."

One last comment. I have recently been working in the south of the Sudan. I used to sit down with a group of people and talk about the country's problems. And I remember an old Dinka chief, whose words will stay with me to my dying day, saying: "Excuse me Sir, Do you want to know what building peace means? Do you want to know what reconciliation means? I answered, "Please tell me" and he said: "it means being ready to sit down under the same tree with your enemy, regardless of who this enemy is, and regardless of what they say. Building peace is nothing more than that."

Bill Bowring

Two very brief comments on what Rafael said. Firstly, I would like to thank him for having reminded us about the European Council's work and particularly Dick Martí, who has done a fantastic job investigating the "extraordinary rendition" and the association between this "extraordinary rendition" and the use of torture. He has made a great contribution. Secondly, as far as the question on defining terrorism is concerned, I have been representing Chechens against Russia in different legal cases before the European Court of Human Rights and last year we won the first six cases. They were brought by women, mothers whose sons were murdered in actions by the Russian armed forces, when, for example, they bombed a column of civil refugees. At the hearing at the European Court of Human Rights, the Russian generals, Shamanov and Nedopitko, were declared responsible for these crimes and of course, true responsibility lies further up. These are not only crimes or murders, but also war crimes. I think that whether we want to use the word terrorism or not is irrelevant. This only demonstrates that terrorism is a label which can be applied to what State civil servants do. My question, for the moment a rhetorical question, is: What can be done to a European Council member state that does this type of things, who is condemned for it but continues doing it? That's the question.

Carlos Villán

I am the President of the Spanish Association to Develop the International Right to Human Rights. I wanted, with the moderator's permission, to return to the topic of torture, which seems to be very important and which is an expression of State terrorism. I think that it is possible to affirm that in this country, in the Basque Country, and in the Spanish context in general, there has been and there is torture. Torture and abuse. It has even been demonstrated judicially and also internationally. Judicially, the Supreme Court recognised that GAL was a State terrorist phenomenon within the anti-terrorist fight and that, as the State used mechanisms of terror, it disqualified itself from the anti-terrorist fight. And this is what is happening right now in all this fight/war against terror which was proclaimed by the United States Republican Administration. They are the same arguments. So then, the question of torture in Spain, as it has been qualified by the reporters from the former Commission and current Council for Human Rights, happily, as a systematic practice, but also as a consistent, persistent and repeated practice. I would even say that it covers not only the State's activities in the fight against terrorism but also other activities which have nothing to do with the fight against terrorism. The reporter Van Boemel exemplifies specific cases of how abuse and torture were used against coloured people, meaning immigrants and women, raping women in Spanish police stations in general and not only in the Basque Country, in specific situations. Even, as the moderator reported, this did not only involve State security forces and bodies but also the regional police, including the Basques and the Catalans and, I would add, the local police. The Torrevieja case is very recent, and it should not be forgotten. Nor the case of raping several women in foreign internment centres in Malaga – foreign women, immigrants, without papers-, which is also an eye catching case of abuse, raping women by the police and which, of course, is the equivalent of torture.

Consequently, it is clear that the European CPT has offered the Spanish State recommendations coinciding with same recommendations made by special reporters from the Human Rights Council and what we have seen so far tells us that the Spanish State has not shown sufficient receptivity to apply these recommendations. This is deplorable and must be denounced. Consequently, if we also want to consider the Basque context, we have to petition the State to recognise the abuse and torture committed in the past, including among the Basque people. But beyond that, I would like to put a positive note on this debate and it is that the Spanish State has made a very important gesture over the last few months. Last February, the Spanish State ratified the optional protocol to the Convention against Torture. This is a very important optional protocol because as many of you probably know, it establishes a similar mechanism to the European Committee for the Prevention of Torture, consistent in that a subcommittee of the United Nations is created against torture which can make periodic visits without warning, to practically any detention centre in the States which have signed this optional protocol, in this case Spain. And it also obliges the States which ratify the protocol to create specific national mechanisms to prevent torture. With this, what it aims to highlight is that we can live in hope that Spain really wants no more to do with torture, a practice handed down from their past under Franco, among the State's security bodies and forces, that it will no longer contaminate the regional and local police, and that opportune measures will be taken so that this does not happen again and that, in the context of negotiation for peace in the Basque Country, what has happened in the past is duly recognised.

Carlos Martín Beristain

Thank you very much professor. Coming out of my role as moderator, I would like to comment on a couple of things. Signing the protocol is effectively very good news. Of course, the key is in the specific mechanism which you were talking about, the specific national mechanism which must be independent, which must be effective and which must be diligent in investigation. Then, this hope will be confirmed or defrauded depending simply on this mechanism: to whom this responsibility is adjudicated and the degree of receptivity among the parties with management responsibility. Because, we are witnesses, in the Spanish context, in the Basque context as well, to a double language from the political parties which, when you are trying to make global declarations, are sincerely against torture, but when they have the responsibility to manage such delicate and necessary areas such as the Home Office – so necessary for defending Human Rights- they follow the logic of the anecdote which I am going to tell you. I was told it by a professor from the University of Tel Aviv in an international Penologist Congress. We were talking about different guarantees in terms of respect in the penal procedure and I was talking to him about this guarantee-based discourse from our own field of cultural-juridical reference. Before Charles said that it was rare to find psychopathic terrorists. And it is also rare to find psychopathic torturers. The majority of torturers are upright civil servants who want to do their job well. They are not unbalanced people. And this guy said to me that we could imagine that the police have some reliable information to suspect that the person they have arrested knows when and where a bomb is going to be set in a place in an action which is going to cause a large number of victims. Why on earth would the law prohibit this policeman from using torture or any other method which would get him the information which is going to save lives? And this is the question about torture; torture is not the only way of going against a freedom fight. No, no. Is the fight (torture) against evil, against terrorists, against people who want to harm others, justified here today? Political forces have a responsibility, not in so many entities to present a vision of society but entities whose members have a management responsibility in the Home Office. We have examples in Spain and in the Basque Country as well, of non receptivity when faced with the criticism from Amnesty International, from the Torture Prevention Committee, from the UN reporters, and from Ararteko.

Julen Arzuaga

As Rafa has just mentioned, I don't believe that the Spanish government are in any hurry to implement this optional protocol. The important thing is not that it's been signed but the political desire that exists after implementing what has been signed, to implement it. We wanted to offer the Spanish Ombudsman institution the mechanism to implement the prevention of torture at a national level so that this optional protocol can be developed. We are aware of the attitude displayed by this Ombudsman: Múgica demonstrated once that "he is not there to defend terrorists," and we already know that torture is one of the problems which occurs around terrorism. The non communication system is also there. It is true that torture is not systematic, but there is a system which helps it to exist. I will take the opportunity to say that, today, the current situation is truly deplorable. We have heard people speak about reconciliation, repair, the truth, justice… but the specific current situation is that torture exists; sentences are being passed in the Spanish National Court which are so exceptional, but not only this. In my opinion, what could be considered as a second torture is occurring, meaning that people who report it are in turn reported. This is the case of Unai Romano, who has been accused of collaborating with an armed group after reporting

torture. The same happened to Martxelo Otamendi. This is why it continues to appear in the news. But not only this, we currently have a prisoner on a hunger strike, who has been given a twelve year sentence for writing two articles giving his opinion. It still remains to be seen whether these two articles are really guilty of threats. The dispersion continues out there and I would also like its consequence to be taken into account because this is an issue which is also concerned with human rights. For this reason, I would like to make a small summary of the human rights situation. We could see the relationship which all this has with what we've talked about concerning justice, truth and reconciliation. Yesterday, Mr McEvoy told us: "If the British won't move on small things, a humanitarian issue, they are not serious". I would like to bring these words to our context, to our situation. If the Spanish authorities will not move on humanitarian matters, then in my opinion, they are not taking things seriously.

Mireia Uranga

I work for peace with different organisations, both in Euskal Herria and in other countries, particularly linked to the Gernika Gogoratuz Peace Studies Centre. I find it very interesting to see the different positions adopted by the victims who have appeared here, and I believe that they have shown what we find out there in the real world. I would like to specifically ask, for example Nora, how she would see, from her sensitivity, that here, people from both ETA and the State who have committed serious crimes, can go back on the street as part of the process. And we have heard about Northern Ireland and how it was a success –at least for those who were organising it– , how they managed it in a few years, how prisoners guilty of very serious crimes were allowed back on the streets. And I would also like to ask Charles how this issue of victims was handled in South Africa, victims who claim a punishment and do not accept any type of process with dialogue and that through which there might be amnesties.

Txema Urquijo

Having the testimony of a victim of terrorism at the table, in the form of Nora, and having demonstrated a central question from the perspective of victims of terrorism, which is their vindication for their right to non-impunity of victimisers, perpetrators, how can this be conciliated with the attitudes which are involved in releasing prisoners or with amnesty, which have been proposed by the representatives of the Truth and Reconciliation Commission in South Africa? Because, in short, what we have seen is the difficulty of conciliation between the victim's interest or satisfaction and punishing the guilty party, the aggressor. This means that we are given the feeling, particularly Nora's clear words, that the victim's satisfaction is intensely linked to the guilty party's punishment. If this is the case, it confronts, I think, any type of measure that concerns impunity or with not fulfilling the punishment or there not being a punishment for the aggressor. I think that this is one of the major problems which any armed conflict resolution process faces, involving violent conflict, and of course it is a reflection which is current right now in our country, in our society, and it is going to be current in the immediate future.

Nora Irma Morales de Cortiñas

When we said "there has to be justice" this is because all crimes have to be punished. Now, every country has its history, its methodology to move forward. I am talking about Argentina, and we believe that they committed crimes of "de-humanity" there that we want to be judged and condemned. We do not want revenge. No mother or father has ever

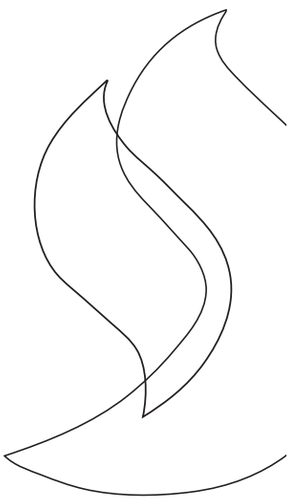
gone out to take revenge by their own hand but we are looking for justice and truth. And we are going to continue this fight. We do not want to live in impunity. This is the case in Argentina. And I am presenting it like that here, aren't I? It was State terrorism. For common crimes, because in any case, the groups of popular fighters committed crimes, there is a penal code and it can be used. But not the brutality of what was State terrorism, with torture, with the forced disappearance of people, which is the crime of all crimes, and with stealing children, the other additional crime. For this reason, I specified and said what it was like over there that I felt that no one talked about State terrorism. However, in every country there was State terrorism, or terrorism directed at other countries in the form of invasions… And when I talk about reconciliation, we are clear that we are not going to reconcile with people who committed genocide. And I am talking about genocides because it was a plan designed to eliminate a national group who fought for social justice and fought for their people. This is what it's like in Argentina. We do not want revenge, and we would also never support the death penalty. The Mothers participate in all Amnesty International campaigns against the death penalty all over the world. This is our position.

Charles Villa-Vicencio

Firstly, we have to understand that the process of amnesty in South Africa was understood as an exceptional transition mechanism. It was perceived as the price which had to be paid to attract people to the negotiation table and accept the result of a democratic election which put people who had previously been excluded in a position of power. Therefore, it was an exceptional mechanism. It was valued to the extent that there had to be public transparency, etc.

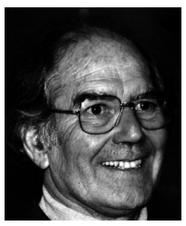
Secondly, the legislation also specified that anyone to whom the Commission did not declare amnesty or anyone who did not want to ask for amnesty would be taken to court. I have been at the front of a movement in South Africa to tell the current government: "When are they going to put on trial the people or refused to cross this historical bridge or could not do it? When are these trials going to start?" Let me to tell you that I believe that right now in South Africa there is not too much political desire to take anyone to trial. The focus has changed (I will come straight to the point) and the priority is no longer the trials but economic reconstruction, as I said before.

My last comment: amnesty is nothing new. Sometimes this is the price which has to be paid. I wish I had more time to talk about it. We ran a survey in South Africa, a couple of years after the Truth and Reconciliation Commission, and 68% of South Africans said that "we can live with the amnesty process as a political necessity." 76% of black South Africans said that "it is something we can accept." I believe that we have to accept that Africa as a whole (although it is true that we should not generalise) is less inclined towards punishment or repercussions than in Europe or particularly in the United States. It is simply a less litigating society. Let's try to learn to live together. And for this reason, I continue to remind people that, when everyone had been throwing stones at Robert Mugabe, Ian Smith continued walking through the streets of Harare. In South Africa, P.W. Boetha, the former President, the State president, a terrorist, the personification of State terrorism, died a week ago. Flags flew at half mast and President Mbeki attended his funeral. Could anyone give any more?



The value of zero."0" in conflict resolution

Mr. Adolfo Pérez Esquivel
Nobel Prize for Peace 1980. President of the foundation Peace and Justice Service. Argentina



Curriculum

Adolfo Pérez Esquivel was born in Buenos Aires on 26th November 1931. He studied at the San Francisco school, the National School of Fine Arts in Buenos Aires and the National University of La Plata.

He has worked in teaching for 25 years at primary, secondary and university level in the faculty of Architecture and Town Planning at the National University of La Plata, the "Manuel Belgrano" National School of Fine Arts, the Azul Teacher Training College, province of Buenos Aires (primary and secondary level), and he was unemployed during the time of the military dictatorship in Argentina (1976).

As an artist, his work has been intense, including exhibitions, murals, monuments, among which we can highlight the Monument to the Refugees, situated at the headquarters of the UNHCR (United Nations High Commissioner for Refugees) in Switzerland, the Mural on the Latin-American People in Riobamba Cathedral (Ecuador), in Pucahuaico, a Mural dedicated to Monsignor Proaño and the Indigenous People of Ecuador, Monument to Mothers in Bernal and Azul (province of Buenos Aires). His "Via Crucis Latinoamericano y Paño Cuaresmal" was presented in Misereor, in Germany, and Fastenopfer in Switzerland, ecclesial organisations of international cooperation.

In 1980, he was awarded the Nobel Peace Prize for his work in defence of Human Rights. His words when he received the prize were: " [...] I accept this on behalf of the people of Latin America, particularly the poor and all of those who are committed to their people [...] "

In February 1994, he took part in the Mission to Thailand of the Nobel Peace Prize Winners for the liberation of Aung San Suu Kyi (Winner of the Nobel Peace Prize 1991), who had been imprisoned for more than three years. This mission visited the Burmese refugee camps; the El Dalai Lama, Archbishop Desmond Tutu, Mairead Corrigan and Betty Williams also participated in the mission.

He is currently the President of the Honorary Committee of the Peace and Justice Service in Latin America, President of the International League for the Rights and Liberation of Peoples with headquarters in Milan, Italy, and Member of the Peoples' Permanent Tribunal.

He is a member of the jury for the UNESCO "Félix Houphouët Boigny" Peace Price. In December 1996, he received the "World Citizen" award, given by the Boston Center for the 21st Century.

From 1997, he formed a part of the "Call by the Nobel Peace Prize Winners for the Children of the World", to encourage the United Nations to pronounce the year 2000 as the "International Year for a Culture of Peace" and to declare the first decade of the New Millennium as the "International Decade for a Culture of Peace and Non-Violence for the Children of the World". And this was carried out by the United Nations General Assembly in response to a petition signed by all the Nobel Peace Prize Winners.

From September 1998, he was the Holder of the Free Chair "Education for Peace and Human Rights", in the faculty of Social Sciences of the University of Buenos Aires.

He received the "Pacem in Terris" award given by the Diocese of Davenport, United States, in 1999.

In March of the same year, together with the Nobel Peace Price Winner Mairead Corrigan, he made a trip to Iraq to learn more about the situation of its people and to demand an end to the Blockade.

From the year 2003, he has been President of the International Academy of Environmental Sciences (IAES) in Venice, Italy.

Summary

The start of the 21st century demonstrates a world in which war-like conflicts reign, encouraging a culture of violence, which is imposed on society itself through the media and education. This increases among chindren, in families and in society.

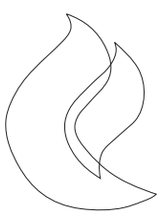
For this reason, it is necessary to "disarm the armed consciousness".

For this to happen in the Basque Country it must be taken into account that any negotiation takes time and that we must be patient and lucid to overcome the obstacles. The main part has to be played by the Basque people and all armed action must stop. The solution must involve everyone, the government and the opposition party. The Government must give specific signs, such as bringing Basque prisoners back to the Basque Country.

We have to look for paths towards moral repair for the victims. From the legal point of view, we to take into account the national and international right for truth and justice.

It is necessary to support friendly people and countries that can contribute to negotiations and strengthen dialogue.

This is a conflict which alludes to a population´s memories, identity and values; to their existence, their sovereignty and their self-determination.



The value of zero."0" in conflict resolution

The world today is undergoing ever-faster change. Technologies have altered our lives and reduced distances. Information that is spreading vertiginously misinforms us and reveals behaviour conditioned by what has come to be termed "globalisation". In these processes the situations and subjects have changed, roles have been transformed and in many cases conflicts, spheres of influence and interests have become more sharply opposed to one another, drawing in new subjects and actors. In other scenarios, where it has previously seemed impossible, it has now become possible to establish dialogue and formulate proposals which can lead to solutions, perhaps not ideal ones, but solutions nevertheless.

We are living, to a certain extent, what Ciro Algería, the great Peruvian writer, stated in his novel "the world is broad and alien", where small, powerful groups have appropriated the world and have left the majority of the world's population excluded and marginalised, suffering hunger, poverty and exploitation.

These political, social and economic power sectors put financial capital before human capital. Atahualpa Yupanqui, the great Argentinean poet and singer, in one of his most celebrated songs, says that "las penas son de nosotros, las vaquitas son ajenas..." with the resignation of those who know that some people are born into riches while others are born into poverty. But in spite of everything they continue in the struggle to reach their objectives, and that is the dynamic that drives the lives of individuals and the lives of nations.

These processes and changes are taking place on this small planet called Earth, our home, which today is in danger due to the irrational way in which it is being exploited. It would seem that instead of valuing the world we have, we consider it to be of little value, and values themselves have ceased to exist.

We all know that one of the great discoveries of humankind is the "0" (zero) which revolutionised human beings' knowledge and gave value and content to thought and to mathematics. We cannot conceptualise them and consider them without the zero.

We often hear a popular saying, when something is considered of absolutely no value which says "it/he is a nothing/nobody". But if to that zero which symbolises "nothing" we add a "1" (one) to its left, the "0" takes on an entirely different value acquiring a number of both symbolic and real meanings. Depending on the number of zeros that are added, they acquire values which make us dizzy. Economic values and other valuations with various social, cultural, political and other meanings can have this effect. The numbers acquire significance in relation to this "0" which on its own is "nothing"

This brief example of the relative nature of values and symbols provides us with new challenges. Values which previously seemed fixed, today have been transformed, some have been devalued and others revalued.

The break up of the Soviet Union is an example to consider. They had shared world power with the United States and competed with them for power as a result of the Second

World War. The Cold War was the root of tension and the basis for the distribution of power after the Yalta agreements.

It is not my intention in this lecture to further develop those themes with which everyone is familiar, simply to point them out.

Over time and through the dynamic of the transformation of the world and tensions "Perestroika" emerged and the break up of the Soviet Union came about. This led to the fall of the Berlin Wall, causing a major upheaval in society and in the power relations between the two superpowers. Then other powers began to emerge, particularly China.

The Cold War came to an end and many of us waited in hope for international relations to enter into a period of collaboration between the most developed countries and countries still in the process of developing. We hoped they would collaborate to combat hunger, poverty and the plundering of resources from the impoverished nations. We were mistaken, and we must recognise that we were naïve, that the human condition and economic, political and strategic interests would seek to accumulate the greatest possible strength and power. The United States ceased to be a hegemonic country, transforming itself into an empire, which is currently imposing its will on the rest of the world, ignoring international law and the pacts and protocols sanctioned by the United Nations, violating human rights in various parts of the world, provoking wars and armed conflicts and generating more hunger and poverty in the world, which then leads to greater insecurity and tensions.

The great power, faced with the September 11 attack on the Twin Towers, introduced the "axis of evil" and so-called "preventive wars", using kidnapping, "extraordinary renditions" and assassinations of opponents and setting up concentration camps such as the military base it has in Guantánamo, Cuba.

However, we cannot blame the United States for all the evils of the world. Let us remember that the present situation of tensions and problems that humanity is experiencing cannot exist without the consent and complicity of other rulers and transnational companies, for whom wars are big business, enabling them to strengthen the military industrial complex that represents millions of dollars and euros. They are traffickers of death, warlords who have formed private armies that sell to the highest bidder and whose only flags are dollars and euros. And on some occasions they barter for payment in strategic minerals such as diamonds, gold and silver.

Wars and armed conflicts continue in the 21st century; the war against Iraq and Afghanistan; in Africa, in Rwanda and the Congo, peoples who are the victims of genocide; these must all make us pause to think. And the grave situation in the Middle East between Israel and Palestine; the recent invasion of the Lebanon; the increase in nuclear arsenals, and the new "members of the terror club" who believe that having nuclear weapons gives them greater security and in fact only manages to increase the risk that is already weighing on planet Earth and the whole of humanity.

We are living in a culture of violence, imposed by the mass media, in education and in society. We can see it growing between children, in families and in society. The justifications given are diverse and the logic used indicates behaviour which needs to be analysed. Many believe that the strongest should impose their will by violence on their opponents. The counter-argument is that generating more violence creates a vicious circle, a downward spiral to which there is no solution. The strongest can defeat the weakest, but do not convince them and so the conflict continues unresolved.

Raimond Panikkar states that it is necessary "to disarm armed reasoning", to look for dialogue and ways that enable people's entrenched attitudes to be disarmed. The example of the Berlin Wall can help us to understand this, as after its fall other walls were erected as a result of intolerance. One such wall was that erected by Israel to divide Palestine, thinking that in doing so they would be more secure. This was another grave error. Today Israel is much more insecure and there is greater tension than before. The conflict which has gone on for nearly fifty years and in which two generations have been killing one another continues to be unresolved.

The United States has erected the wall of shame on the frontier with Mexico. The superpower wants goods to cross the frontier, but rejects human beings. The division between North Korea and South Korea continues. It is a fractured country, victim of the interests of the superpowers. Pakistan and India have been divided and in confrontation with one another ever since independence.

Other conflicts are relevant in terms of the internal situation of the countries involved, such as Colombia with its fight with the guerrillas, paramilitary groups and para-police groups. Others looked for ways of overcoming the conflict, as in Northern Ireland, where after decades of confrontations, pain and tears a solution to the conflict was arrived at, perhaps not ideal but a solution nevertheless.

The civil war in El Salvador cost the lives of 70 thousand people; in Guatemala more than 200 thousand died and disappeared in decades of violence. Despite the pain and the horror they lived through, solutions were reached to put and end to the fratricidal war. Not all the problems have been resolved but one has to remember that "out of acorns great oaks grow" and "Every journey starts with a single step". This Zen proverb helps us to comprehend the journeys to be undertaken.

But the hardest walls of all to knock down are within every one of us, in our lives, in ourselves; in the societies in which we live, in the intolerance of some in relation to others and that will continue if the capacity for understanding and values with which to "disarm armed reason" do not exist.

I cannot forget the problem which the Basque Country is undergoing and the hard times it is suffering due to violence. Much has been done to try to overcome it. There were attempts over time, and regrettably many failed to reach a just solution. The political will did not exist amongst the parties to resolve the conflict. We are now facing a new opportunity. Today the political will does exist to progress towards a solution and to find ways to achieve dialogue and understanding in order to overcome the violence which has been going on for decades and which has led to tension and the loss of human lives.

I would like to make a few points which I believe have to be taken into account in order to find alternatives and be able to make progress in reaching the objectives.

In negotiations, there are moments when progress can be made, and this often happens quite unexpectedly. One has to be patient and clear to overcome obstacles. An old indigenous Guarani woman, who had lived for many suns and many moons and had the wisdom of knowing how to listen, said that there is a need to find a balance within ourselves and with others. In the societies in which we live we need to find a balance between us and the universe and between us and God. When balance is lost, violence results. When I was a child they used to say to me that you have to wait until the turbulent waters of a river calm down and become still to be able to see their transparency and discover the bottom.

That Indian was my grandmother, whose life had marked her face with creases, brought about by pain and hope

In all negotiation processes, the advances and setbacks are part of the agreements. They make it possible to progress through the different stages and finally reach agreement over those aspects which can be resolved. It is not necessary to wait until everything can be resolved; there are tactics and strategies which enable partial objectives to be reached and which make it possible to progress.

During the time I acted in the conflict between ETA and the Spanish government I suggested that the problem was not only two sided. The fundamental protagonist in the conflict is the Basque people themselves who cannot take the role of the "silent partner". There is no solution to the problem without the participation of the Basque people. The parties need to take specific and credible steps, such as suspending armed activities, a step that has already been taken and is important to maintain over time.

The Spanish government finds itself subject to pressure from the opposition, principally from the Partido Popular that is trying to block any solution to the problem that is proposed, using hoping to achieve their objectives as a political catch phrase, so that nothing changes. It is necessary to open the way to dialogue with the opposition because a just solution involves everyone concerned, rather than just political and ideological positions.

The government needs to give definite signals in order to make progress in resolving the conflict. A key point, on which I always insisted, is bringing the ETA prisoners closer to the Basque country, for humanitarian reasons, and the right which stipulates that prisoners must complete their sentences near the places where they live so that their relatives can visit them.

Another of the problems that must be dealt with is the victims of violence. Regrettably lives cannot be regained, but ways must be sought of providing moral and material reparation in accordance with humanitarian law, so that acts of violence do not occur again. From the legal point of view, national and international law of truth and justice must be taken into account; there are bloody acts that should be dealt with in working groups within the framework of the current law.

It is necessary to call for support and monitoring from individuals and countries that can contribute to the negotiations and strengthen the dialogue. There are organisations with extensive experience in conflict resolution. I think that one should remember that people who are not involved can see the situation in perspective without being dominated by their emotions, and so can contribute objectively to bringing the parties together.

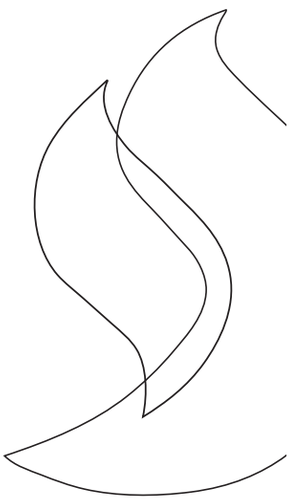
Various organisations in the Basque country have been working for many years to find alternative ways of resolving conflicts, including the situation in Navarra and that of the Basques in France. The Basque country was divided. I believe that it is not just a question of a territorial problem, it is much more profound, and concerns the memory, identity and values of a people, their existence, their sovereignty and their self-determination.

There are many questions and possible ways forward and we cannot come to a standstill, facing a blank wall, without the possibility of making progress, or finding solutions. Peoples must decide their own paths, what they want and how they want it in order to overcome the conflict and construct peace and understanding between individuals and peoples.

In today's world, marked by so called "globalisation", a strange word that I do not like, there is talk of interdependence, of societies in which "single thought" exists, massification and consumer societies that lead to a loss of identities and values. It is as if we were returning to the "0 a la izquierda".

In this globalised frenzy the other side of the coin is the capacity of peoples to resist, to "think independently", and to strengthen their memory and the values which form their raison d'être. These are the seeds which resist current events and are now re-emerging with strength, and whose cause we proclaim in the World Social Forum. "Another world is possible".

Dear friends, I deeply regret not being able to be with you to share your concerns and the paths of hope. I wish you all the best and you know that you always have a brother who wishes you great strength and hope.



Conclusions

Report. II International Human Rights Congress: resolving conflicts

The reflections which are presented below aim to summaries some of the main ideas which emerged during the "2nd International Human Rights Congress: Resolving Conflicts," an even which aimed to contribute new perspectives to the peace process which the Basque Country is undergoing. These reflections, which were already presented in the closing event of the Congress, cannot be considered as structured conclusions but as a summary of the event, ordering recurring themes in the speeches and the debate sessions.

Decidedly, one of the encompassing points in the Congress was the conception of Human Rights as a major, transverse axis, involved in peace processes and not an accessory issue (this trend is being consolidated in the UN, particularly helped by the Brahimi report). Furthermore, it was stressed that respecting human rights should not depend on agreements reached in a negotiation process but they should be a prior and nonnegotiable question. In this respect, the implications are clear in relation to the red-hot issues which open up the human rights wound in the name of fighting terrorism, dispersing prisoners, lack of communication in the field of anti-terrorist legislation or the political party act itself.

The fundamental questions that emerged during the Congress can be mainly classified into three groups: the challenges of peace processes, their difficulties or most sensitive aspects and guidelines for resolving them from a compared perspective.

As far as the goals are concerned, it has been that one of the goals in a peace process involves achieving a balance between what is required in terms of human rights another need to make good process. Although a pragmatic conception or conflict solving can lead human rights left to one side so as to solve it sooner, it has been that, precisely from an utilitarian perspective, the inclusion of human rights in the process is what makes sure that peace will last and that the conflict does not start up again.

Another of the fundamental challenges in any peace process and a prior condition to reconciliation is that the truth should come out. In this respect, allusions were made on repeated occasions to interdisciplinary independent commissions who, thanks to their credibility, are the ideal medium to work towards this target. In the debate sessions the point was raised on the need to give greater depth of meaning to the word "truth", with emphasis on working towards at least being stand up to reject lies.

A second block highlighted the difficulties or sensitive aspects for those people who the process must stand up against.

Firstly, and as has been highlighted in other countries, the issue of prisoners acquired great importance. In fact, the treatment that this issue is given can even demonstrate the type of conflicts this will turn out to be. Among the aspects that were brought up in this field, we should highlight reinsertion of prisoners, their participation in the peace process and above all, problems that can be derived from conceding general amnesties.

Secondly, the issue of the victims should be mentioned, as this sets a guideline for the whole peace process. Among the ideas that were brought up during the Congress, we should emphasise the importance given to appropriate damage repair (which would cover both financial compensation and symbolic repairs) as well as respect for diversity (although warning of the danger which comes with recognising symmetry between the parts). Another frequently mentioned aspect relating to the victims was that they cannot be asked to forgive o forget, although the importance was stressed that conditions are created for them to do so (starting for example by assuming responsibility for the damage inflicted).

Another of the aspects which were highlighted as possible obstacles for the peace process were legal recourse through criminalisation of the negotiation itself and specific groups, as well as torture, a realistic situation which was included in the debate, qualifying it as a persistent factor requiring urgent attention.

In short, it emphasised the need to unify justice and flexibility, highlighting that it would be beneficial to all if the law did not represent an obstacle but also created appropriate limits for flexibility.

A third and final block should cover the steps to follow to guarantee success for the whole peace process, meaning that certain prior premises must be taken into consideration which emerged during the Congress: firstly, it cannot be ignored that conflicts involve change, to the extend that they involve real-world dynamics. In this respect, and as experts remind us, we should remember that signing a peace treaty does not signify that the conflict has been solved, but that a new phase is starting. Secondly, it tackled the fact that democratic principles do not receive the same consideration and respect in all conflictive societies. And as the last of these premises, it highlighted the need for the whole peace process to adapt to the dynamics of societies in conflict, attempting to avoid, as far as possible, the international community´s authoritarianism over this society.

Secondly, another of the most oustanding points for the speakers and participants in the debate sessions involved the characteristics required by all peace processes. The transparency of the process and the need to recognise both individual and collective responsibility were widely developed highlighting, above all, the importance of dialogue. Dialogue was seen as the essential mechanism in resolving conflicts, invalidating any repressive or oppressive means.

Finally, the congress looked at the need for participation from people affected by the process, the need to create an inclusive process that facilitates intervention from all the groups involved and which respects the balance between men and women. It recognises the importance of collaboration from the international community whenever this does not mean it taking over running the process from those affected by it.

To finish, we should affirm that it is necessary to have a certain 'attitude' to undertake a successful peace process. The capacity lo listen and empathy, the faculty to humanise others are essential qualities to develop the process properly, in addition to persistence and imagination to obtain satisfactory results, because, as similar experiences have shown, peace processes are always long and difficult.

The leaders must be conscious of their responsibility and what this brings with it. Therefore, they should be prepared to face up to complicated situations and to understand that negotiations always imply concessions and compromises. Initiative and political courage are essential thus we cannot expect changes in others if we are not prepared to change ourselves.

Finally it was stressed that in a peace process, all policies that target victims and reconciliation must involve the need to reconstruct the past and develop a "historical memory". Reconciliation can never signify impunity, nor can it be used as an excuse to oppose recovering truth and memory.