

## Transitional justice and sanctions

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### **Abstract**

*Transitional justice aims at once to restore victims' dignity, build confidence between warring groups and foster the institutional changes needed to bring about a new relationship within the population, in order to usher in the rule of law without endorsing practices that amount to total or partial impunity. In situations of post-conflict, however, governments are also faced with other pressing needs, such as disarming fighting forces, improving civilian security, compensating victims and relaunching the economy of a society in ruins. This article explores the relationship between these needs and transitional justice mechanisms, and critically evaluates their influence on the forms justice has taken in post-conflict situations.*

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Transitional justice is a concept with wide currency nowadays. Regarded as a mechanism allowing a shift – transition – from an authoritarian system in which there is no rule of law to a democratic regime that respects human rights, it is nevertheless highly ambiguous as regards both the philosophy that subtends it and the methods it employs.

The avowed aims of transitional justice are at once to restore victims' dignity, build confidence between warring groups and foster the institutional changes needed to bring about a new relationship within the population, in order to usher in the rule of law without endorsing practices that amount to total or partial impunity. The various measures that make up transitional justice generally combine “healing” measures of restorative justice (truth and reconciliation commissions) with a parallel system of punitive justice (in particular with regard to those chiefly responsible for and the perpetrators of

the most serious crimes).<sup>1</sup> Moreover, transitional justice arrangements set out to reform institutions by restoring the primacy of law and making sure that the judicial bodies are operational for the future. At the same time, they work to ensure that the crimes committed during the previous era do not go unpunished.

Transitional justice therefore pursues manifold aims in a post-conflict situation in which those in government are faced with other pressing needs such as disarming fighting forces, improving civilian security, compensating victims and relaunching the economy of a society in ruins.

## Obstacles to setting up transitional justice arrangements

Does the end of a conflict always present all the conditions necessary for transitional justice arrangements to be put in place?

Disarmament, demobilization and reintegration as top priorities viewed in the light of demands of transitional justice: the case of the Democratic Republic of the Congo

The Democratic Republic of the Congo (DRC) experienced one of the longest-lived dictatorships on the African continent. Colonel Mobutu, who seized power in 1965, was to cling on to it until the “war of liberation” in 1996–7 in which Uganda and Rwanda took part. The combined death toll of that war and the subsequent one, which broke out in 1998, was some three to four million, depending on the source, over and above the countless victims of the Mobutu regime.<sup>2</sup>

As of today, almost half the fighters have been processed through disarmament measures, but in terms of justice the transition has achieved virtually nothing. Plans for an international tribunal for the DRC have not come to fruition and the International Criminal Court has indicted and brought to trial only one accused. Moreover, the Truth and Reconciliation Committee provided for under

1 For a definition of transitional justice, see Alex Boraine, President of the International Centre for Transitional Justice, “La justice traditionnelle: un nouveau domaine”, Colloquium “Réparer les effets du passé. Réparations et transitions vers la démocratie”, Ottawa, 11 March 2004, available at [www.idrc.ca/uploads/user-S/10899187131Discours\\_d'Alex\\_Boraine.doc](http://www.idrc.ca/uploads/user-S/10899187131Discours_d'Alex_Boraine.doc) (last visited 10 July 2008); Marc Freeman and Dorothee Marotine, “Qu’est-ce que la justice transitionnelle ?”, International Centre for Transitional Justice, 19 November 2007, available at [www.ictj.org/images/content/7/5/752.pdf](http://www.ictj.org/images/content/7/5/752.pdf) (last visited 10 July 2008); the observations of Juan Méndez in the *amicus curiae* brief submitted to the Colombian Constitutional Court on the Justice and Peace Act (Law 975) on 17 January 2007, analysing the requirements of transitional justice on the basis of various experiences, available at [www.ictj.org/en/news/press/release/767.html](http://www.ictj.org/en/news/press/release/767.html) (last visited 10 July 2008).

2 The PopulationData.net Centre lists two studies by the International Rescue Committee dated April 2003 and December 2004 on the number of war casualties in the DRC at the end of the 1990s. The first reports 3.3 million dead and the second 3.8 million. Available at [www.populationdata.net/humanitaire/guerre\\_bilan\\_rdc2004.html](http://www.populationdata.net/humanitaire/guerre_bilan_rdc2004.html) (last visited 10 July 2008).

the Comprehensive and All-Inclusive Agreement has proved incapable of doing its job, even in the context of reparation measures for victims.

As demonstrated by the Second International Conference on Disarmament, Demobilization and Reintegration (DDR) and Stability in Africa, held in Kinshasa from 12 to 14 June 2007, the lack of progress made by transitional justice in the DRC can be explained in the terms of the priority given to the DDR process.<sup>3</sup>

In order to disarm, demobilize and reintegrate the 330,000 or so fighters involved in the conflicts, it proved necessary not only to give warlords guarantees of impunity but also to reintegrate (and even promote) them so that they would encourage their troops to disarm. Furthermore, the “mixing” that is going on has by no means broken down all the tribal loyalties of the reintegrated soldiers.<sup>4</sup>

Against such a background, DDR operations not only fail to serve transitional justice (because there is a deliberate policy of not passing on information obtained so as to allow the violations committed to be investigated), they constitute a twofold obstacle.

First, they do not allow justice – of any kind – to deal with cases arising from the past and, second, they create a deep sense of injustice among the victims, who see that the international community not only guarantees that the perpetrators go unpunished but devotes vast amounts of money to reintegrating the main human rights violators by allowing them to take up high-level positions within the public security forces, even as these are being reorganized; at the same time, they are forced to recognize that this same international community is not in a position to provide the victims with adequate compensation.

My purpose here is not to deny military necessities. DDR operations in the aftermath of wars such as those which ravaged the DRC in the 1990s are necessary and extremely complex. Without them, conflict would rage on for decades and would eventually jeopardize the state’s very existence and its ability to perform its most fundamental roles, which is what we are currently witnessing in Somalia. The question is rather whether transitional justice really offers an alternative in a context of this kind.

In the DRC, even the right to the truth seems unthinkable for the time being, so great is the priority being given to the need for disarmament.

## International geopolitics, selective justice and negationism

### *In the Great Lakes region ...*

A still more gloomy picture can be painted in the case of Burundi. Despite several genocides (1966–1972 and 1993), as documented for instance in the report drawn

3 “DDR and Transitional Justice”, issue paper, Second International Conference on DDR and Stability in Africa, Kinshasa, Democratic Republic of the Congo, 12–14 June 2007, UN/ISAA and the Government of the Republic of the Congo.

4 Ibid.

up by B. Whitaker for the Sub-Commission on Human Rights (1984),<sup>5</sup> those of the Special Rapporteur on Burundi<sup>6</sup> and the documents of the UN Security Council,<sup>7</sup> the transition towards a return to peace (if not to normality) has not been accompanied by any efforts to achieve justice, be it retributive or restorative, for these extremely grave violations.<sup>8</sup>

In neighbouring Rwanda, however, under pressure from public opinion, the 1994 genocide was not only recognized by the United Nations and the African system, but prompted the establishment of an ad hoc tribunal with the mandate to bring to trial those responsible for the massacres and other serious violations perpetrated in this context. Moreover, Rwandan justice also made use of local traditional courts to try those who had taken part in the genocide either at close range or at a distance. It is a pity that the United Nations did not decide to deal with the Burundi and Rwanda situations as a whole within the framework of the same proceedings. One outbreak of genocide can in no way justify another, and the Tutsi victims massacred by the Hutus in Rwanda must not be weighed against the Hutu victims massacred by the Tutsis. But when instances of genocide occur in two neighbouring countries, apparently with very similar if not identical causes, it is shocking to see one being given the attention it deserves whilst the other is simply ignored. This difference in treatment by the international community cannot be explained either by the scale of the massacres or their nature. It must be ascribed mainly to geopolitical considerations which led certain powers, in particular the United States, to advocate that the Rwandan genocide should be dealt with but that at the same time neither the genocide in Burundi nor the

5 Whitaker Report, Revised and updated report on the question of the prevention and punishment of the crime of genocide, United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Thirty-eighth session, item 4 of the provisional agenda, UN Doc. E/CN.4/Sub.2/1985/6-2, July 1985.

6 Paulo Sergio Pinheiro, Special Rapporteur on Burundi, described the situation in Burundi in 1995 as genocide. UN Doc. E/CN.4/1996/16/Add.1, 27 February 1996.

7 The Security Council set up a Preparatory Fact-finding Mission (Report UN Doc. S/1995/157, 20 May 1994); a Mission (Report UN Doc. S/1995/163 of 9 March 1995) and an International Commission of Enquiry (Report UN Doc. S/1996/682). In its conclusions, the Commission of Enquiry considered that the evidence was sufficient to establish that acts of genocide against the Tutsi minority had taken place in Burundi. It also considered that the evidence showed that indiscriminate killing of Hutu men, women and children had been carried out by members of the Burundian army and gendarmerie, and by Tutsi civilians. It found that, although no evidence was obtained to indicate that the repression was centrally planned or ordered, it was an established fact that no effort was made by the military authorities at any level of command to prevent, stop, investigate or punish such acts. In its final report, the International Commission of Inquiry on Human Rights Violations in Burundi since 21 October, commissioned by a number of humanitarian organizations (Human Rights Watch/Africa Watch (New York, Washington), the Fédération Internationale des Droits de l'Homme (FIDH, Paris), La Ligue des Droits de la Personne dans la Région des Grands lacs (LDGL, Kigali), L'Organisation Mondiale contre la Torture (OMCT/SOS Torture, Geneva), Le Centre National pour la Coopération au Développement (Brussels) and NOVIB (Amsterdam)), drew markedly more serious conclusions as to the role of the Burundi army and gendarmerie, which were essentially made up of Tutsis.

8 In "The International Criminal Tribunal for Rwanda: justice betrayed", Montreal, October 1995, John Philpot, associate secretary-general of the American Association of Jurists, denounced the limitations that prevented the tribunal from delivering justice worthy of the name in the wider context of the conflict. See also Pinheiro, above note 6.

crimes committed by Kagame's army should be examined.<sup>9</sup> This discriminatory treatment can only lead to fresh tension in the region. Despite all the imperfections of the Arusha tribunal and the *gacaca* courts, it might be considered that an initiative for justice has been made in Rwanda which should help the transition towards a society with greater respect for law. However, the neglect of the situation in Burundi can only reinforce the impression of the country's Hutu victims that the violations committed against them are not perceived by the international community as being as serious as those suffered by the Tutsis in Rwanda.

... and in Asia

In Cambodia the genocide,<sup>10</sup> referred to by some as an "autogenocide",<sup>11</sup> carried out between 1975 and the end of 1978 by the Khmers Rouges ended only with the intervention of Vietnam in December 1978. The figures generally accepted put the number of dead in the massacres at a third of the population. The question of justice was "forgotten" for various reasons.

The United States, China and their allies allowed the Pol Pot regime to survive artificially for fourteen years on the pretext that a change of regime brought about by foreign intervention was unacceptable. This made any international action impossible. The international community paid no attention to the depredations documented within Democratic Kampuchea, because during all that time it was the Khmer Rouge ambassador who sat in the United Nations and condemned the violations committed by the "Vietnamese invader".<sup>12</sup> In 1979 the Human Rights Commission refused to get involved in the matter of massive violations perpetrated by the Khmers Rouges<sup>13</sup> and for more than a decade international institutions systematically refused to bring to trial those responsible for the genocide.

Subsequently, peace negotiations opened in 1989 aimed to include the Khmers Rouges in the talks, which clearly would exclude any reference to crimes they had committed against humanity. Not until the Paris Agreement was concluded in 1991 was any reference made to the politics and practices of the past.

On the other hand, two attempts to bring cases for atrocities committed during the Pol Pot era have run into difficulties which have so far not been

9 Florence Hartmann, spokesperson for Carla del Ponte at the International Criminal Tribunal for the former Yugoslavia from 2000 to 2006, in *Paix et Châtiment, Les guerres secrètes de la politique et de la justice internationale*, Flammarion, Paris, 2007, unveils the role played by the United States in ousting the Prosecutor in August 2003.

10 As regards the definition of genocide, it is noted that, although the relevant articles of the Convention make it possible to establish fairly precisely what constitutes genocide and which situations do not fulfil the legal definition, in practice recognition of genocide more frequently depends on political factors.

11 In Gérard Chaliand and Jean Lacouture, *Voyage dans le demi-siècle: Entretiens croisés avec André Versaille*, Editions Complexe Bruxelles, Paris, 2001, Lacouture confirms that he was the first to use this concept but he stresses its inherent ambiguities. The term was borrowed by Elisabeth Beeker for the title of her work *Les larmes du Cambodge, l'histoire d'un autogénocide*, Presse de la Cité, Paris, 1988.

12 Raoul-Marc Jennar, "Cambodia: Khmer Rouge in court", *Le Monde diplomatique*, Archives, October 2006, available at <http://mondediplo.com/2006/10/11/cambodia> (last visited 10 July 2008).

13 See report of the UN Human Rights Commission's 35th Session.

overcome.<sup>14</sup> The people's revolutionary tribunal which tried Pol Pot and Ieng Sary in 1979<sup>15</sup> was not accepted or recognized by the people of Cambodia, who perceived it as a system of justice imposed by the Vietnamese liberator/invader.

In 2003 the United Nations and the government of Cambodia decided to schedule a trial for 2007. The plan was to set up a tribunal consisting of seventeen Cambodians and eight international members.<sup>16</sup> Their brief is to try breaches of Cambodian criminal law and violations of human rights and humanitarian law.<sup>17</sup> There is a risk that the judgment will concern only the last survivors, since the chief culprits, including Pol Pot, are dead. Only five accused have been arrested. Although they bear enormous responsibility, they are only a handful out of the many responsible for the atrocities committed and will be answering for crimes committed over thirty years ago. The small number of persons accused and the fact that they will be tried for crimes committed against victims from the previous generation are two factors that run counter to the avowed aims of transitional justice, which sets out to deal with the legacies of the past in full and as promptly as possible.

These few cases would tend to indicate that transitional justice, like its "ordinary" counterpart, does not provide a suitable response to all post-conflict situations and also that it is paralysed by obstacles associated with the both the domestic situation and the international context. We may therefore question its suitability when it implies substantial derogations from certain principles of international law, particularly in connection with measures of punitive justice. The judgments delivered in a transitional justice system have the same force as those handed down by "classical" courts according to "classical" laws. The principle of *ne bis in idem* or the application of the most favourable criminal law could therefore be relied on by their beneficiaries.

## Transitional justice or transitional policy?

According to Mark Freeman,

[T]ransitional justice focuses on the question of how societies in transition from authoritarian rule to democracy, or from war to peace, address a history of massive human rights abuse. It is concerned primarily with gross human rights violations understood as torture, summary executions, forced disappearances, slavery, and prolonged arbitrary detention, as well as certain

14 See Centre de droit international de l'Université de Bruxelles, "L'intervention du Vietnam au Kampuchéa en 1978–1979", for a compilation of the positions of states, available at [www.ulb.ac.be/droit/cdi/Site/Vietnam%20Kampuchea%201978-1979.html](http://www.ulb.ac.be/droit/cdi/Site/Vietnam%20Kampuchea%201978-1979.html) (last visited 10 July 2008).

15 <http://droit.francophonie.org/df-web/publication.do?publicationId=4278> (last visited 10 July 2008).

16 34th Session of the UN General Assembly, UN Doc. A/34/491. See also Trial Watch Saloth Sar, available at [www.trial-ch.org/de/trial-watch/profil/db/facts/saloth\\_sar\\_659.html](http://www.trial-ch.org/de/trial-watch/profil/db/facts/saloth_sar_659.html) (last visited 10 July 2008).

17 See "Law on the establishment of extraordinary chambers in the courts of Cambodia for the prosecution of crimes committed during the period of democratic Kampuchea", available at [www.derechos.org/human-rights/seasia/doc/krlaw.html](http://www.derechos.org/human-rights/seasia/doc/krlaw.html) (last visited 10 July 2008).

“international crimes”, including genocide, crimes against humanity and serious violations of the laws and customs applicable in armed conflicts, whether of a national or international character.<sup>18</sup>

The author lists a number of characteristics which distinguish traditional justice as a “*distinct field*” (emphasis added):

1. Transitional justice focuses on legacies of past human rights crimes. While the main approaches to transitional justice have important forward-looking aims such as building trust between and among victims, citizens and institutions, these mechanisms are primarily concerned with accountability for human rights crimes committed in the past.
2. Transitional justice does not call for retroactive justice at any cost. There is an understanding that in transitional societies the demand for transitional justice must be balanced with the need for peace, democracy, equitable development and the rule of law.
3. The different measures of transitional justice are not meant to be implemented in isolation but to complement each other.
4. Transitional justice prioritizes a victim-based approach. Mark Freeman states, “The legitimacy of transitional justice mechanisms is measured by the extent to which victims oppose or support them, and the degree to which they are able to participate in and benefit from them.”<sup>19</sup>

First, it would appear that among the four characteristics distinguishing transitional justice as a distinct field, only the second and fourth introduce any specific new elements.

The first characteristic – the fact that transitional justice focuses on violations of human rights committed at a time when the mechanisms which would dispense justice under the rule of law were either paralysed or non-existent – is in fact a piece of information with no specific content.

At least since Nuremberg, justice that cannot be dispensed at a given moment is deferred until things return to normal or until it is possible to give a ruling on the basis of the law which was already in existence, in particular international customary law.

The third characteristic poses the principle of holistic justice, which is not in itself an original idea, since justice cannot be content merely to punish, with no attempt to redress the situation, return to the *status quo ante* or compensate the victims and restore institutions.

Points 2 and 4, on the other hand, introduce variables which might fall within the order of justice or might be considered as arising from purely political imperatives.

18 Mark Freeman, “What is transitional justice?”, International Center for Transitional Justice, 2003, not published – quoted in DDR and Transitional Justice, issue paper, Second International Conference on DDR and Stability in Africa, Kinshasa, Democratic Republic of the Congo, 12–14 June 2007, UN/ISAA, p.5.

19 Ibid.



The contention that transitional justice does not argue for retroactive justice is on the face of it a source of confusion. It is not a question of the retroactive implementation of a law enacted after the crime was committed – which would be incompatible with the principle of legality of sanctions – but rather of the implementation, when it becomes possible, of the law that was in existence before the crime was committed.

## Violations of the most fundamental rights

The scope of transitional justice is limited to “gross” violations of human rights and certain international crimes such as genocide, crimes against humanity and grave breaches of the laws and customs of war. It therefore focuses essentially on a category of crimes which, according to the International Law Commission, “assailed sacred principles of civilization and, as it were, fell under *jus cogens*”.<sup>20</sup> This rules out the possibility of any rule, national or international, under which the impugned practice would be defined as non-criminal.

Moreover, since the adoption of the Rome Statute setting up the International Criminal Court, the crimes concerned all fall under the jurisdiction of that court (Article 5). The definition of these crimes is to be found in Articles 6, 7 and 8, and the penalties incurred are set out in Articles 77 and 78.

The establishment of the International Criminal Court was rightly perceived as a major step forward in terms of international justice and as a new weapon in the fight to end impunity in order to protect the rule of law.

However, in his second point, Mark Freeman suggests that the demand for transitional justice “must be balanced with the need for peace, democracy, equitable development and the rule of law”.

This idea of balance seems to me particularly dangerous to the extent that it makes an act of justice conditional on political imperatives. It will doubtless be pointed out that, in practice, impunity is rife in those very places where societies and those who compose them are incapable of achieving peace and democracy. Is it not logical, then, to foster the establishment of conditions that will allow a return to the rule of law, at the risk of failing to punish the crimes of the past, putting off their punishment till a later date or limiting the penalties inflicted on the perpetrators?

In political terms, the reasoning is perfectly acceptable, but can it be considered an element of justice, whatever name we use to describe it?

The fourth criterion seems to take care of this objection by affirming that the legitimacy of transitional justice mechanisms is to be measured in terms of their acceptance by the victims, the more so since this criterion is to be combined with the third, which refers to complementary measures as part of a holistic approach.

20 Extract from the *Yearbook of the International Law Commission*, 1983, Vol. I, Summary record of the 1755th meeting A/CN.4/SR.1755.



We can therefore imagine that measures combining punitive and restorative justice while ensuring that those aims are balanced against the need for peace and democracy would be legitimate provided that they enjoyed a degree of acceptance on the part of the victims. Is reconciliation between tormentors and victims, which may be desirable but is rarely attained in reality, a matter of justice in the strict sense? How far can we go in balancing the two forms of justice and can we countenance amnesty measures in some circumstances where the victims are in agreement?

### Conditional amnesty – on what conditions?

So far, South Africa is the country where the victims have been most willing to accept the need to limit punitive justice and to accept amnesties. The pre-1994 apartheid regime was based on a system of institutionalized racism which, although it was far from unique in history, had started to become intolerable, not only for the country's black community but also for a growing portion of South Africa's white minority and the international community. In November 1973 the international community adopted an international convention outlawing apartheid and providing for its punishment.<sup>21</sup> Article II of this Convention defines the crime of apartheid and Article I states that it is a crime against humanity.

Following years during which they refused to countenance reform and perpetrated acts of repression entailing the worst violations of human rights, the extremist white minority, under pressure on both the national and international fronts, finally made a U-turn and invited the leaders of the black majority to take part in a transition towards a system based on equality among citizens.<sup>22</sup> That process led to the election of a president from among the black majority.

In that case the term "transition" referred not to a slow and gradual process of change, but rather to the manner in which powers were transferred and to the way in which the new authorities assumed those powers to keep the country unified.

In fact, once the white majority agreed to share power with the black minority, the cause of the conflict disappeared. A new social order in which all were recognized as equal was set up immediately. The question in that case was how to dispense justice, that is, how to punish serious human rights violations of the past whilst conserving the major institutional *acquis* represented by an end to apartheid and without causing widespread conflict.

The South African authorities favoured a system of restorative justice placing the emphasis on finding the truth and granting total or partial amnesties to offenders who co-operated with that quest for truth. However, these amnesties,

21 International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted and opened for signature, ratification by General Assembly Resolution 3068 (XXVIII) of 30 November 1973, entry into force 18 July 1976, in accordance with Article XV, available at [www.unhcr.ch/html/menu3/b/9.htm](http://www.unhcr.ch/html/menu3/b/9.htm) (last visited 10 July 2008).

22 On the end of apartheid see Elise Colette, "Fin de l'apartheid", *Jeune Afrique*, 26 June 2005.

the aim of which was to avoid a bloody confrontation, were the result of a bargaining process. The victims generally had no way of finding out what had become of their family members other than through the confessions and cooperation of those responsible for their fate. Faced with the choice of never knowing or accepting that the perpetrator would go unpunished, many placed a higher value on truth than on punishment. This “choice” is an experience shared by many relatives of people who have disappeared: anything is preferable to the torment of uncertainty. In such cases the decision not to prosecute the perpetrator(s) is not so much a result of balancing the needs of justice against those involved in bringing about a reconciled society as a choice between Scylla and Charybdis.<sup>23</sup> Moreover, the remission of penalties and above all amnesties by no means won the approval of all the victims’ families, and some, such as that of Steve Biko,<sup>24</sup> held out in vain against arrangements of that kind.

From a legal point of view, there are two remarks to be made. First of all, these amnesties run counter to the principle of international law that there should be no amnesty for the most serious human rights violations, and in particular crimes against humanity, of which apartheid is one.

As in other countries, the concept of forgiveness has sometimes been put forward to justify the dropping of proceedings against a perpetrator on the grounds that the consent of the victim makes a solution of this kind acceptable. Forgiveness and reconciliation are powerful forces for reconstructing a society riven by conflict; they need to be facilitated within the framework of ad hoc commissions. But these commissions and their work cannot be a substitute for justice. As recalled by the Inter-American Commission on Human Rights<sup>25</sup> and as pointed out by Louis Joinet in his Principles,<sup>26</sup> even forgiveness by a victim cannot exonerate the perpetrator. The damage done to the victims and society through violation of the rules that protect fundamental rights gives rise to an obligation on the part of the state to prosecute and punish the perpetrator.

23 In Homer’s *Odyssey*, when passing through the straits of Messina Odysseus is forced to choose which monster to confront while passing through the strait: Scylla, who was a creature who dwelt in a rock, had six heads and ate people, or Charybdis, who had a single gaping mouth that sucked in huge quantities of water and belched them out, thus creating whirlpools. The phrase “between Scylla and Charybdis” has come to mean being in a state where one is between two dangers and moving away from one will cause you to be in danger from the other.

24 Leader of the anti-apartheid movement who died under torture on 12 September 1977.

25 See Angelika Rettberg, *Entre el Perdón y el Paredón: Preguntas y Dilemas de la Justicia Transicional*, Universidad de los Andes, Bogotá, 2005, available at [www.idrc.ca/openbooks/190-6/](http://www.idrc.ca/openbooks/190-6/) (last visited 10 July 2008). See also Pronunciamentos OACNUDH-UNHCHR Ponencia del Director 2004-02-10, “Derechos a la verdad, a la justicia y a la reparación integral en caso de graves violaciones a los derechos humanos”, available at [www.hchr.org.co/publico/pronunciamentos/ponencias/po0435.pdf](http://www.hchr.org.co/publico/pronunciamentos/ponencias/po0435.pdf) (last visited 10 July 2008). In Amicus Curiae Expediente No. D-6032, Washington, 2 December 2005, submitted to the Colombian Constitutional Court, the Center for Justice and International Law (CEJIL) analyses in detail the state’s obligation to punish in the light of Inter-American and international case law. Available at [www.cejil.org/documentos/AMICUS%20FINAL.doc](http://www.cejil.org/documentos/AMICUS%20FINAL.doc) (last visited 10 July 2008).

26 In two annexes to his final report “L’administration de la justice et les droits de l’homme des détenus: Question de l’immunité des auteurs des violations des droits de l’homme (civils et politiques)”, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, Louis Joinet defines forty-two principles, known as “Joinet’s Principles”.

Transitional justice theorists do concede that these two parallel sets of measures belong to different spheres, but when they claim that they balance two imperatives as part of a justice system with a new dimension, they weaken the very fundamentals of justice even though they do facilitate the transition process. We should therefore speak rather of transitional “policies” and make it clear that, through these measures, we are attempting to guarantee a minimum level of justice in dealing with past violations.

### What sorts of punishment are appropriate during the transition process?

Several solutions have been put forward.

1. A sequential solution.
2. A system that restricts itself to vouchsafing the truth and compensating victims.
3. A conviction on lesser charges under a special law.
4. Conviction followed by remission measures.

### *Justice “deferred”*

In Argentina, the dictatorship (1976–82) imposed an extreme nationalist and fascist system after eliminating representatives of the forces of the left and democratic organizations by means of assassination and forced disappearance. Also subject to international pressure, but above all faced with economic difficulties which it could not resolve, the junta tried to mobilize public opinion in a “great” national cause – the recovery of the Falkland (Malvinas) Islands, which were under British rule. Severely defeated, those responsible for the policy which led to the conflict lost all credibility. Dissent broke out even among the armed forces, who found themselves constrained to hand over power to a civilian government.<sup>27</sup>

Successive democratic governments have tried to limit the role of the armed forces in order to provide a better foundation for democratic structures whilst avoiding a head-on confrontation. In 1985, following the military defeat, the junta was put on trial and the chief members were sentenced,<sup>28</sup> but over the

27 Nicolas Zeisler, “La guerre des Malouines dans la société argentine depuis 1983 jusqu’à nos jours”, EPIcentre – études politiques internationales, available at <http://etudespolitiquesinternationales.blogspot.com/2006/11/la-mmoire-des-malouines.html> (last visited 10 July 2008).

28 Once democracy was restored in 1983, indictments were brought against the main junta leaders for the crimes committed between 1976 and 1983. The Cámara Federal en lo Criminal y Correccional handed down verdicts in 1985 which were subsequently confirmed by the Supreme Court, for example against Videla in 1986. Following the presidential pardons bestowed by Carlos Menem, other charges were brought against some of these former leaders. For Videla see Causa Nro 33714, “Videla Jorge R. s/ procesamiento”, “Sentencia confirmando el procesamiento del General Jorge Rafael Videla en la causa Plan Cóndor”, Buenos Aires, 23 May 2002, available at [www.derechos.org/nizkor/arg/doc/videla2.html](http://www.derechos.org/nizkor/arg/doc/videla2.html) (last visited 10 July 2008). For Galtieri see “Leopoldo Galtieri”, Enciclopedia aRiKaH, [www.arikah.net/enciclopedia-espanola/Leopoldo\\_Galtieri](http://www.arikah.net/enciclopedia-espanola/Leopoldo_Galtieri) (last visited 10 July 2008). For Massera see “Decisión de la Cámara en lo Criminal y Correccional Federal de la Argentina, en el proceso contra Massera y Otros”, Expdte. 30514, “Massera, s. Excepciones”, J. 7/S. 13, Buenos Aires, 9 September 1999, available at [www.derechos.org/nizkor/arg/ley/massera.html](http://www.derechos.org/nizkor/arg/ley/massera.html) (last visited 10 July 2008).

next two years the Full Stop Law in 1986 and the Due Obedience Law in 1987 guaranteed impunity to those who committed the acts and those with intermediate responsibility.<sup>29</sup>

As in South Africa, but operating in a different manner, the new Argentine authorities tried to consolidate the new regime, although the army, albeit weakened, still posed a serious threat. But, whereas South Africa favoured truth and restoration, Argentina placed the emphasis on sentencing and punishment but confined its attentions to the main perpetrators.

By adopting a system that guaranteed impunity for thousands of middle-ranking officials by means of laws that could be revoked, Argentina appeared to be protecting the future. In August 2003 its parliament repealed the Full Stop and Due Obedience laws and in June 2005 the Supreme Court ruled that the amnesty laws, which had guaranteed impunity to a thousand or so military personnel guilty of serious human rights violations during the period of the dictatorship, were unconstitutional.<sup>30</sup>

However, courts hearing cases brought by victims who want to see the perpetrators convicted and obtain redress for the injustices they themselves have suffered were confronted by a fresh, albeit somewhat less intractable obstacle in the form of reactions by the defendants. A real “law of silence” was imposed on prisoners implicated in cases of mass violations by their fellow perpetrators, and witnesses and plaintiffs found themselves under serious threat. It is worth noting in this context that in September 2006 a former detainee from one of the junta camps, Jorge Julio López, disappeared the day after he gave evidence before the La Plata Court, and there is no news of him to this day.<sup>31</sup> Everything indicates that he was murdered by the people he had denounced. Actions brought by hundreds of victims come up against threats from former perpetrators, showing that even more than twenty-five years after the events it is still problematical for them to reveal the whole truth and seek to have the guilty punished in the Argentina of 2007.

Despite these grave difficulties, the public in Argentina has been able to learn the truth, the victims have been – at least partially – compensated and the main perpetrators of violations have been tried and punished. Nevertheless, over the past twenty-five years successive democratic governments have been unable to reduce the influence of the middle-ranking officials from the time of the dictatorship, some of whom have managed to reinforce their positions within the state structure, thanks to laws which protected them until recently. The fact that

29 On the content of laws no. 23492 (Full Stop) and 23521 (Due Obedience), see José Balla “Leyes de Punto final y Obediencia Debida”, available at [www.monografias.com/trabajos/puntofinal/puntofinal.shtml](http://www.monografias.com/trabajos/puntofinal/puntofinal.shtml) (last visited 10 July 2008).

30 See “Les droits de l’homme”, published by the Embassy of the Argentine Republic in France following the commemoration of the 30th anniversary of the Coup d’état, 24 March 2006, available at [www.ambassadeargentine.net/derechoshumanos.htm](http://www.ambassadeargentine.net/derechoshumanos.htm) (last visited 10 July 2008).

31 See OMCT urgent appeal ARG 260906 and press release of 3 October 2006 at [www.omct.org/index.php?id=APP&lang=eng&articleSet=Press&articleId=6308&PHPSESSID=b784778ae05123cb37-c20844114f2de9](http://www.omct.org/index.php?id=APP&lang=eng&articleSet=Press&articleId=6308&PHPSESSID=b784778ae05123cb37-c20844114f2de9) (last visited 10 July 2008).

many victims are now taking legal action against these perpetrators reveals a dissatisfaction with impunity and the limits of a sequential system.

*The right to truth on violations perpetrated by persons unknown*

Morocco is an interesting example. Regarded as one of the most repressive regimes during the “years of lead”, the country is now held up as a “champion” of human rights in the region.<sup>32</sup>

Towards the end of his reign, King Hassan II realized that the repressive, authoritarian monarchical regime he had instituted during the 1960s could not survive for long. He therefore decided to open up the political arena by appointing as prime minister a man sentenced to death in his absence by that regime, and making provision for victims to obtain compensation.

A new policy, continued and enhanced under King Mohamed VI, led to the freeing of political prisoners and mediation by the Equity and Reconciliation Commission in the most serious cases.<sup>33</sup>

That Commission made it possible to bring to light the situation of political prisoners and the suffering endured during the harshest years of King Hassan II’s repressive regime. Thus it performed one of the essential functions of restorative justice, which is to allow the community to see what has happened and the victims to give evidence about the reasons for their struggle and the repression suffered (right to truth). It also opened up the possibility of compensating victims for the violations perpetrated on them.

On the other hand, there was no real questioning of the perpetrators’ role and, above all, those mainly responsible have still not been punished, contrary to the principle that those who have committed serious crimes should pay for their actions.

Morocco now faces a twofold challenge. First, as regards the transition itself, it was not the intention of the monarchy to introduce a democratic system in the Western sense of the term, but to strengthen a modernized and enlightened monarchy. In that system, the king not only remains the main source of power but is regarded as holy (Commander of the Believers) and, as the courts brutally reminded us in summer 2007, any criticism of the king’s statements in the press

32 The appointment of Abderrahmane Youssoufi, whose human rights record is uncontested, as prime minister of Morocco in 1998; the appointment of Driss Benzekri, a victim of the Years of Lead and a leader in the struggle for human rights, as chair of the advisory council on human rights; and the prominent role played by the Moroccan representatives, both in the UN Commission on Human Rights and in the UN General Assembly in the adoption of the 1998 Declaration on Human Rights Defenders, were perceived by the international community as signs of a major change. See statement by Rosalyn Higgins, President of the International Court of Justice, on 20 September 2007, available at [www.magharebia.com/cocoon/awi/xhtml1/en\\_GB/news/awi/newsbriefs/general/2007/09/21/newsbrief-03](http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/news/awi/newsbriefs/general/2007/09/21/newsbrief-03) (last visited 10 July 2008). See also Christine Daure-Serfaty, “Le Maroc vers les droits de l’homme à petits pas”, 9 December 2004, available at [www.yabiladi.com/article-politique-196.html](http://www.yabiladi.com/article-politique-196.html) (last visited on 10 July 2008).

33 See first report of the Moroccan advisory council on human rights (CCDH) under the UPR (Universal Periodic Review) procedure, available at [http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/MA/CCDH\\_MAR\\_UPR\\_S1\\_2008\\_ConseilConsultatifdesDroitsdeHomme\\_urpsubmission.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/MA/CCDH_MAR_UPR_S1_2008_ConseilConsultatifdesDroitsdeHomme_urpsubmission.pdf) (last visited 10 July 2008).

may result in long prison sentences for the journalists concerned.<sup>34</sup> In other words, the aim of the transition is to grant human rights to the population whilst maintaining the royal prerogatives which are still the cornerstone of the system. In the context of Morocco, the fact that the transition was of the top-down variety and that it was aimed at modernizing a monarchical system whilst preserving the basic elements of the previous regime largely explains the limited extent to which justice has been brought to bear on the legacy of the past.<sup>35</sup>

Similar observations may be made about Bahrain, another monarchy in which a transition has provided an opportunity to modernize the state by introducing “from the top down” a whole range of legislative innovations supposed to guarantee human rights, but where political parties remain outlawed and those responsible for depredations go unpunished.

In Chile, the dictatorship of General Pinochet set up following the 1973 coup d'état was obliged to undergo a gradual transformation under pressure from international quarters and national public opinion. Greater independence was given to the courts and more open elections were able to take place.

The dictatorship took great care – as did the Franco dictatorship in Spain in its time – to guarantee impunity for the main leaders as far as possible and to keep the opposition in check.

In 1978 an auto-amnesty law guaranteed protection from prosecution to those who carried out the coup d'état and those responsible for subsequent outrages.<sup>36</sup> In 1985 an agreement on greater democracy was concluded between the junta led by General Pinochet and some of the parties now tolerated.<sup>37</sup> The 1980 constitution allowed a limited degree of democracy and electoral freedom, and above all ensured that General Pinochet and the other members of his junta retained control of the process. The 1988 plebiscite that brought Pinochet's presidential mandate to an end took place against that background.<sup>38</sup>

34 Two journalists on the weekly *Nichane* were in January 2007 sentenced to three years in prison for insulting Islam. See [www.algerie-dz.com/article7825.html](http://www.algerie-dz.com/article7825.html) (last visited 10 July 2008). One journalist from *Al Watal Al An* was sentenced to eight months in prison and another to a six-month suspended sentence in August 2007. See [http://tempsreel.nouvelobs.com/actualites/medias/20070815.OBS0676/prison\\_ferme\\_pour\\_un\\_journaliste\\_marocain.html](http://tempsreel.nouvelobs.com/actualites/medias/20070815.OBS0676/prison_ferme_pour_un_journaliste_marocain.html) (last visited 10 July 2008).

35 See Pierre Hazan, “The nature of sanctions: the case of Morocco's Equity and Reconciliation Commission”, in this issue.

36 For the text of the Amnesty Law, see [www.derechos.org/nizkor/chile/doc/amnistia.html](http://www.derechos.org/nizkor/chile/doc/amnistia.html) (last visited 10 July 2008). For its effects see Amnesty International on the case of Carmelo Soria Espinoza at [www.derechos.org/nizkor/chile/soria2.html](http://www.derechos.org/nizkor/chile/soria2.html) (last visited 10 July 2008). For the case of Luis Alfredo Almonacid, see “Corte Interamericana condena vigencia de Ley de Amnistía en Chile”, [www.memor-iando.com/noticias/101-200/158.html](http://www.memor-iando.com/noticias/101-200/158.html) (last visited 10 July 2008). See also Communication No 746/1997 against Chile of 4 August 1999 to the UN Human Rights Committee, available at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.66.D.746.1997.En](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.66.D.746.1997.En) (last visited 10 July 2008).

37 See text of August 1985 “Acuerdo Nacional para la transición a la plena democracia”, available at [http://es.wikisource.org/wiki/Acuerdo\\_Nacional\\_para\\_la\\_transici%C3%B3n\\_a\\_la\\_plena\\_democracia](http://es.wikisource.org/wiki/Acuerdo_Nacional_para_la_transici%C3%B3n_a_la_plena_democracia) (last visited 10 July 2008).

38 See “Constitución Política de la República de Chile”, Instituto de derecho público comparado Universidad Carlos II de Madrid. This document contains a brief introduction to the constitutional development of Chile, the text of the 2001 Constitution and the different laws that amended the Constitution between 1991 and May 2001, available at <http://turan.uc3m.es/uc3m/inst/MGP/conschi.htm> (last visited 10 July 2008).

In 1991 a truth and reconciliation commission set up to investigate the fate of victims over the period from 1973 to 1990 was able to begin its work.<sup>39</sup> It established 3,197 cases, a figure clearly much lower than the real scale of repression.

In 1994 the Reparations and Reconciliation Commission decided that compensation should be paid to 2,115 families. However, the recognition of violations suffered by victims and the award of compensation did not entail prosecution of the perpetrators.<sup>40</sup> The UN Human Rights Committee at its March 2007 meeting welcomed the process of institutional restoration begun in Chile. It nevertheless expressed concern that a decree-law that continued to provide total amnesty for those who committed violations between 11 September 1973 and 10 March 1978 had been kept in place, contrary to the provisions of the International Covenant on Civil and Political Rights.<sup>41</sup>

In 1998, with a view to his retirement, General Pinochet had himself appointed senator-for-life, thereby guaranteeing himself total immunity from prosecution until his death. The plan proved less than foolproof, however – not because of any reaction by the opposition but thanks to interventions at international level, including that of Spain’s Judge Baltasar Garzón.

It was not until 2005, thirty-two years after the coup that overthrew President Salvador Allende, that a constitutional reform approved by the parliament swept away the remaining authoritarian elements inherited from the Pinochet dictatorship, marking the final act of the transition to democracy. The transition lasted two decades, from 1985 to 2005, and ended with the emergence of a democratic regime that showed greater respect for human rights. However, in terms of truth, compensation for victims and, most of all, punishment for perpetrators of violations, the process remained highly constrained by the limits put in place by the general’s regime.

### *Negotiated penalties or guarantees of impunity*

The process unfolding today in Colombia under the “Justice and Peace Act” is intended to bring about an end to hostilities between the government and organized groups operating outside the law. The rebels are invited to lay down their arms and help to restore the rule of law. The law provides for reduced penalties for crimes linked to political ends. This raises a great many questions.<sup>42</sup>

39 “Comisión nacional de Verdad y Reconciliación” established by President Patricio Aylwin on 24 April 1990 by ‘Decreto Supremo No. 355’. Report available at [www.usip.org/library/truth.html#Chile](http://www.usip.org/library/truth.html#Chile) (last visited 10 July 2008).

40 See “Linea Cronológica del Programa: De la Comisión Nacional de Verdad y Reconciliación al Programa de Derechos Humanos”, Ministerio de Interior Chile, available at [www.ddhh.gov.cl/historia\\_programa.html](http://www.ddhh.gov.cl/historia_programa.html) (last visited 10 July 2008). See also Report of the National Truth and Reconciliation Commission referred to in the above document.

41 Concluding observations of the Human Rights Committee: Chile 18/05/2007, Eighty-ninth session 12-30 March 2007, CCPR/C/CHL/CO/5.

42 See Report “Consideraciones sobre la Ley de Justicia y Paz”, Office of the United Nations High Commissioner for Human Rights, Bogotá, 27 June 2005, available at [www.hchr.org.co/](http://www.hchr.org.co/) (last visited 10 July 2008). Up-to-date documentation on the impugned legal instruments is also to be found on the site of the Colombian Commission of Jurists “Documentos acerca del marco jurídico sobre desmovilización e impunidad en Colombia”, available at [www.coljuristas.org/justicia.htm](http://www.coljuristas.org/justicia.htm) (last visited 10 July 2008).



Under this law, in contrast to its South African counterpart, the members of organized groups operating beyond the law are not threatened with losing the advantages they obtain under its provisions even if they do not co-operate fully and honestly by confessing all the crimes they have committed and passing on information in their possession. On the contrary, the law stipulates that if a perpetrator “forgets” a crime – even one as serious as a massacre – the maximum increase in the sentence initially imposed will be 20 per cent.

Moreover, as pointed out by Jaime Araújo Rentería, a judge of the Supreme Court of Colombia, the alternative penalty reserved for armed groups under the Justice and Peace Act for crimes such as genocide, genocide by multiple homicide, justifying genocide, homicide and aggravated homicide is between five and eight years, whereas for these same crimes, depending on how they are categorized, the penal code provides for sentences of between eight and fifty years. As common crimes committed for political ends are covered by the law, a drug trafficker who could be sentenced to fifty years’ imprisonment for torture, murder and massacres has every interest in declaring himself to be a “narco-paramilitary”, as “Don Berna” did in Medellín, in order to take advantage of the maximum sentence of eight years stipulated for the same type of crimes under the “Justice and Peace Act”.<sup>43</sup>

That would explain some statistical curiosities. First of all, when the paramilitaries were demobilized, the official figures indicated that 35,000 paramilitaries, over 10,000 of them bearing arms, had asked to benefit from the Act. However, it should be pointed out that the paramilitaries continue to operate on practically all the territory they occupied prior to its enactment.

On the face of it, it is a little difficult to explain such continued control of the territory, since according to the figures published by the armed forces prior to demobilization of the paramilitaries, the number was some 15,000 men. It was established that some of those “demobilized” had never in fact been “mobilized” but had “enlisted” in order to be able to take advantage of the law.<sup>44</sup> Furthermore, many of those demobilized were either reincorporated into other groups or are continuing to lead their troops covertly. The Act has therefore had little effect on the military operations of the outlaw groups.

The Act has also had another unwanted side-effect. Over the past two decades, thousands of farmers have been massacred and, according to the figures of farmers’ organizations, some three million of them have been forced to leave their lands.<sup>45</sup> According to the same sources, over half of the displaced were small

43 Jaime Araújo Rentería, “Loi ‘Justice et Paix’ et droit des victimes: l’expérience colombienne”, *Mouvement* 2008/1, No. 53, pp. 88–94.

44 On the demobilization of paramilitaries, see the report by Human Rights Watch “Las apariencias engañan: La demobilización de grupos paramilitares en Colombia”, August 2005, Vol. 17 (3) (B) and compare with the statements by the Colombian armed forces to the *Diario Occidente* of 11 March 2006, “Fuerza Aérea Colombiana: concluye proceso de desmovilización de 26,000 paramilitares”, available at [www.fac.mil.co/index.php?idcategoria=8374&facmil\\_2007=689fbbe5ae2017760f8ef647ed40aaba](http://www.fac.mil.co/index.php?idcategoria=8374&facmil_2007=689fbbe5ae2017760f8ef647ed40aaba) (last visited 10 July 2008).

45 See “Solidaridad mundial con las víctimas de los crímenes de Estado y del paramilitarismo en Colombia”, Medellín, 6 March 2008, available at <http://colombia.indymedia.org/news/2008/03/82561.php> (last visited 10 July 2008).

landholders. Jaime Araújo Rentería estimates the amount of land stolen from people forced to flee at some four million hectares.<sup>46</sup>

Most of the victims will never be able to recover their property. Those who have appropriated that land by purchasing it through straw men or by taking advantage of laws on possession or laws intended to stamp out illegal crops are making enormous profits. In practice, a real agrarian reform in reverse is under way, favouring the growing of palm trees for the multinationals as opposed to the traditional food-producing agriculture. The Act, which provides for a very meagre compensation fund that will not allow dispossessed families to recover their former way of life, is helping to propel the sector into poverty. Colombia illustrates how difficult it is to address criminal violations of civil and political rights in isolation from the economic and social crimes with which they are closely bound up.

### *Conviction and/or punishment*

Louis Joinet formulated one way in which transitional justice could combine the demands of the fight against impunity with reconciliation and the consolidation of a process aimed at ensuring full respect for rights. At a colloquium held in Santiago de Chile in 1996, he presented a report entitled “Set of principles for the protection and promotion of human rights through action to combat impunity”, in which he suggested that a distinction be made between the amnesties pronounced before any trial and sentencing could take place and those granted at the end of a process that has led to the conviction of a perpetrator.<sup>47</sup>

Amnesties that prevent persons suspected of violating fundamental human rights from being brought to trial are unlawful from the viewpoint of international law. However, according to Louis Joinet, an amnesty granted after someone has been convicted, either to reduce the sentence or even to enable the convicted person to avoid serving it altogether, could be not only acceptable but also favourable to the transition process. In some cases, the conviction itself stigmatizes the perpetrator and his or her acts sufficiently to satisfy the expectations of both society at large and the victims themselves. The most important thing is that the law be spoken and a values-based order restored by means of a clear statement to the effect that the tormentor is a criminal and the one tormented is a victim. A judicial sentence satisfies the related demands for truth and rehabilitation. It is therefore possible to imagine post-conviction amnesty mechanisms.

46 Araújo Rentería, above note 43.

47 When presenting his report (see above note 26), Louis Joinet raised the question of the compatibility of any form of amnesty with international law. According to his analysis, reported by Benjamín Cuellar in his address “Amnesia or amnesty” in San Salvador in autumn 1995, amnesties organize a conspiracy of silence and prevent the victims from obtaining any form of reparation. A conviction followed by an amnesty has fewer unwanted effects. The address by Benjamín Cuellar is available at <http://pauillac.inria.fr/~maranget/volcans/06.96/amnesie.html> (last visited 10 July 2008).

In terms of principles, it is plain that a solution of this kind deserves credit for satisfying the twofold demands of transitional justice. However, some questions arise when it comes to putting it into practice. As we have seen in South Africa, the aim of amnesty measures is to get the perpetrator to co-operate as fully as possible so as to establish the truth about all violations, both those committed by that perpetrator and any others of which that person may have knowledge.

An amnesty declared after the perpetrator has been sentenced would not necessarily help to achieve those objectives in the same way. If the perpetrator has been tried for crimes, some of which he could not be convicted for because of insufficient evidence, he will have no incentive to help to establish a truth that could cost him further indictments. The principle *ne bis in idem* would not cover crimes that had remained hidden, even if they were part of a series. There remains a possibility that a convicted criminal might denounce accomplices or other acts he or she may have become aware of, for example in an official capacity. There too, we may wonder whether someone in that position might not be more inclined to keep quiet to avoid any reprisals by those incriminated in the form of further accusations.

To avoid such problems, the convicted person would probably demand assurances that any new information he or she provided or any information provided by others incriminating him or her would not lead to a heavier sentence or any further indictments. This would give rise to precisely the kind of situation that the measures were intended to avoid, namely an amnesty that protects a perpetrator from being tried and convicted in accordance with his or her deserts as the “price” of co-operation.

Practice in South Africa has shown that, even when they agree to co-operate, perpetrators of violations tend to disclose their own violations or those they are aware of gradually and often out of fear that one of their accomplices may speak first and provide fuller information on crimes they themselves wished to hide or minimize. Those who want to take advantage of an amnesty law are encouraged to be transparent, all the more so since they are assured of an amnesty or a pre-negotiated reduction in sentence in return. After conviction, however, it seems to me that the conditions are not the same and that, unless they are protected from the consequences should they confess crimes as yet undiscovered, people already convicted are likely to be more circumspect.

### Dealing with violations selectively

Transitional justice theorists tend to postulate a radical caesura between a “before” rife with the worst evils and an “after” free of the slightest defect.

Far be it from me to defend dictatorships or become an apologist for conflicts, but it should be pointed out that, even though they may constitute remarkable improvements over situations of lawlessness, transitions rarely meet the needs of peace, democracy, fair development and the rule of law to which traditional justice avowedly aspires.

*Justice that restricts itself to violations of civil and political rights*

Thus understood, transitional justice tolerates limitations on the ideal application of justice, and particularly punitive justice, inasmuch as it countenances derogations justified by the need to speed up the transition process. The philosophy implicit in this approach is based on the idea that democracy and peace – which allow society to be rebuilt and the community to be reunified – will guarantee a peaceful and more just way of life and that it is therefore legitimate to sacrifice the absolute application of certain principles in view of the anticipated gains.

This process is greatly tinged with ideology in that it envisions a model of democracy defined mainly from the point of view of freedom of expression for the citizens and respect for internationally recognized civil and political rights. This liberal approach overlooks the fact that any conflict – whether it is an internal conflict or a conflict arising out of a dictatorship – sets in and smoulders on in a context marked by deteriorations in the social structure of the state that affect not only civil and political rights but economic, social and cultural ones as well.<sup>48</sup>

Transitional justice claims to address the most serious crimes that form part of the legacy of the past situation, for example torture, summary executions, forced disappearances, slavery, arbitrary detention. Its approach considers the “core” of human rights, which it sees as restricted to civil and political rights. If we attempt to deal with the past in an exhaustive way, can we overlook massive violations of economic, social and cultural rights such as denial of shelter, food or land? This is all the more paradoxical since transitional justice aspires not only to restore the *status quo ante* but to create the conditions necessary to the emergence of a peaceful society under the rule of law.

This being so, would it not be appropriate to take into account violations of economic, social and cultural rights perpetrated or aggravated during the conflict period, such as we have witnessed in South Africa or Colombia? There would seem to be all the more justification for doing so since the violations of civil and political rights listed by Mark Freeman<sup>49</sup> are often combined with very serious violations of economic, social and cultural rights and, in some cases, failure to respect the latter creates fertile ground for violation of the former.

Admittedly, it is more difficult to criminalize and punish violations of these rights, but precisely these violations often sow the seeds of conflict. If the aim is to bring about a real transition, surely it is necessary to address all serious human rights violations of the past. It will then become apparent that the roots of torture and forced disappearance are to be found in the social tensions generated by an unequal and unjust system and an inequitable sharing out of the fruits of production and by abusive appropriations and despoilment of entire

48 See Thomas E. McCarthy (ed.), *Attacking the Root Causes of Torture: Poverty, Inequality and Violence*, preface by Louise Arbour, OMCT, Geneva, 2005, available in book or electronic format ([www.omct.org](http://www.omct.org)).

49 Freeman, above note 18.

communities. Can we punish the one without punishing the other? Is it because violations of economic, social and cultural rights are considered less serious that they are not included in the scope of transitional justice? How solid can a reconciliation be when violations of social and economic rights are glossed over and the future is organized on a basis that perpetuates or even aggravates those violations?

It may be objected, as mentioned earlier, that judicial mechanisms that could punish violations of economic, social and cultural rights are still at the embryonic stage and that it would therefore be appropriate to develop further the implementation mechanisms for civil and political rights for which there already are more precise and effective instruments. Although I would not deny the validity of this objection, I would point out that, while it purports to define a new domain, transitional justice seeks to operate within the framework of a combination of measures aimed at protecting civil and political rights while totally ignoring social, economic and cultural rights, violations of which are not even referred to within that framework. Post-conflict and post-dictatorship situations often lead to deep-seated frustrations as the citizens, while they may be relieved to be free of arbitrary rule, remain dissatisfied with the social model that emerges from the transition. In this connection, the situation in the countries of the former socialist bloc in Europe present characteristics which it would be interesting to study in depth.

By the same token, while the South African transition in practice made it possible to apply the principle of “one man/one vote”, it had practically no impact on the country’s social structure, which was a legacy of colonialism. That social structure keeps the essential natural wealth of the country in white hands while the vast majority of black people continue to live in frequently unbearable conditions of poverty. Violence in South African society (the country has one of the highest urban crime rates in the world) is not regarded as a result of political discrimination, but it is certainly linked to social discrimination which was not dealt with in the context of the transition.

As a result, over and above the relative impunity granted to the perpetrators of crimes against civil and political rights, these societies have to face post-transition situations in which the system of social injustices that led to the conflict in the first place is left intact.

There are two possible approaches. Given that it is impossible to punish all violations of fundamental rights for want of an appropriate system for punishing violations of economic, social and cultural rights, the first approach accepts the inevitability of applying the rules with a degree of flexibility that, logically enough, can call into question the very principles of criminal law in matters of civil and political rights too. The second approach, premised on the view that impunity must be fought in all areas of fundamental rights if the law is not to lose its role as a common regulator of social conduct, sets out to define avenues for bringing violations of economic, social and cultural rights to justice and effective mechanisms for punishing as crimes violations of those rights.

## Democratic transition?

Although it is not possible to isolate violations of civil and political rights from offences against social, economic and cultural rights, it is important to question the political purpose of a transition, which will depend on the parameters of the conflict.

Whether in Spain, Chile or Argentina, the clashes that brought dictators to power were the result of confrontations between political forces seeking to establish diametrically opposite political regimes. In these three countries at least, the aim of the transition that followed the period of dictatorship was not so much to restore the political *status quo ante* as to consolidate a process that had been embarked on against the will of the majority of the population.

It is admittedly not possible to undo historical processes that are the result of a complex and largely irreversible dynamic. Nevertheless, in transitions that follow dictatorships, when we envisage potential reparations and punishments, we should consider not only individual victims and their aggressors, but also the social and trade-union movements and other institutions involved. This collective aspect is often not addressed because the protagonists are in fact the same people; the results of crime become institutionalized and the crimes themselves legitimized. The purpose of any dictatorship is after all to prevent or check a democratic process in order to give the country's future a slant different from the one favoured by the majority of the population.

Like the uprising against the Republican regime in Spain in 1936, the coup d'état against President Allende in Chile in 1973 was a crime against democracy. This type of crime is not restricted to the elimination of legitimately elected authorities, but continues over time through the destruction or far-reaching corruption of social and political movements entrusted by a popular majority with running the country's affairs.

At the end of a dictatorship, groups across the political spectrum are fundamentally and nearly always irremediably changed. Parties subjected to bloody purges are left with lasting damage to their identities and sometimes even cease to exist.

At the moment, we are impotently witnessing a phenomenon of this kind in Colombia. In less than two decades, the Patriotic Union has been decapitated. Over 3,000 of its members, including a good number of its leaders who had seats in the highest bodies of the state, have been assassinated or "disappeared". These crimes are the result not of clashes between opposing armed forces, regular or irregular, but of the implementation of the aims set out in extermination plans thought up by one part of the army and bearing code names such as "The Red Ball" or "Operation Coup de Grace".<sup>50</sup> Like the thousands of targeted murders of

50 When he visited my office in June 1994, Senator Manuel Cepeda Vargas informed me that he expected to be assassinated on his return as part of an operation nicknamed "Golpe de Gracia", aimed at eliminating the members of the Patriotic Union. He was indeed assassinated on 9 August that same year. A documentary film, *El Baile Rojo: Memoria de los Silenciados*, by Yesid Campos, was broadcast on the Colombian television channel Caracol on 18 August 2008. See [www.reiniciar.org/drupal/?q=node/145](http://www.reiniciar.org/drupal/?q=node/145) (last visited 10 June 2008).

trade-union leaders, these plans are part of a strategy aimed at eliminating the forces of the left and trade-union opposition in order to build a state based on consensus democracy and ultra-liberal principles.

The transition must therefore take into account the situation that prevailed before the conflict and the one that will result from the transitional process. Will that really make it possible, not to return to the *status quo ante*, which is impossible in view of the foregoing, but at least to guarantee the various components of society the right to express and organize themselves, not just freely but in a society that has punished the forces that created the current conditions?

Unlike the international Convention on the Prevention and Punishment of the Crime of Genocide, Colombian criminal law, like that of most of the countries of Latin America, has incorporated a definition of genocide in line with the initial draft of the authors of the Convention, that is, including elimination of political groups as a constituent element in genocide.<sup>51</sup> However, as we have seen in the case of the democratic transition in Chile, although General Pinochet was at least ruffled by the attempts to prosecute him for the crime of genocide, it was thanks to the actions of a foreign judge and not in the context of the Chilean transition.

Inasmuch as the transitional phase is aimed at restoring or establishing democracy and the rule of law, it should logically not only pursue the individual perpetrators responsible for extermination policies but also the organizations that planned and organized them. That is all the more vital in countries that legally characterize such crimes as genocides. By the same token, the various movements affected by a dictator's policies of repression or elimination should be able to obtain reparation and compensation so as to be able, as far as possible, to recover a status similar to the one they enjoyed before the crime.

However, although the needs of national reconstruction allow these types of measures to be adopted in relation to individuals, it is extremely rare for organizations, parties or trade unions to receive reparations for the damage they have suffered, although they do sometimes benefit from some form of symbolic rehabilitation. Admittedly, it is hard to see how a party or a political movement or an association that has disappeared as a result of repression could be adequately compensated.

Punishing the authorities that conducted this policy should be viewed as all the more fundamental since this would be the most effective means of opening the way for a genuine democratic reconstruction. But there, too, the practical problems are often insurmountable. Authoritarian or dictatorial movements that have successfully wrested power from the legitimate forces and then broken those

51 When Judge Garzón indicted General Pinochet, one of the heads was genocide. In an interesting study entitled "Exclusión de los Grupos Políticos en la Tipificación Internacional del Genocidio", Rigoberto Paredes Ayllon analyses the difference in approach between the concept as proposed by Rafael Lemkin in 1944 and the wording of Article 2 of the Convention (see above note 21). He also points out the differences between the Latin American criminal codes and international law. See [www.rigobertoparedes.com/web\\_english/ver\\_publicacion.php?Cual=11](http://www.rigobertoparedes.com/web_english/ver_publicacion.php?Cual=11), [www.rigobertoparedes.com/web\\_english/\\_files/Exclusion\\_de\\_los\\_Grupos\\_Políticos-Genocidio.doc](http://www.rigobertoparedes.com/web_english/_files/Exclusion_de_los_Grupos_Políticos-Genocidio.doc) (last visited 10 July 2008).



forces are no longer the same at the end of a process that often extends over several decades. After an extremely violent phase in order to gain legitimacy and ensure their staying power, these regimes generally replace the officials of the apparatus of state under their control with technocrats considered as politically neutral. As a result, a more acceptable face gradually emerges within the initial dictatorial movement, allowing a transition towards a democracy geared to the perpetuation of a system conceived by the putschists. That is how democracy gained ground in Chile within the framework of the ultra-liberal system the military junta wanted to impose in complete contradiction to the programme the people voted for in the early 1970s.

Paradoxically, the question of punishment for political groups or movements of a political nature can only be addressed where there is a total break with the past rather than a transition. The Nuremberg tribunal was able to judge not only individuals but the Nazi party per se only because there was no transition. Conversely, the political forces put in place by Franco and Pinochet had time to adapt so that they were not challenged when the transitional period came to an end.

To the extent that the democratic process can again function untrammelled, it is to be hoped that new movements, new trade unions or new parties more in line with the interests of the democratic forces in society will come into being and help to create a fresh debate. However, there is still a danger that, if keen tensions should again make themselves felt, extremist movements could be tempted to interrupt the process. They will feel even more confident in doing so if similar attempts in the past have a history of success.

### Punishment, one element of justice among others ...

This rapid survey, which is not remotely exhaustive (either geographically or thematically), leads us to draw some conclusions.

The first, it seems to me, is that the various transitions have responded to circumstances and political imperatives rather than providing a genuine model that could guide us in our approach to punishment and its corollary, an end to impunity.

The emphasis placed in Chile on restorative justice favouring elucidation of violations by means of a truth and reconciliation commission and subsequently a reparation and reconstruction commission and then, in a second phase, compensation for victims, was the best that could be achieved under the 1978 amnesty laws. True, General Pinochet and the junta that brought him to power in 1973 were subjected to strong pressure both from international public opinion and from the people, who aspired to greater freedom, but the regime kept a firm hold on the liberalizing process on which it was forced to embark. These parameters therefore shaped the struggle of the families of the disappeared and those killed by the armed forces or the police and those who themselves were victims of torture and arbitrary acts. Both the force of the pressure exerted and the regime's proclivity to reject any attempt to impugn the perpetrators (particularly those

principally responsible for the coup d'état and for managing repression during the dictatorship) explain the stages, contours and limits of the transitional process.

Conversely, in Argentina, the circumstances of the Generals' defeat made it possible for the highest military authorities to be put on trial and convicted, both for the coup d'état and for the depredations committed while they held virtually all the powers of the state. The regime's inability to handle the country's economic difficulties had prompted it to embark – in order to restore its prestige – on the disastrous invasion of the Falklands. Once defeated, the Generals were obliged to move over and lost any semblance of credibility as to their ability to manage the country. The way was thus opened to a transition.

But very quickly the new authorities found themselves forced to restrict their measures to the members of the regime who bore the heaviest responsibility. A total purge of the forces involved in depredations during the dictatorship appeared too risky, as there was a danger of it destabilizing the regime (danger of a fresh coup) and undermining internal security (a long period of challenge to the authority of the security forces could have weakened the state's ability to maintain order).

In contrast to Chile, the new regime had the benefit of circumstances that made it possible to punish the principal perpetrators, but only if their subordinates were considered not to bear any responsibility. The Due Obedience Law legalized a defence resorted to in vain by the accused in the Nuremberg trials, namely the defence that they had a duty to obey the orders of their superiors and could not be held responsible for doing so.

This amnesty for middle-ranking officials will not only help to reinforce the hierarchical position of perpetrators of serious violations, especially in the provinces, as pointed out above, but will also constitute a major obstacle to the establishment of the truth. In the absence of any criminal proceedings against those who stole their grandchildren after killing their sons or daughters, the grandmothers of the Plaza de Mayo will in very many cases never find any trace of the babies they are seeking. In most cases it will prove impossible to establish the chain of complicities between the murderers, the officials who forged the necessary documents and the couples who took the children as their own.

In that respect, at least, South Africa obtained more convincing results. But there, too, the special features of the transition can be explained in terms of the particular circumstances of the country. In view of the massive legacy of injustices, the tensions between different African tribes and the fact that the white minority still controlled the economy, there was a danger that the collapse of apartheid would unleash a situation which would engulf the country in violence.

The personality and, in particular, the personal history of Nelson Mandela were crucial in gaining acceptance – sometimes tempered with much reluctance and bitterness – for the system of conditional amnesties as the price to be paid for truth and as a basis for compensation and reconstruction. The man who led the transition to democracy and who asked the victims and his community to sacrifice their right to justice was himself a victim, having spent over a quarter of a century in arbitrary detention in particularly unpleasant conditions.

This appeal was therefore not perceived as motivated by cold political calculation, but as the project of a man who had suffered in his own flesh and who was entitled to demand justice, but who was prepared to forgo that entitlement in clearly defined conditions in the interests of a higher goal, namely to avoid the risk of a bloodbath. A situation like that remains an exception, as it is rare for one man to be able to personify all the victims and the cause of democracy and, moreover, to possess the stature and abilities of a statesman with the influence to make his mark on the two communities and manage a peaceful transition to everyone's satisfaction.

### ... or the guarantee of a return to the rule of law

The three examples referred to above would tend to indicate that the solutions found so far have never been wholly satisfactory and appear rather to be *sui generis* responses that do not necessarily provide the basis of an abstract system that could be generally applicable.

Moreover, as pointed out at the beginning of this article, transition measures sometimes presuppose the paralysis of all forms of justice, be they restorative or punitive. The needs of disarmament, demobilization and reintegration operations in the DRC translated not only into guarantees of impunity but also into the non-transmittal of all information obtained in the course of the operations, thereby making it impossible to establish the truth. Worse still, the mixing of troops, indispensable for the breaking of tribal ties, meant that violators of fundamental rights, in terms of both humanitarian and human rights law, were given new commands. And yet these operations are supposed to be necessary to stop massacres, rape and pillage.

It is generally agreed that the aftermath of any conflict calls for a transition phase in which the state apparatus necessary to the rule of law is still under construction and is still too fragile to exercise its competences in terms of justice in a satisfactory manner, particularly with regard to past violations. But can we therefore consider that in this context punishment must be somehow "adapted" to the circumstances and that it should focus more on the perpetrator's contribution towards reparation than on punishing him in the classic sense of the word?

In practical terms, that is exactly what happens, hence the temptation to place this process within a normative framework, a justice system that facilitates transition but cannot be considered as neglecting the rights of victims and the duties of the states. But, faced with the resulting dilemma, it has to be admitted that greater emphasis is placed on restorative justice measures, which are often considered sufficient to meet the conditions of retributive justice.

Furthermore, the application of punitive justice raises sometimes insurmountable obstacles. Over and above the fact that for practical reasons the judicial system is often unable to deliver justice fairly, the serious nature of the crimes committed makes it difficult to apply proportionate punishments. How is it possible to apply commensurate punishments to someone who massacres a

family in cold blood and someone who organizes a genocide. If the perpetrator of genocide receives life imprisonment, what does someone convicted of a “mere” massacre deserve?

These questions and many others are perfectly legitimate. Nevertheless, it must be borne in mind that the end of any conflict marks a return to the rule of law – that is, the application of abstract rules, valid for all, and not political arrangements hammered out on the basis of the relative clout of the people involved.

The question of punishment for crimes involving violations of human rights and, to a certain extent, violations of humanitarian law is not posed in the same terms as that of punishment for infringements of the positive law of a state.

Generally speaking, the person who infringes a rule of criminal law is not invested with any authority and does not have the obligation to enforce the law, still less to interpret it. The offender is acting in an individual capacity when, for personal reasons, he or she infringes an established rule that is supposed to protect all citizens or society as a whole against wrongful attacks on fundamental interests, including the right to life.

Violations of human rights, in contrast, are perpetrated by agents of the state or by individuals invested with authority recognized by the state or acting with the implicit acquiescence of the state. There is therefore a twofold responsibility in such cases, namely that of the state qua state for non-compliance with its international obligations or of customary law, and that of the individual holder of authority who commits an unlawful act.

As a general rule, and in contrast to the situation in classic criminal law, the perpetrator not only violates a rule but he also purports to relativize or reject the rule he violates in the name of a higher rule or a higher interest of state.

For the dictatorships of the Cono Sur (Brazil, Paraguay, Uruguay, Argentina and Chile) the doctrine of national security served as a normative reference superordinate to positive law. In his reply to Guy Aurenche, the former president of ACAT (Action by Christians against Torture), Brazil’s Captain Fleury did not deny using torture, enforced disappearances and summary executions, but he justified them as difficult but necessary acts that courageous men agreed to perform to protect a threatened society whose members were not aware of the danger that threatened them and did not have the courage to employ the necessary means to eliminate that danger.<sup>52</sup>

In that type of context, punishment has a propaedeutic and prophylactic role. It serves to send a clear message to society as a whole on the values that subtend it and on the sacrosanct nature of the law that underpins and protects those values. At the same time, it serves to ensure that perpetrators of violations or

52 Captain Fleury was a known Brazilian torturer to whom the then president of ACAT sent a letter urging him to change his ways in the name of the Christian values on which he purported to found Brazilian society. In his reply, the captain justified the need to resort to torture (see exchange of letters in the ACAT publication: *Echange de lettres dans le Courrier de l’ACAT N°12: Non à la Torture en Europe*, Paris, 1979).

those who countenance them and justify them by refusing to accept the primacy of the rule of law are kept out of positions of authority in the country's institutions.

In the words of a mother of a militant who died under torture, the hardest thing to bear was the reaction of their neighbours who, without going so far as to justify the atrocities committed against her child, claimed to be "bringing up" their own so that they would not "commit" the type of actions that had led to her son's arrest. Children were being brought up in a culture of fear and taught to show respect for a system based on the negation of the rule of law and a form of arbitrary "law" that shaped society around anti-democratic and inhumane values, in order to avoid wrongful punishment.

In systems of that kind, punishment ends up legitimizing the unacceptable references that the *de facto* authorities purport to impose. In a climate where citizens denounce their fellows, one often hears the remark "They must have done something to be treated that way". A victim of a human rights violation is presumed guilty because he or she is punished by the authorities and it is dangerous to speculate that the punishment was not in a good cause.

In a context like that, the "shaming" mechanism of restorative justice is most unlikely to work. In extreme cases, as with Fleury, the regime pays tribute to the violator to justify its policies. The Americans observed the same phenomenon in the Nuremberg trial when Goering was interrogated.<sup>53</sup>

The aim of a transition is to restore a scale of values that will serve as a basis for unchallengeable rules and also protect those rules. Attempts to contravene them or, worse still, challenge their legitimacy, on the part of those who violated them in the past and continue to do so, must be effectively resisted. For the victims, for society and even for the perpetrators, punishment is often the only yardstick against which the law is judged.

Since the Middle Ages, a state's full sovereignty has been measured by the its ability to deliver justice at all levels. There has happily been some progress in concepts, but a system that negotiates punishment reveals its weakness. Justice should be at once restorative and punitive.

This requirement is all the stronger since we are living in an age marked by very serious relativism at the international level and in which human rights treaties are not only frequently violated, as has often been the case in history, alas, but also one in which their very content is undermined by abusive interpretations, and their authority challenged, for instance by the enactment of domestic legislation or regional treaties that are in contradiction with the states parties' obligations. This trend is particularly noticeable in relation to the prohibition on torture.

To violate a rule – particularly one of *jus cogens*, is a serious matter, but to actively challenge the rule itself, its scope and its consequences, is even worse. A

53 During his trial, Goering cut a strong figure. He was aggressive towards his accuser and posed as the immortal hero of the German nation, a leader imbued with his own superiority and acting for the sake of a grand design. Far from repenting, he used the court as a tribune from which to defend his achievements.

debate on the nature of punishment in the context of a transition is likely to aggravate the danger of relativism in respect of the rule itself, particularly when the debate addresses the need to lighten the prescribed punishment to favour the transition. A particularly perverse strategy is to reaffirm forcefully the principles and the unchallengeable nature of the rules while at the same time voiding them of their substance.

Current attempts to call into question the absolute prohibition on torture – and inhuman and degrading treatment – are a case in point. While proclaiming their unfailing support for the ban on torture, some leaders and jurists claim, in the teeth of all the *acquis* of international law, that cruel, inhuman or degrading treatment or punishment falls into a category in respect of which the prohibition can be challenged depending on circumstances. Moreover, as the criteria they use to define torture circumscribe the violation abusively, acts belonging to the category of torture are “downgraded” to cruel, inhuman or degrading treatment or punishment as characterized, no less abusively, as lawful when necessitated by threats to the security of the state or particularly serious circumstances.

By the same token, there is a likelihood that the punishment of very serious crimes may be questioned – or at least considerably attenuated – for noble reasons such as the restoration of democracy. That such measures may sometimes be inevitable for inescapable political reasons, may be accepted, even by the victims, but if they were at the same time to be presented as emerging from a justice system, with all the consequences that implies (*res judicata*, *ne bis in idem*, etc.), that would constitute a considerable risk in my view.

Whatever form it may take, a punitive sanction for a serious crime is the only possible response to a violation. The perpetrator’s remorse, his efforts to restore the *status quo ante* or at least to compensate the victims or help to establish the truth are elements that can influence the punishment inflicted. However, they are no substitute for it and do not justify reducing it to a level below the minima prescribed by law before the act was committed.

No doubt many victims will never see justice done during their lifetimes. However, as it strengthens its institutions after a conflict or a dictatorship, a state must try to dispense justice and not give in to the temptation to negotiate the application of the law “à la carte”.