

Restoring a just order in post-conflict situations in the light of the social teachings of the Catholic Church

by **Giorgio Filibeck**

We should start by noting that, even today, not all post-conflict situations are marked by a return to true peace. A situation of latent conflict often persists, ranging from isolated hostile acts, sometimes terrorist in nature, to sporadic military operations which maintain a climate of aggressivity. In such situations, it may be hard to ensure the security conditions which are so vital to the proper functioning of justice. Effective justice is thus conditioned by an essentially political factor: without a real consensus on ending armed conflict, it is impossible to restore an order in which justice can be seen as a realistic goal. However, if there is no political will to punish those responsible for behaviour that is morally unacceptable, quite apart from being legally criminal, it will be impossible to pave the way for authentic peace.

We know full well that peace cannot be defined as the absence of war, but is based on justice; this fact must, however, be emphasized. In terms of our reflection, justice goes hand-in-hand with truth, another precondition for justice.

Two thousand years ago, in a “political” trial in Jerusalem that was to become famous, the representative of the colonial power of those days, the procurator Pontius Pilate, listened distractedly as the accused, a Jew, a certain Jesus Christ, told him that he had come to bear witness to the

The author is a member of the Secretariat of the Pontifical Council for Justice and Peace.

Original: French

truth. The puzzled procurator answered him almost as if reflecting out loud: "What is truth?" (John 18:38). This question is both deeply troubling and crucial, and takes on its full significance in relation to the issue concerning us here, for it refers essentially to each person's responsibility, at whatever level it may be, and covers not only actions but also omissions.

We all know that the trial just mentioned ended with a death sentence. The Roman procurator, who exercised a type of "supra-national jurisdiction" in those days, thought that the accused was innocent, but condemned him for reasons of political expediency, at the request of the "national jurisdiction", following a kind of trial by the people — yet another reason, by the way, for reservations on the ability of a national legal system always to judge objectively!

Truth is also a force for peace, for only knowledge of the facts can help to bring about a climate in which it is possible to defuse the antagonisms that smolder under the shadows of suspicion, to overcome the aggressivity that feeds on the desire for revenge, and to choose the response best able to further the quest for mutual understanding. Such a response can be "just" even if it is not strictly "judicial". It may seem somewhat inappropriate to introduce the notion of equity into this context, but I should like to paraphrase Pascal: "Equity has reasons which justice does not understand." This is not to deny the principle of legality that underlies modern criminal law, nor to whitewash the guilty, but to suggest that there are certain contexts where an approach other than legal proceedings may be possible, or a judge may be granted equitable leeway in applying the law. It is not a question of relativizing the law, but of keeping in mind the old wisdom of Roman jurists who stressed that *summum ius, summa iniuria*; in other words, if the legalistic approach is carried to extremes, it leads precisely in the opposite direction from that intended, that is the defence and promotion of human dignity and peace.

In situations where there have been deep rifts in the social fabric of a nation or an ethnic community, dignity that has been trampled on and peace that has been shattered cannot be restored solely through legal procedures. In any case, the legal process must be complemented by in-depth education. We should not cherish the illusion that condemnation — and I would say above all if this entails capital punishment — is enough to eliminate crimes against humanity. Penal sanctions must be accompanied by an investment in education, and this is also true for common crimes (although I would recall that any murder is fundamentally an act against a human being, against his or her right to life — from conception until natural death — and thus against humanity). Actually, when we speak

of a “culture of impunity”, it is a clear sign of the importance of the educational dimension.

In situations where crimes against humanity have been committed, it is particularly important that *post factum* punishment be accompanied by action designed to change hearts and minds. In some cases, judicial proceedings can help to bring about this change, while in others the outcome can be better achieved by other measures. The two approaches may also be complementary, depending on the gravity of the crimes.

To prosecute or not to prosecute? That is not the question! Rather, we must consider the causes of a conflict, and the conditions in which criminal behaviour erupted. If such behaviour is to be permanently eliminated, its roots must be dug up, and the path of reconciliation must be travelled. This is a hard road to follow, because it requires a change of heart. It is quite simply a matter of moving from hatred to love. These words may sound out of place in a legal perspective, but if we lack the courage to look at the ultimate goal of our efforts, then there is a danger that our commitment will be vain. “Evoking the past” in order to exorcise its ghosts is necessary, but it is not sufficient.

It is also important to act on the level of consciences, and here the South African experience after the establishment of the *Truth and Reconciliation Commission* seems especially worthy of note. In the final analysis, every law is born or dies in the human conscience. And this is precisely the dramatic situation of international humanitarian law: highly developed in terms of legal instruments, but widely flouted in practice.

Dissemination of these legal instruments is not sufficient. It must be accompanied by appropriate education in the principles underlying and inspiring international humanitarian law, above all the eminent dignity of every human being, at all stages of existence. Within such a pedagogical process, motivations of a religious order can play a significant role in orienting the conscience towards behaviour in keeping with legal provisions. Therefore, programmes of instruction in international humanitarian law would greatly benefit if they were drawn up in cooperation with religious authorities.

Some people have reservations concerning the positive role that religion can play in providing solid motivations for respect for international humanitarian law: they use the argument of armed conflicts of a religious nature. However, this argument is based on a superficial reading; in-depth analysis reveals that the root cause of such conflicts is a struggle for power which exploits religious identity to reinforce the reasons for fighting.

Now that progress is being made towards the establishment of an international criminal court, despite some resistance, it seems useful to recall that the Catholic Church has encouraged such a step for quite some time. I refer in particular to a speech made by Pope Pius XII on 3 October 1953 to the participants in the Sixth International Congress on Criminal Law. In surprisingly contemporary tones, considering how long ago it was, the Pope took up the question now under consideration. For Pius XII, “protecting individuals and peoples from injustice and violations of the law by drawing up an international penal code is a noble aim”. He referred to the tragic experience of two world wars, in which the enemy “was in general no longer thought of as a human being,” an attitude that led to criminal behaviour. For the Pope it was “imperative that all the guilty, whoever they may be, be called to account and punished, and that nothing should shield them from punishment for their deeds, neither victory, nor even the plea that they were acting on higher orders”. He hoped to see the adoption of “clearly defined coercive legal norms which will be ratified in formal treaties, and thus be binding on the signatory States”. The object of these norms should be “particularly serious crimes” — the only ones for which “it is possible to establish a uniform penal code for all countries”.

The Pope gave objective criteria for identifying the particularly serious crimes to be prosecuted, listing first of all the case of a war “that does not entail the unconditional need for self-defence”, and declared: “The community of nations must reckon with criminals without conscience, who are not afraid to unleash total war in pursuit of their ambitions”. He also gave a list of criminal acts, ranging from the shootings of innocent people in reprisal to mass deportations.

He then discussed the sentences to be imposed, noting that “where a criminal game is played with human life, and where hundreds and thousands of people are subjected to great suffering, a simple withdrawal of civil rights is a mockery of justice”, and said that sentences “should fit the seriousness of crimes”. He recommended an agreement to ensure that sentences be uniformly applied, while noting that “those who live by injustice cannot contribute to the setting up of laws”.

The Pope stressed the importance of legal guarantees for defendants, noting that “sending someone to a concentration camp and keeping him there with no regular trial is a mockery of law”. He particularly emphasized the prohibition on physical and psychological torture, and cited Pope Nicholas I who, in reply to a query from the Bulgarian King in 866, clearly proclaimed the inadmissibility of such a practice under both divine and human law.

Pius XII also stressed the need to guarantee “the possibility for the accused to defend himself properly, and not just as a matter of form”, as well as the “impartial composition of the court of justice ... which is especially important when international relations are involved in criminal trials”; in such cases, “it may be necessary to resort to an international court, or at least allow the possibility of appealing from a national court to an international court” so as to avoid the deplorable sight of “the victor judging the vanquished for war crimes, even though the victor is guilty of similar actions against the vanquished”.

Pius XII touched lastly on the difficult question of establishing guilt and responsibility, and confirmed the moral and legal validity of the principle *in dubio standum est pro reo*. He was well aware that armed conflict raises the delicate problem of orders issued by “higher authorities”, and he reiterated the moral rule that “no higher authority is entitled to order an immoral action”, suggesting that this rule be translated into an appropriate legal form.

In the Pope’s view, “a positive law presupposes a set of fundamental requirements borrowed from the ontological order”, and consequently “all public law and all human rights have a clear, solid and lasting foundation in common human nature”. Despite age-old polemics, the structure of law continues to rest on this “natural” base. This is especially true for international humanitarian law, as is illustrated, for example, by the famous “Martens clause”.

The ontological dimension basically means that human dignity is a transcendent value inasmuch as it provides a yardstick for any human action. If humanitarian law does not take root in the conscience in all circumstances, its respect will ultimately depend solely on the will of the strongest, and attempts to codify it will thus fail.

The topic has carried us a long way: reconciliation is costly; above all, it is not an alternative to justice. Pope John Paul II made this point very clearly in his Message for the 1997 World Day of Peace: “Another essential requisite for forgiveness is *justice*, which finds its ultimate foundation in the law of God and in his plan of love and mercy for humanity. Understood in this way, justice is not limited to establishing what is right between the parties in conflict but looks above all to re-establishing authentic relationships with God, with oneself and with others. Thus there is no contradiction between forgiveness and justice. Forgiveness neither eliminates nor lessens the need for the reparation which justice requires, but seeks to reintegrate individuals and groups into society, and States into the community of Nations. No punishment can

suppress the inalienable dignity of those who have committed evil. The door to repentance and rehabilitation must always remain open.”

If it is true that the search for compromise is a feature of peace negotiations, this does not mean that all is up for bargaining. It is important to know how to base the negotiations on elements capable of furthering the great process of peace that opens up once agreements have been reached, because the struggle against impunity requires intervention on different levels.
