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Dealing with crimes against humanity

Edited by Henning Melber

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Why normative frameworks? An introduction

Henning Melber

In an address at the University of California's Convocation on 13 May 1954 the United Nations second Secretary-General Dag Hammarskjöld concluded: 'It has been said that the United Nations was not created in order to bring us to heaven, but in order to save us from hell.' According to him, 'that sums up as well as anything I have heard both the essential role of the United Nations and the attitude of mind that we should bring to its support' (Cordier and Foote 1972: 301). The thematic focus of this issue of *Development Dialogue* and the content of the contributions testify to the same spirit and the recognition of the continued need to support efforts of such a nature. It is the third volume in a series, dealing with the challenges of how to come to terms with genocide, other forms of mass violence and now explicitly also with crimes against humanity.¹

It is noteworthy that in the shadow of the Holocaust the adoption on 9 December 1948 of the Convention for the Prevention and Punishment of the Crime of Genocide actually preceded (if only by one day, but with more votes by member states in favour of it) the Universal Declaration of Human Rights. Both normative frameworks, like many more to follow, have created a compass and navigation kit for measuring the policy of states – both domestically and internationally – and providing them with demarcations. As Noeleen Heyzer, then for a decade the executive director of the United Nations Development Fund for Women (UNIFEM) summarised when presenting the annual Dag Hammarskjöld Lecture in 2004: 'The United Nations plays an important role in upholding the rule of law by helping coun-

¹ See for the earlier volumes of *Development Dialogue* (Nos. 50 and 53) Melber and Jones (2008) and Melber (2009). Like all other publications, these are freely accessible at the Foundation's website: www.dhf.uu.se.

Manuel Fröhlich, Robin May Schott, Jan Axel Nordlander, Diana Amnéus, Monica Serrano and Alex Obote-Odora, all contributors to this volume, participated in an internal seminar and a public panel debate organised by the Foundation in March 2010. The events were arranged in combination with the annual Hugo Valentin Lecture. The collaboration with Paul Levine of the Hugo Valentin Centre of Uppsala University and Björn Wittrock and his colleagues at the Swedish Collegium for Advanced Study during these interrelated activities as an initial point of departure ultimately leading to this publication is herewith gratefully acknowledged.

tries to strengthen national systems for the administration of justice in accordance with international standards. Increasingly, the UN is realizing the importance of adopting a comprehensive approach, by engaging all relevant institutions in the development of national justice systems, and paying attention to various dimensions of this process, including establishing standards of justice, formulating laws that codify them, strengthening institutions that implement them, developing mechanisms to monitor them, and protecting the people who must have access to them' (Heyzer 2004: 17ff.).

Not everyone shares this fundamentally positive view when judging the performance of the institution established as a global body embracing all recognised governments of sovereign states in this world, seeking to shape, formulate and implement – often against all odds – normative frameworks as reference points and guiding principles for the execution of responsible governance. Often the United Nations tends not to be appreciated for its achievements but judged and criticised for its failures. The wide range of conventions, resolutions and other programmatic declarations adopted in the more than 60 years of its existence indeed often reveal an appalling discrepancy between the defined norms and the social and political realities. But would the world of today be a better one in the absence of such frameworks, as selectively and arbitrarily as they are far too often applied? Mary Robinson, then United Nations High Commissioner for Human Rights, in the first Dag Hammarskjöld Lecture delivered in 1998 pointed to some important facts: 'Since the adoption of the Universal Declaration of Human Rights in 1948, there have been notable achievements. An impressive body of international law has been enacted, including the two Covenants and the Conventions on racism, torture, the rights of the child and the elimination of discrimination against women. Human rights mechanisms such as special rapporteurs, experts and working groups have been established.' (Robinson 1998: 8)

Since then, not least empowered through the institutionalisation of the International Criminal Court with its executive legal powers to prosecute, as a result of the Rome Diplomatic Conference in June/July 1998, the seemingly 'toothless tiger' has at least partly turned into a serious watchdog.² The authors of the capstone volume in the impressive stocktaking United Nations Intellectual History Project Series documented the extent of the United Nations' role – greater than many would concede – not only in the creation of a globally rel-

2 The emergence of legal norms, institutions and instruments in international law to prosecute perpetrators – and the limits thereof – is thoroughly reflected upon in the contributions to Hankel (2007).

evant range of normative frameworks but also in the implementation of these, thereby enhancing the effectiveness of codified norms in respect of various essential human rights. That this is a never-ending mission and far from achieving only remotely satisfactory results is another story. The authors themselves stop short of praise songs but point among others to the need for:

- ‘- Integrated approaches to human security that go beyond the traditional compass of territorial defense or military and security forces of countries
- Actions to promote and encourage a greater sense of human solidarity and commitments to human rights, democracy, and culture.’

(Jolly, Emmerij and Weiss 2009: 30).

As Weiss and Thakur (2010: 51) in the additional volume on global governance and the United Nations, with the programmatic subtitle ‘an unfinished journey’, note that the organisation has as an ‘intellectual actor’ succeeded in identifying and diagnosing problems, developing norms and formulating recommendations, while it has somewhat less successfully tried to institutionalise ideas. But in the absence of a better alternative, we remain tasked to strengthen the same organisation that Dag Hammarskjöld as its second Secretary-General between 1953 and 1961 was seeking to turn into an active global governance institution contributing to more peace and human rights for all. Looking back, it would be unfair to dismiss the efforts and achievements completely. Especially the voices from the so-called global South, at times now overtly critical of the flaws and biases that international governance as a tool for hegemonic interests displays, should remember that in the absence of the limited power of a United Nations their future might have been even more at stake.

Three volumes recently published in a noteworthy ‘Pennsylvania Studies in Human Rights’ series deserve mention in this context (Burke 2010; Gibney and Skogly 2010; Whelan 2010). They all document the historic and contemporary relevance of the normative, human rights related frameworks generated by the United Nations and their impact on the global order where they have been implemented politically, as in the case of the decolonisation processes emerging since the 1950s. The historical discourses and stages of contestation over the definition and applicability of the Universal Charter of Human Rights is a fascinating case in point, which shows that ‘the South’ (and in particular representatives from the colonised world, not least from Africa) were indeed able to claim ownership of these

fundamental platforms, also created for the sake of their own emancipation – if only at times to later forget about them or dismiss them as instruments of Eurocentric cultural imperialism when the same conventions were applied to the new governments. Opportunistic selectivity of such a dubious nature seems to be among those matters political rulers share when it suits them – no matter where they are and what they represent. Double standards are, so to say, among the universally shared techniques for those in power. Despite such temptations for member states to make selective use of what suits their own interests and to abandon what is considered as an unwanted nuisance, the former Permanent Representative of South Africa to the United Nations could summarise the role of the United Nations in the following way: ‘It serves as a beacon of hope and inspiration for the poor, disadvantaged, and marginalised peoples of the world. It is also a centre for the political co-ordination of liberation efforts, and the font of many of the international laws and norms on which those who are involved in struggles for liberation and independence can draw their strength and legitimacy’ (Kumalo 2006: 31).³

The spirit and understanding documented in this conclusion, drawn during our times, resonates with that of the second Secretary-General of the United Nations. In an address before the Academic Association of the University of Lund delivered on 4 May 1959 on ‘Asia, Africa, and the West’, Hammarskjöld confidently claims that, ‘the Organization I represent is based on a philosophy of solidarity’ (Cordier and Foote 1974: 384). On 31 October 1956, during the Suez crisis, he stated before the Security Council in no uncertain terms: ‘The principles of the Charter are, by far, greater than the Organization in which they are embodied, and the aims which they are to safeguard are holier than the policies of any single nation or people... [T]he discretion and impartiality...imposed on the Secretary-General...may not degenerate into a policy of expediency. He must also be a servant of the principles of the Charter, and its aims must ultimately determine what for him is right or wrong’ (Cordier and Foote 1973: 309). In his introduction to the 15th Annual Report of the UN for 1959–1960 (31 August 1960) he reiterated: ‘It is my firm conviction that any result bought at the price of a compromise with the principles and ideals of the Organization, either by yielding to force, by disregard of justice, by neglect of common interests or by contempt for human

3 Given this positive support it seems opportune that the United Nations High Commissioner for Human Rights, heading the most important human rights office within the system, is currently the South African judge Navi Pillay.

rights, is bought at too high a price. That is so because a compromise with its principles and purposes weakens the Organization in a way representing a definite loss for the future that cannot be balanced by any immediate advantage achieved' (Cordier and Foote 1975: 139).

2011 marks half a century since Hammarskjöld died during a mission to seek a peaceful solution for the Congo. The country has remained torn by violence bordering on chronic civil strife, at the expense of the lives of millions of people and the destruction of the physical and mental health of so many more. As so often, women and children suffer most and are the victims of a warfare which does not shy away from systematic rape and other forms of destruction of the individual. But the situation in what is today the Democratic Republic of the Congo is only the tip of the iceberg. People are exposed to similar forms of destruction in many other parts of our world. The challenges Hammarskjöld and his staff were facing in their day have not been solved. Nor have mistakes, which marred the United Nations' involvement in this decolonisation conflict and culminated in the brutal murder of the Congo's first prime minister, Patrice Lumumba, been eliminated since then in other missions.⁴ But the onus 'to save us from hell' still rests on the institution, which despite all setbacks and shortcomings has at the same time also been a norm-setting authority. Since then a wide range of further reference points in support of the advocacy of human rights for all have been created.⁵

The quiet diplomacy at times so skillfully applied by the late Dag Hammarskjöld to advocate the interests of people who otherwise would continue to remain victims of the abuse of power should, however, not be confused with a 'façade of action' (Roth 2011). Throughout his eight years in office Dag Hammarskjöld lived what he considered the ethics of 'The International Civil Service in Law

4 The ambiguous – both constructive and destructive – role of the United Nations in the decolonisation processes on the African continent was personified by Ralph Bunche as one of the most outstanding international civil servants during the 1940s to 1960s. The contributions marking the occasion of the centenary of his birth – in recognition of the remarkable services he rendered – display the merits but also the failures, especially with regard to lack of judgment in the case of the Congo (Hill and Keller 2010).

5 Among the last of these has been the breakthrough achieved by an unanimously adopted United Nations Security Council resolution (1960) on 16 December 2010 to publicly shame armed groups that target women for sexual abuse, using rape as a weapon in warfare. The Council resolution – voicing deep concern at the slow progress in combating the scourge and the limited number of perpetrators brought to justice – stresses the need to end impunity and vows to take 'appropriate steps to address widespread or systematic sexual violence in situation of armed conflict' in accordance with procedures of relevant sanctions committees. For more details see http://en.wikipedia.org/wiki/United_Nations_Security_Council_Resolution_1960

and in Fact'. This was the programmatic title of his address delivered at Oxford University on 30 May 1961 – not much more than 100 days before his untimely death. As he stressed in this paradigmatic explanation of his understanding: '...the international civil servant cannot be accused of lack of neutrality simply for taking a stand on a controversial issue when this is his duty and cannot be avoided. But there remains a serious intellectual and moral problem as we move within an area inside which personal judgment must come into play. Finally, we have to deal with the question of integrity or with, if you please, a question of conscience' (Cordier and Foote 1975: 488).⁶

The question of conscience also guides the thematic focus of this volume and the contributions. This is evident in the first chapter by *Bengt Gustafsson*, who addresses the moral and political aspects scholars and scientists alike – just as much as political office bearers and governments – should face and contemplate by adhering to the existing norms and conventions and refraining from an involvement in potentially adverse activities. In a similar spirit, *Manuel Fröhlich* revisits the schools of thought and resulting arguments of three political philosophers, who contributed with lasting effects to our moral compass. As he suggests, the ideas of Kant, Arendt and Broch provide us with some robust insights and convictions, forming the basis for a legal constitution of the international community.

Following these more theoretical reflections on principles, the chapter by *Robin May Schott* addresses the actual effects of rape as social death and political evil. In doing so, she positions her own approach in the tradition of a feminist philosophy also inspired by and engaged with Hannah Arendt's analyses of the extermination practices under Nazism. The comments by *Jan Axel Nordlander* underline the political relevance for both men and women of such engagement as rigorous contemporary human rights advocacy.

Diana Amnéus explores the legal implications for the (limited) prosecution of sexual violence in a post-conflict situation and discusses the normative weaknesses in the legal procedures protecting against sexual and gender-based violence. She raises the concern that current initiatives fall short of providing any secure protection to women and girls in the aftermath of armed conflicts. The dilemma of reconciling

6 See for the current relevance of Hammarskjöld's Oxford speech the illuminating essay by the former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations, Hans Corell (2010).

a pragmatic effort to reduce violence without sacrificing prosecution and providing new impunity for perpetrators is at the centre of the deliberations offered by *Francis Deng* in the Dag Hammarskjöld Lecture 2010, which is added to this volume for its obvious relevance to the thematic focus. He describes the – at times – painful choices his office has to make by walking the thin line between justice, prosecution and pragmatism. While it is difficult to accept that perpetrators commit their crimes with impunity, this might under certain circumstances bring an end to mass violence and save the lives of thousands more potential victims. Who would want to take these decisions without moral scruples?

Monica Serrano presents overview on the emergence of the R2P norm to protect populations from genocide, ethnic cleansing, war crimes and crimes against humanity. The progress made by the initiative to promote a Convention for Crimes Against Humanity is summarised in an overview by *Leila Nadya Sadat* as the main initiator of this concerted action, which has the support of many renowned scholars and legal practitioners. *Alex Obote-Odora* reflects on his experiences and insights related to the Rwanda Tribunal's jurisprudence and the normative effects the judgments have in the further development of international criminal law related to genocide, war crimes and crimes against humanity.

Finally, the challenges of peacebuilding and statebuilding as an emerging paradigm for responses by the United Nations to fragile situations are at the core of the deliberations of *Ursula Werther-Pietsch* and *Anna-Katharina Roithner*. Their article suggests that in the face of the consequences of the evil of warfare and civil strife, under which so many people continue to suffer in this world, prevention is the best cure. They conclude that regional integration, coherent action, local ownership and proper leadership should be among the ingredients to establish a new standard for United Nations interventions.

★★★

On 8 September 1961, Dag Hammarskjöld addressed the staff at the Secretariat of the United Nations for the last time. His words then are as relevant today, half a century later: 'What is at stake is a basic question of principle: Is the Secretariat to develop as an international secretariat, with the full independence contemplated in Article 100 of the Charter, or is it to be looked upon as an intergovernmental – not international – secretariat providing merely the necessary administrative services for a conference machinery? This is a basic question, and the answer to it affects not only the working of the Secretariat but the

whole of the future of international relations. (...) There is only one answer to the human problem involved, and that is for all to maintain their professional pride, their sense of purpose, and their confidence in the higher destiny of the Organization itself, by keeping to the highest standards of personal integrity in their conduct as international civil servants and in the quality of the work that they turn out on behalf of the Organization. This is the way to defend what they believe in and to strengthen this Organization as an instrument of peace for which they wish to work' (Cordier and Foote 1975, 563ff.).

Hammarskjöld died 10 days later, during the early morning hours of 18 September 1961, in the wreckage of the plane that crashed before landing in Ndola, the Northern Rhodesia border town to the former colony of the Belgian Congo.⁷ His legacy remains alive – not only, but not least through the further drafting and implementation of normative frameworks serving the promotion and protection of human rights for all.

7 None of the 15 other members of his entourage and the crew on board survived. For a short and concise summary of the official versions of the crash as well as the various speculations about foul play see Fröhlich (2008, 27ff.). Until today, rumours have not ceased that the official accident version might not be the full story. As Cordier and Foote (1975: 573) summarise: 'A UN investigation commission later found no evidence to support such theories but also reported its inability definitely to exclude any of four possible causes – sabotage, attack from ground or air, aircraft failure, or pilot failure.'

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Scientists in contemporary wars

Bengt Gustafsson¹

In 1761 the Danish king sent an expedition to Arabia. Many knew, in those years, that Arabia was the happiest region on Earth, and the king wanted to find out why, so that he might improve the conditions in his own poor country, Denmark. The cartographer on board the ship lent by the Danish Navy, a frigate called Grønland, was Carsten Niebuhr.

The Grønland went into the harbour in Marseille on her way to Arabia to take on supplies of food and water. However, in those years Great Britain was at war with France, and British pirates ruled the Mediterranean waters. On the way out of the harbour, several French merchant ships followed the Danish frigate in a convoy, hoping for protection. The weather was calm and sunny, with little wind. At sunset the enemy's sails were visible on the horizon.

The following day the good weather continued. At sunrise the pirate ships were closer, and on board Grønland the ship was made ready for battle. Cannons were loaded and put in position. It was June 5th, the very day on which astronomers had predicted that the planet Venus was to pass across the solar disk. This happens only twice every century and it offered a golden opportunity to measure the distance scale within the solar system. Of particular interest was the distance between Earth and the Sun, about which knowledge was only approximate but which could be measured if observations were made from different viewing angles. So, astronomers were spread across the globe, from northern Lapland to the Cape of Good Hope, to watch the event. Also, on board the Grønland, Carsten Niebuhr set up his telescope. And so, during the initial exchange of fire between the ships, he made his observations. In his diary he complains that the ship was shaking so much that the accuracy of his observations was severely compromised.

What rights and responsibilities can be ascribed to science and scientists in situations of war or warlike conditions? Can they go on

¹ This article has been initiated by the Committee for Freedom and Responsibility in the conduct of Science, CFRS, of the International Council of Science, ICSU. I am grateful for in-depth discussions of many of these issues with CFRS members. I also thank Carol Corrillion, Lars Rydén, Roger Roffey, John Sulston and Peter Wallensteen for valuable suggestions and comments on an earlier version.

doing science as usual? Are principles of scientific freedom – such as freedom of movement to meet other scientists, to exchange information and research materials with colleagues abroad, and to publish – at all possible to argue for under such conditions? If other direct threats are more immediate, such as lethal threats to the scientists themselves and their institutions, do scientists and science communities have any special privileges relative to any other citizens in these respects? And do scientists have special responsibilities in such warlike conditions, vis-à-vis taking part, or refusing to take part, in the development of new weapons?

These questions are complex and difficult to deal with, not least to discuss in general terms. One reason for their complexity is that ‘war and warlike conditions’ can signify very different situations. One situation may be a low-activity war being fought, for instance, in a distant mountain region with only relatively small effects on science in a city university; another may include terrorist attacks in various places within a city; a third may relate to conditions for science and scientists in an area occupied by a neighbouring state; and a fourth could occur when regular armies fight intensively across a region.

The conditions for the survival and pursuit of science in circumstances such as those described above have been discussed repeatedly by the scientific community. Within the International Council of Science (ICSU), such discussions have often focused on the possibility of invoking, in such situations, the Principle of the Universality of Science: freedom of movement, association, expression and communication for scientists, as well as equitable access to data and research materials, independent of such factors as ethnic origin, religion, citizenship, language, political stance, gender, sex or age. ICSU and its committees have, over the years, worked hard to implement this principle in concrete cases and, not least, to defend it for scientists working in warlike situations. But in practice the possibility of enforcing this principle depends on the character of the ongoing conflict.

ICSU’s Universality Principle is inspired by more general principles of human rights, such as the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948.² It includes freedom of movement and residence, and freedom to leave

2 <http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx>. While the present paper was mainly written in 2007, attempts have been made to update references and addresses to web pages. The author regrets possible forthcoming changes in such addresses – adequate web pages should, however, in general be possible to locate using browsers.

and return to the home country; freedom of opinion and expression, and to receive and impart information and ideas through any media and regardless of frontiers; the right to peaceful assembly and association; the right to share in scientific advancement and its benefits; and the right to the protection of the moral and material interests resulting from any scientific, literary or artistic productions of which one is the author. When at war or in conflict, several of these rights may not be fully respected. Nevertheless, the Declaration still gives a basis for arguing for the Principle of the Universality of Science.

Protection through international conventions

How well are scientific rights and scientific institutions protected by international conventions concerning warfare? The situation for the protection of civilians in time of war is considered in detail in the Fourth Geneva Convention of 1949.³ The Convention has now been signed by 194 countries, which are obligated to follow it, even when fighting an enemy who has not signed it, if the latter accepts and applies its provisions. A general principle is that persons who do not take an active part in the hostilities shall, in all circumstances, be treated humanely. With regard to personal mobility, ‘all protected persons who may desire to leave the territory at the outset of or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State’. The types of material for which free passage is permitted are quite limited, as is freedom of communication. We note, however, that internees ‘shall be granted [the right] to continue their studies or to take up new subjects’.

The facilities in which scientific research is conducted have some protection under the Geneva Conventions as well. ‘Any destruction by the Occupying Power of real or personal property, belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.’ The first Additional Protocol to the Convention of 1977 prohibits any acts of hostility directed against historic monuments, works of art, or places of worship, which constitute the cultural or spiritual heritage of peoples. Also, ‘in case of doubt whether an object which is normally dedicated to civilian purposes such as...a school, is being used to make an effective contribution to military action’ (which would make it open to attacks)

³ <http://www.icrc.org/ihl.nsf/INTRO/380?OpenDocument>

‘it shall be presumed not to be so used’. ‘Care shall also be taken in warfare to protect the natural environment against widespread, long-term and severe damage.’ The Second Protocol of 1977, relating to non-international armed conflicts, contains similar protections for individuals as well as for installations and cultural heritage.

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict⁴ of 1954 has been ratified by 88 parties, including Iran, Iraq, Jordan, Lebanon, and the Syrian Arab Republic, as well as Israel, the United States and the United Kingdom, in the latter cases with some reservations. In this Convention, cultural property is defined as ‘movable or immovable property of great importance to the cultural heritage of every people’ and ‘scientific collections and important collections of books and archives’ are explicitly included, as well as buildings where such items are stored. The parties undertake preparations to safeguard such property in time of peace against the foreseeable effects of an armed conflict and to ‘refrain from any act of hostility, directed against such property’. If under occupation they shall ‘as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property’, and shall prepare and foster within their military ‘a spirit of respect for the cultural property of all people’ and supplement it with competent specialist personnel to ‘secure respect for cultural property and to cooperate with the civilian authorities responsible for safeguarding it’. Of particular interest for scientists may be the following: ‘As far as is consistent with the interests of security, personnel engaged in the protection of cultural property shall, in the interest of such property, be respected and, if they fall in the hands of the opposing Party, shall be allowed to continue to carry out their duties whenever the cultural property for which they are responsible has also fallen in the hands of the opposing Party.’ Of significance is also that ‘the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them ... If one of the Powers in conflict is not a Party of the Convention, the Powers which are Parties should nevertheless be bound by it.’

4 <http://www.icomos.org/hague/>

A related convention is the Unesco World Heritage Convention,⁵ first signed in Paris in 1972. As of 2010, there were 187 ratifications. The Convention pertains to the cultural and natural heritage, where cultural heritage is defined as ‘monuments or groups of buildings of outstanding value from the point of view of history, art or *science*’⁶ and natural heritage consists of ‘physical and biological formations or groups of such formations, or geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants, or natural sites or precisely delineated natural areas, which are of outstanding universal value from...a *scientific point of view*.’ Each state party to the Convention recognises that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated on its territory belongs primarily to that state. ‘It will do all it can to this end, to the outmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, *scientific* and technical, which it may be able to obtain.’ Also, ‘each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage...situated on the territory of other States Parties to this Convention’. An intergovernmental committee for protection of the world’s cultural and natural heritage has been set up. The committee was charged with establishing a ‘List of World Heritage in Danger’. The list may include only such property as is threatened by ‘serious and specific dangers, such as...the outbreak or the threat of an armed conflict; calamities and cataclysms ... The committee shall decide on the action to be taken with regards to...requests [for international assistance], determine where appropriate, the nature and extent of its assistance.’ Among the 911 items on the list of world heritage sites presently 34 locations are listed as being in danger.

In the International Covenant of Economic, Social and Cultural Rights,⁷ which is a UN treaty based on the Universal Declaration on Human Rights and created in 1966, it is agreed, vis-à-vis the right to take part in cultural life, that ‘[the] steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right include those necessary for the conservation, the development and the diffusion of science and culture’. Also: ‘The States Parties... undertake to respect the freedom indispensable for scientific research

5 <http://whc.unesco.org/en/conventiontext/>

6 Here and below, the italics are the author’s.

7 ICESCR, see <http://www2.ohchr.org/english/law/cescr.htm>

and creative activity’ and ‘The States Parties...recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.’ This Covenant entered into force in 1976 and was ratified in January 2010 by 160 states, which did not include Malaysia, South Africa or the United States.

Another – and in practice even more relevant – international treaty to consider is the International Covenant on Civil and Political Rights,⁸ another United Nations treaty based on the Universal Declaration of Human Rights. It was also created in 1966 and has now been signed by most states though in some cases (for example, the US) with a number of reservations and understandings, and has not ratified by, for example, China or Pakistan. In this Covenant the following rights are granted to all persons: freedom of movement, to choose their place of residence, and to leave and enter their country; freedom of thought, conscience and religion; freedom of expression and of writing, receiving and imparting ‘information and ideas of all kinds’, and of printing; of the right to ‘peaceful assembly’; and the right to protection against discrimination of all kinds. Moreover, a Human Rights Commission has been set up as an instrument to monitor the implementation of the Covenant and to consider and judge violations by states. An additional Optional Protocol⁹ gives legal force to the Covenant by allowing the Human Rights Commission to investigate and judge complaints on human-rights violations by individuals in signatory countries. To date, more than 100 states have signed this Protocol. However, a number of important states are not among them. States that have not signed the Protocol but have signed the Covenant may still face criticism from the Commission, which usually meets in Geneva, since regular reports on the implementation of the Covenant have to be presented by each state, and on such occasions, specific violations may be brought up by a Commission member. This instrument could be considered as one working model by which violations of the ICSU Principle of the Universality of Science can be addressed.

Unfortunately, despite the various international agreements, in war conditions protection of the Principle of the Universality of Science is not very effective. The conventions and covenants are often not adhered to, nor signed by all relevant countries, and are not fully applicable under contemporary war conditions.

8 ICCPR, <http://www.hrweb.org/legal/cpr.html>

9 <http://www//www.hrweb.org/legal/cpr-prot.html>

Modern wars and science in difficulties

The Geneva Conventions were written with ‘classical warfare’ or ‘second and third generation’ war (as classified in an American military doctrine of 1989) in mind. In this scheme second generation war still maintained lines of battle while the development of the blitzkrieg in the Second World War demonstrated the possibility of using speed and surprise to bypass the enemy’s lines and overcome their forces from the rear, a tactic that characterises third generation war. Fourth generation war includes warfare’s return to a decentralised form, in a sense regressing to the uncontrolled combat of medieval times. The conflicts are decentralised, extended in time, low-intensity and episodic. Often, one of the major participants is not a state but a violent group outside the nation state, blurring the lines between war and politics, soldier and civilian, peace and conflict, battlefield and safety, as concluded by Lind (2004). Examples include the Kosovo War, the Lebanese Civil War as well as the recent Israel-Lebanon conflict, and the Iraq War.

A related discourse on changes in warfare is based on the distinction between ‘old wars’ and ‘new wars’, based on observations drawn from the post-Cold War Period by Kaldor (1999). She notes that globalisation has put the focus on identity, not territory, that guerrilla and terror tactics are used, and that the financing of the war-related activities has changed considerably. Distinctions between internal and external wars are difficult to make, as are distinctions between aggression and repression. The question of whether civilians and civil society are suffering more or less in the new wars than in the old ones is disputed (cf. Melander, Öberg and Hall 2006). A major problem in the present context is how to make certain that the rights and responsibilities of scientists are protected in the ‘fourth generation’ or ‘new’ wars. Although the lines between civilians and soldiers are ‘blurred’, the possibilities of continuing scientific activities during such a war may be greater than in previous wars, in particular if the war is of relatively low intensity.

In 2006 the Uppsala Conflict Data Programme (UCDP)¹⁰ on armed conflicts listed more than 30 ongoing active conflicts (that is, conflicts in which there are at least 25 battle-related deaths per year). Of these conflicts, almost all involved one or more states versus one or more insurgencies or rebel groups. States involved in such conflicts were

¹⁰ <http://www.pcr.uu.se/research/UCDP>

Afghanistan and its allies, Algeria, Burundi, Chad, Central African Republic, Colombia, Ethiopia, India, Iran, Iraq and allies, Israel, Myanmar (Burma), Nepal, Pakistan, Philippines, Sri Lanka, Sudan, Thailand, Turkey, Uganda and the US. Two conflicts between states were listed: those between Russia and the Republic of Chechnya, and between Somalia and Ethiopia.

What is the situation for science in these conflicts? On the agenda of the ICSU Committee for Freedom and Responsibility in the conduct of Science (CFRS) is, among other tasks, that of considering individual cases of breaches of the Principle of Universality or other related problems for individual scientists. A considerable number of such cases have reached the Committee, and most of them concern citizens of the countries listed above.

In many of these cases freedom of movement is hampered. In the Middle East, Palestinian students, including PhD students, have only quite limited possibilities of going to Israeli universities and even suffer restrictions within Palestine, and most students in Gaza can presently not leave the Gaza strip at all. Scientists in Cuba and the Arab world, as well as those in other countries, experience considerable difficulty in obtaining visas to travel to the US and other countries, even for short-term visits to attend scientific conferences and participate in scientific collaboration. Conferences arranged by some countries appear to omit colleagues from certain countries on political grounds. Freedom of association and communication is severely limited in many of the countries with ongoing conflicts. In Russia, several physicists and technology experts have, in recent years, been convicted of spying and given long prison sentences, because, it is widely believed, of having had contact with colleagues and companies abroad and using unclassified research in commercial undertakings. In several countries scientists have been punished for taking public stands on controversial issues, or for criticising the government or local political entities. Many of these cases seem to arise because scientists tend to seek and speak the truth, whether the issue is scientific or political. When scientists learn of unjust government behaviour and repression of human rights, they sometimes create or become involved in political movements to promote respect for human rights and social or governmental change. In associating with others who share their views, they can make themselves vulnerable to false accusations of associating with terrorists or plotting with others to violently overthrow the regime. A number of these cases have been lethal, for example in Iraq and recently in Chad. In several other cases, critical scientists have been imprisoned on unclear legal grounds, and

in numerous other cases they have been forced to leave their scientific positions or undertakings on political grounds.

It is not uncommon for authorities to limit the activities of universities. Often reported too is direct violence by the police and armed forces and by opposition forces against lawful meetings or other activities at universities. Recent reports about such interventions have come from Egypt, Ethiopia, Eritrea, Iran and Russia. Such measures are generally attributed to security concerns. In countries in conflict universities and schools are often among the first to suffer. During the last decade a number of universities have been closed or reorganised for what appears to be purely political reasons. In certain countries, export or import restrictions make transfer of research materials impossible, or extremely cumbersome.

These examples are very worrying in themselves. They often have a mixed character, in the sense that those suffering from oppression may be leading scientists but also be active politically, and punished perhaps mainly for exercising their ordinary human rights. In some cases, one may suspect that the scientific background and stature of those involved may worsen their situation. In other cases it may give them a measure of protection. Scientists and students, like everyone else, have the right to freely express their ideas and opinions, be it in writing, by speaking, or through other means of communication. In a number of countries, when individuals criticise government policies – whether these concern the environment, health, education or science – they risk severe repercussions. Often, broad state security laws are put in place when governments are involved in conflicts, whether international or internal. More worrying is that the cases mentioned above are most probably only the tip of the iceberg. We have reason to believe that less publicly visible cases, where lesser-known public figures are the focus or where student demonstrations are suppressed, are quite common but they do not attract the attention of the media and fail to reach human rights organisations. Also, science may be seriously hampered or even stopped altogether by more refined means, where the breaches of the Universality Principle are much less conspicuous. Finally, in a warlike situation, there is often general acceptance among the population and even within the scientific community that measures such as the rationing of commodities, and other economic restrictions, may have negative repercussions on schools, universities or research institutions.

Science and weapons development

When a state is threatened by an armed conflict, individuals in various sectors of society are often mobilised, on a more or less voluntary basis, to strengthen defence. In development of weaponry, including advanced weapons, people with a background in natural sciences, mathematics and technology are recruited. This occurs all over the world, and not only in situations involving open armed conflicts. The pressure on the civilian scientist to undertake weapons work generally increases in such situations. We will not discuss here the general question of whether it is ethically acceptable for a scientist to engage in the development of, for example, biological or chemical weapons, nuclear weapons or cluster bombs.¹¹ However, we do wish to comment on the question of whether, and to what extent, there is pressure or force exerted on the individual scientist to become involved and shift towards such military activities in modern conflict situations, against his or her will. We shall also discuss to what extent such pressures can be resisted or reduced by scientists or the scientific community as a whole.

The attitudes and roles of scientists in weapons development in warlike situations has been discussed in relation to historical evidence, concerning the roles played by leading scientists in the development of nuclear weapons and other weapons of mass destruction – chemical or biological. An interesting summary by Miller (2002) argues that Fritz Haber, the pioneer in the development of chemical weapons in the First World War, as well as the leading nuclear physicists developing nuclear weapons in both the US and the USSR (and even Werner Heisenberg in the case of Germany), were driven by patriotism and a conviction that what they did was necessary. A quote from Andrei Sakharov illustrates this in Miller's presentation. At the age of 27, Sakharov joined the Soviet nuclear weapon project, led by Igor Kurchatov and senior colleagues such as Igor Tamm and Yakov Zeldovich: 'In 1948, no one asked whether I wanted to take part in such work. I had no real choice in the matter, but the concentration, total absorption, and energy that I brought to the task were my own. Now that some many years have passed, I would like to explain my dedication – not least to myself. One reason for it (though not the main one) was the opportunity to do 'superb physics' (Fermi's comment on the [US] atomic bomb program). But I feel confident in saying that infatuation with a spectacular new physics was not my primary

¹¹ A principle to adhere to could be not to take part in the development of weaponry because, according to international conventions, that is not allowed. Another principle could be to refuse to take part in work that, in the personal judgement of the individual scientist him/herself, would do more harm than good (cf. Gustafsson et al. 1984).

motivation; I could easily have found another problem in theoretical physics to keep me amused – as Fermi did, if you will pardon this immodest comparison. What was most important for me at the time, and also, I believe for Tamm and the other members of the group, was the conviction that our work was essential. – I understood, of course, the terrifying, inhuman nature of the weapons we were building. But the recent war had also been an exercise in barbarity; and although I hadn't fought in that conflict, I regarded myself as a soldier in this new scientific war (Kurchatov himself said we were 'soldiers', and this was no idle remark). We were possessed by a true war psychology, which became still more overpowering after our transfer to the Installation [the secret weapons laboratory at Arzamas-16].'

According to Miller, the context of Sakharov's work was the 'recent war in which 20 million Soviet citizens had been killed, and the strong feeling that the fruits of victory over Nazi Germany would be short-lived if the US maintained a monopoly on nuclear weapons'. Sakharov and his colleagues were thus 'possessed by a true war psychology'. M. M. Miller, however, argues that even without as strong a commitment as that described by Sakharov, weapons were developed by enthusiastic scientists: '... in the US from the end of World War II until the Soviet Union tested an atomic bomb in August 1949, there was little of this ['war psychology']'. Nuclear weapons development at Los Alamos continued apace, but the consensus view was that the US had a long lead over the Soviet Union in the nuclear domain. In this atmosphere, the opportunity to improve the Nagasaki bomb design had a strong appeal. One of the pioneers in this work was Theodore Taylor: 'I continue to insist that, although a concern for national well-being may have been what drew most scientists and engineers into the world's nuclear weapon programs, the work has remained fascinating for any who have been creatively inclined. I'm also convinced that the fascination persists in any environment in which pushing the physical limits for nuclear weaponry is encouraged... As a graduate student at Berkeley I had even been strongly involved in student activism against the bomb. But within weeks after getting to Los Alamos [in 1949], I was thoroughly hooked on the fascinations for nuclear explosives. That addiction persists through the present, and I can only deal with it by abstinence' (cited in Miller 2002).

It seems realistic to assume that strong disincentives would be needed to prevent gifted scientists from joining weapons programmes when such programmes offer good working conditions, interesting scientific problems and technological challenges, and win them the appreciation of colleagues and leaders. This is particularly relevant if no other

options to continue to do science are offered. Indeed, it is not clear whether it would be at all realistic to persuade scientists not to take part in weapons development in situations where there is also a consensus among the population that the nation is under threat, whether this is true or not. On the other hand, the factual background plays a role in the attitude of the scientists. At least some scientists, including Einstein, took a stand against nuclear weapons in the US when it became clear that they would be used against Japan to end the war. And Kanatjan Alibekov, who was responsible for developing biological weapons for the Soviet Union and who, like Sakharov, said patriotic ethical arguments were behind his engagement in the project, defected in 1992 to the US, and claims that he did so partly as a result of learning that the US had no biological-weapons programme, contrary to what he had been told earlier (Alibek and Handelman 1999).

A special case arises when scientists are asked or forced to contribute to the development of weapons that are forbidden, according to international conventions, such as biological or chemical weapons.¹² It is most important that young scientists are given clear information about their countries' obligations to adhere to these conventions. Similarly, an internationally based code of conduct for scientists taking part in research on protection against biological and chemical weapons should be established (Roffey, Hart and Kuhlau 2006) in order to support scientists who suspect that the results of their nominally defensive activities are actually intended for the development of offensive weapons, and, if possible, to prevent individual scientists from misusing their expert knowledge.¹³

Is it reasonable to expect scientists in fields relevant to military applications to refuse to engage in the development of weapons in warlike situations? And if they resist, at what price? One may certainly find examples of established scientists in relevant fields who, despite war or the threat of war, have still succeeded in avoiding such undertakings. In general, it is probably easier for well-established professors to say no. For young scientists, there may only be a choice between a safe and interesting research position at a military 'installation' or ordinary military service at the frontiers. Senior scientists may also feel compelled to accept offers from the military or weapons industry, not to support their own interests, but to help young scientists on their career paths.

12 According to the Geneva Protocol 1925 (<http://www.icrc.org/ihl.nsf/intro/280>) and the Biological Weapons and Biological and Toxin Weapons Conventions from 1973. (<http://www.opbw.org>).

13 We note that the individual who produced and sent the anthrax letters in the US in 2001 and for many years worked in the US Army Medical Research Institute for Infectious Diseases on protection against biological threats.

Also, under less pressing conditions, the choice for young scientists may be restricted. Even at well-established Western universities the involvement of military or weapons-industry interests is considerable. For example, a recent study by Langley, Parkinson and Webber (2008) suggests that among 43 UK universities studied, at least 42 receive military funding of, on average, about £2 million per year per university. The income of military origin for a major institution like Cambridge University corresponds to more than 10 per cent of the income of the total contracts from industry. In practice this implies that hundreds of scientists at British universities have no other option, in pursuing a scientific career, but to work on military projects. There are strong reasons to believe that the situation is similar in many other countries.

Finally, it should be noted that scientists engaged in weapons development in industry, and sometimes also within the public sector, are not unusually promoted to managerial levels where they may become responsible for decisions about arms exports, including to various parties in fourth generation wars. The question now is the extent to which they, as scientists, may or should bring their ethics with them when promoted. A reasonable argument could be that people who take pride in their identity as a scientist should be expected to follow explicit or implicit codes of conduct, generally accepted in the scientific world. A person who is tempted or forced by commercial or security interests to give up such principles should also lose credibility and integrity as a scientist.

Recommendations

Given the background described above, what can be done by the scientific community and organisations such as ICSU to help promote scientific freedom, as expressed in the Principle of the Universality of Science, in contemporary armed conflicts?

1. To promote and follow up on adherence to the international conventions listed above is an important task. This long-term undertaking requires persistence, but should be seen in a broader context, as part of a general effort to defend human rights. As part of this work, efforts should be made to encourage those countries that have not yet signed the various conventions to do so. These countries include the US and the UK for the Hague Convention for the Protection of Cultural Property, the US for the Covenant of Economic, Social and Cultural Rights, and several countries including China, Egypt, Iraq, Iran, Israel and the US for the Optional Protocol of the International Covenant on Civil and

Political Rights. Through the Protocol, legal force is added to the Covenant by allowing the UN Human Rights Commission to investigate and judge complaints about human-rights violations committed by individuals from signatory countries. States that have not signed this Protocol may still have to face criticism in the Commission, which usually meets in Geneva, since regular reports on the implementation of the Covenant have to be presented by each state. On such occasions, specific violations may be raised by the Commission members. This instrument could be used with regard to violations of the Universality Principle for ICSU.

2. A different, or complementary, way of working could be to try to create the position of a special rapporteur at the United Nations under its Human Rights Council. Presently, there are close to 30 rapporteurs who specialise in different areas, such as ‘the sale of children, child prostitution and child pornography’, ‘the right of education’, ‘the promotion and protection of the right to freedom of opinion and expression’, ‘the independence of judges and lawyers’, ‘the situation of human rights in the Palestinian Authority’, which has been occupied since 1967, and ‘human right defenders’, among others. If the UN were to have an active rapporteur ‘on breaches of the Principle of the Universality of Science’ (or, for example, ‘freedom and responsibility of science’) this officer could play an important role, as well as making cases of violations known. A natural way to try to further such a development would be to approach several governments and ask them to raise the issue at the UN. A coordinated effort within the scientific community could be rewarding in this respect. An argument against advocating for a special rapporteur for the rights of scientists could be that scientists make up a relatively small group. Inclusion of university students or other groups of intellectuals might be advisable. An alternative could be to strengthen the collaboration between different NGOs presently monitoring and reporting on breaches of Universality Principle, as well as other threats against academia.
3. The situation of scientists whose human rights are violated or who are exposed to breaches of the Principle of Universality is presently continuously monitored by a number of groups and organisations, at several national academies of science (in particular the US academies¹⁴), by the Committee on Academic Freedom of the Middle East Studies Association,¹⁵ Amnesty International,¹⁶

14 <http://sites.nationalacademies.org/PGA/humanrights/index.htm>

15 http://www.mesa.arizona.edu/aff/academic_freedom.htm

16 <http://www.amnesty.org/>

ICSU CFRS,¹⁷ and various networks.¹⁸ It is also discussed within Pugwash.¹⁹ This work is important and must continue. If possible it should be strengthened. Presently, these activities only provide support and visibility for a limited number of cases. Too little is known in general about how war conditions affect science and higher education today. A more directed study is needed. Particularly if the situation of science and scientists in contemporary conflicts is to be a focus as background for further and broader actions, it is necessary to explore more systematically what actually happens to scientists and research in such situations.

4. A particular effort should be made to systematically monitor and report on the situation of universities as intellectually free organisations, in countries where there are armed conflicts or where human rights are suppressed for other reasons. The value of a monitoring activity lies in the reaction to violations by international networks of scientists that help support science and teaching under difficult circumstances. In fact, the value of such an initiative goes beyond the interests of science and academia. Political intrusion into academic affairs may serve as an early warning sign that human rights are being violated and political oppression is occurring more widely in a particular region, or even that military interventions are being prepared. At the European level, an Observatory of Fundamental University Values and Rights, based on a Magna Charta Universitatum, has been signed by a number of European universities.²⁰ A global initiative of this nature should be considered. ICSU could act as a catalyst or possibly take on a leading role. That said, the International Association of Universities²¹ could be a more appropriate responsible organisation.
5. Principles of openness regarding research funding are particularly important to maintain a free and open research and teaching agenda. Generally, every young scientist must have the possibility to fully understand how her or his work, as well as that of close colleagues, is financially supported. Moreover, students should have clear information about the objectives and the funding of

17 http://www.icsu.org/5_abouticsu/STRUCT_Comm_Poli.html#CFRS

18 e.g. International Network for Education for Democracy, Human Rights and Tolerance, <http://www.bertelsmann-stiftung.de/>; Scholars at Risk Network, <http://scholarsatrisk.nyu.edu/>; International Human Rights Network of Academies and Scholarly Societies, http://sites.nationalacademies.org/PGA/humanrights/PGA_044113

19 <http://www.pugwash.org>

20 <http://www.magna-charta.org/>

21 <http://www.unesco.org/iau/>

their universities. In the case of state universities, taxpayers should have full insight into the funding situation. There is a concern, in the case of funding by the military, that the research agenda may become biased towards security issues and, in particular, those that focus on the development and use of high-technology weapons, rather than alternative non-military research. Principles of openness regarding funding and external commitments are important to formulate and maintain as part of the global initiative recommended in the previous paragraph.

6. The interesting question of whether, and how, one should persuade scientists not to engage in weapons development, at least not in development of weapons of mass destruction (WMD), needs further discussion. The fundamental question of whether the possession and possible use of such weapons is at all legitimate under any conditions should be addressed. Another issue is what sticks and carrots should be used to discourage weapons research; for example, should scientists working on WMD in countries that have not signed international agreements that restrain development of these weapons²² have to face restrictions on travel abroad, publishing papers, and so on? In other words, should the Principle of the Universality of Science be breached in such cases?²³ If so, on what evidence? Should collective restrictions, such as ones based on nationality, ever be tolerated?
7. The position of an international ombudsman, for example connected to the UN system or possibly to an NGO like Pugwash, should be established. The ombudsman's role would be to advise and in other ways serve scientists who feel or suspect that they are forced into illegal activities with respect to international conventions against WMD. The individual cases should be handled with discretion, while general public statements should be made and other actions taken when conventions are breached.
8. The complexity of issues related to weapons development, security and the role of scientists, must be appreciated, and the scientific community must be guided by true knowledge and careful studies

22 Examples are the Comprehensive Test Ban Treaty, the Nuclear Nonproliferation Treaty and the Chemical Weapons Convention

23 A recent example of such a breach is a Dutch law, passed on 4 July 2008, which bans students with Iranian citizenship, as well as those with dual Iranian/Dutch citizenship, from enrolling in graduate courses involving nuclear and rocket technologies; see <http://www.nature.com/news/2008/080707/full/news.2008.938.html>. We note, however, that Iran has signed the Non-Proliferation Treaty.

of standpoints and actions.²⁴ These studies involve an interdisciplinary approach with, not least, the social sciences. It is true that final conclusions will be value-based, but better knowledge about these issues is urgently needed, and that can certainly not be limited to technical aspects only. Therefore, the community must take an interest in and strongly support such studies.

9. It may be true, as is sometimes suggested,²⁵ that the vast majority of working scientists are quite happy to leave the discussion of societal and ethical issues to a small minority of scientists. If this is presently true, it is all the more important to discuss the ethical implications of work on WMD and other so-called dual-use issues when the risks of misuse of scientific findings may outweigh their use for the good of society. Such broad discussions should be initiated at universities, laboratories and professional societies.
10. An international fund or funding agency to support scientists who have decided to give up or refuse military engagements should be created. Time-limited research grants should be provided, (based on the quality of research proposals and subject to peer review), to facilitate transfer to civil research activities.
11. An international prize of considerable size and prestige should be established and awarded to individual scientists who actively promote the Principle of the Universality of Science by taking stands, in their daily lives, against suppression of the principle. This should not be seen as a reward primarily from scientific colleagues anxious to keep their rights or privileges. More importantly, the state of the world is such that scientific talent must be used for constructive contributions. Making this possible is an urgent task for everyone.

24 Quoting the former director of Lawrence Livermore Laboratory and US Ambassador to the Comprehensive Test-Ban Negotiations in Geneva, Herbert F. York (1995, p. 109): 'Clearly, zeal is not enough. Anyone wishing to contribute to solving either of our... national security problems must, first, admit that these problems involve deeply rooted and difficult issues, and, second, he or she must make a serious attempt to understand more than just one of their important aspects: political, moral, military or technological.'

25 Miller, M. M. (2002), CNS Branch Office: Briefing Series, *From Haber to Heisenberg and Beyond: The Role of Scientists in the Acquisition of WMD*, http://cns.miiis.edu/archive/cns/programs/dc/briefs/02_03_26.htm

Concluding remarks

The Danish author, Thorkild Hansen, who has written about the Danish expedition to Arabia (with Carsten Niebuhr as cartographer) and the observation of the Venus passage that occurred aboard a ship in the midst of preparations for a battle, which I referred to in my introduction, says: ‘While the ships are made ready for the battle the astronomer starts his observations, what a moving scene! It is also comforting that in a world where many more heavy weapons are now made ready to deliver their deadly arguments²⁶ some people dare to look in quite different directions. Maybe that is why we can still keep humanity alive’ (Hansen 1962/1964: 72; translation from Danish edition by present author).

Carsten Niebuhr was not an irresponsible person. In fact, when the leader and several other members of the expedition subsequently died from dysentery and malaria, he took up the leadership of the expedition and brought it to an Arabia that they found to be far from happy, and then back to Copenhagen, together with a great number of scientific findings and specimens.

²⁶ This was written during the Cold War in the early 1960s.

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Crimes against humanity, humankind and the international community

Reflections on Kant, Arendt and Broch

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The challenge of dealing with crimes against humanity encompasses a number of technical legal and political questions. But the challenge also lies in the conceptual understanding of the content and relevance of international efforts for the prevention and prosecution of crimes against humanity. In this context, the theoretical underpinnings of the terms involved can provide some orientation into the nature, scope and significance of crimes against humanity and their connection with the concepts of humankind as a collective entity and the international community as a concrete legal manifestation and actor thereof. In order to explore this context, the following reflections will discuss some pertinent insights from Immanuel Kant, Hannah Arendt and Hermann Broch that indicate a distinct path of reasoning about crimes against humanity within the history of ideas, which in turn can provide some orientation in dealing with the present challenges.

1.

In 1795 Immanuel Kant published his essay on 'Perpetual Peace' in which he outlined a strategy of legalisation to pacify international relations. While the preliminary articles of that essay contained the preconditions for the pursuit of an active programme for peace, the definitive articles outlined the positive steps to be taken in the realms of domestic, international and cosmopolitan law. The third and last definitive article reads like a rather strange provision: 'Cosmopolitan right shall be limited to conditions of universal hospitality' (Kant 1795: 118; Gerhardt 1995; Fröhlich 1997; Dicke and Kodalle 1998). This article is in fact related to Kant's critique of colonial practices at the time: 'When discovered, America, the lands occupied by the blacks, the Spice Islands, the Cape, etc., were regarded as lands belonging to no one because their inhabitants were counted for nothing' (Kant 1795: 119). Such behaviour, from Kant's point of view, is not only a breach of the central provisions in the preliminary articles (such as the proscription not to treat societies of men as possessions) but is also in stark contrast to Kant's categorical imperative: 'Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.' (Kant 1785: 96) This imperative has clear conse-

quences for political philosophy. Kant emphasised the crucial importance of a society's consenting to its political constitution which, to meet this crucial requirement, had to be republican. The first definitive article of the peace essay therefore states: 'The civil constitution of every nation should be republican' (Kant 1795: 112). With this article, Kant hoped the principles that guide human relations within states (such as freedom, equality and tolerance) would also promote peaceful relations between states: 'If (as must inevitably be the case, given this form of constitution) the consent of the citizenry is required in order to determine whether or not there will be war, it is natural that they consider all its calamities before committing themselves to such a risky game' (Kant 1795: 113). The interrelationship between norms, rules and behaviour at the domestic level and the international level is taken one step further with the third definitive article and its reference to the cosmopolitan level. Objecting to the practice of colonialism, Kant argues: 'Because a (narrower or wider) community widely prevails among the Earth's peoples, a transgression of rights in one place in the world is felt everywhere; consequently, the idea of cosmopolitan right is not fantastic and exaggerated, but rather an amendment to the unwritten code of national and international rights, necessary to the public rights of men in general. Only such an amendment allows us to flatter ourselves with the thought that we are making continual progress towards perpetual peace' (Kant 1795: 119). It is in this sentence that, in the original German edition, the 'public rights of men' are phrased more specifically as 'öffentliches Menschenrecht' (public human right) (Kant 1795a: 24). Kant's reasoning is compelling: if there are such things as rights that people have simply by virtue of being human, then the denial or violation of them experienced by any member of humankind can be seen as a broader assault on the very notion of these universal rights and therefore a (potential) denial or violation of these rights experienced by all members of humankind. It is exactly this feeling of interconnectedness that constitutes the 'community among the Earth's people' which, in its very self-understanding as a collective entity, is challenged but also reinforced by such transgressions.

The notion of human rights in Kant's day was of course heavily influenced by the American and French revolutions, which causes a number of critics to raise objections to the claim to universality of such a notion, which, in their view, is too much linked to Western concepts of natural law, European thought or Enlightenment philosophy. While there may be reason and space to discuss contending notions of individual rights and freedom, Kant's approach offers three strong orientations in conceptualising crimes against humanity. His notion of humanity establishes a basis to conceive of 'humanity' as the victim of certain crimes, which Kant clearly defends against the easy criticism of being 'fantastic and exaggerated'. Further to that, Kant speaks of 'humanity' as a collective,

but both the perpetrators and the victims of crimes against humanity can be thought of as individual human beings who, therefore, can be held accountable or are entitled to compensation. And last but not least, Kant does not try to enumerate various examples of ‘crimes against humanity’ but rather speaks of the ‘feeling’, the common acknowledgment and experience of the transgressions of certain rights as a constitutive feature of these crimes: not all crimes against human beings are crimes against humanity. They must conform to certain standards, which leads us to yet another discussion in the history of ideas.

2.

In 1963 Hannah Arendt published her reports from the Eichmann trial in Jerusalem. In the epilogue of her book, Arendt considers the notion of ‘crimes against humanity’ and makes an interesting observation: ‘[The Nuremberg Charter defined] “crimes against humanity” as “inhuman acts”, which were translated into German as *Verbrechen gegen die Menschlichkeit* – as though the Nazis had simply been lacking in human kindness, certainly the understatement of the century’ (Arendt 1963: 252). Arendt points to the difference between humanity as a standard of conduct (*Menschlichkeit*) and humanity as a collective entity (*Menschheit*). The difference in wording is indeed a crucial one for the whole concept of crimes against humanity as it offers two variations on what constitutes the essence of these crimes. The first reading focuses on the *intensity* of the breach committed, which is understood to go against established standards of human behaviour. The acting perpetrator behaves in a way that is not human and he forces the victim into a situation where he or she is deprived of the normal ‘human’ respect for a person, his or her rights and dignity. The second reading focuses on the *extent* of the reach of the crime committed, which is understood to be an attack upon humanity as a whole. While acknowledging the relevance of the first, Arendt stresses the importance of the latter. She even goes so far as to argue that his assault on humanity could in fact have justified the death penalty for Eichmann. In a hypothetical plea at the end of her book she wrote: ‘[J]ust as you [Eichmann] supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of nations – as though you and your superiors had any right to determine who should and who should not inhabit the world – we can find that no one, that is, no member of the human race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang’ (Arendt 1963: 256). Regardless of this specific conclusion, Arendt’s thinking can surely be linked with Kant’s argument in the third definitive article. The denial of certain rights considered essential to a human being is not only a concrete attack upon the individual concerned but a general attack on humankind – humanity as a whole – and represents a challenge to its self-understanding as a collective entity.

Employing a similar distinction between ‘at least two different meanings [of humanity], the one connotating the human race or mankind as a whole, and the other, humaneness, i.e. a certain quality of behaviour’ (Schwelb 1949: 195), Schwelb argued that it is the latter sense of the word that would be most appropriate when talking about the elements of crimes against humanity. But Schwelb’s argument, which states that it is ‘not necessary for a certain act, in order to come within the notion of crimes against humanity, to affect mankind as a whole’, is not utterly strict in ruling out the reading of humanity that relates to extent, as he goes on to define: ‘A crime against humanity is an offence against certain general principles of law, which, in certain circumstances, *become the concern of the international community*, namely, if it has repercussions reaching across international frontiers, or if it passes “in magnitude or savagery any limits of what is tolerable by modern civilizations” [a statement by Justice Jackson from the Nuremberg trials]’ (ibid.). Schwelb also mentions the fact the General Assembly in its resolution on the Affirmation of Principles of International Law recognised by the Charter of the Nuremberg Tribunal of December 1946 called upon the Committee on the Codification of International Law ‘to treat as a matter of primary importance (...) a general codification of offences *against the peace and security of mankind*’ (GA Res. 95(I) 11 December 1946) – a formulation that clearly pays tribute to the extent reading.

Following up on these interpretations, a more recent discussion of crimes against humanity frames the principal contrast as that of a human-kind reading versus a human-nature reading (Macleod 2010: 283) and then offers a total of seven possible definitions of crimes against humanity. A specific action alternatively could be identified as a crime against humanity, (1) if it is an action contrary to the human nature of the perpetrator; (2) if it targets the human nature of the victim(s); (3) if, in ignoring it, we would ourselves be acting contrary to human nature; (4) if it is an action that shocks the conscience of mankind; (5) if it is a crime that endangers the public order of humankind; (6) if it is a crime that diminishes humankind; (7) if it is a crime that damages humankind. Also referring to Arendt, Macleod advocates the last definition as being the most valid as it goes beyond a mere enumeration of ‘lower’ crimes. Schwelb had in fact also argued that, ‘[i]n a general sense, nearly every crime is inhumane and therefore a crime against humanity’ (Schwelb 1949: 196). Against that background, the understanding of ‘an offence committed against humanity as such’ (Macleod 2010: 287) stands out as a distinctive qualification. When Macleod argues that in this case ‘members of states not directly involved are damaged secondarily’ (Macleod 2010: 300) he makes reference, at least indirectly, to Kant’s argument. Also relying on Kantian thought, Manske has tried to further elaborate on the meaning of crimes against humanity as crimes against humankind in identifying the need for such

crimes to pose the threat of a state of lawlessness, manifesting itself *inter alia* in the organised denial of human rights of a certain population or distinct groups thereof (Manske 2003: 332ff.).

The distinction between an ‘intensity’ reading and an ‘extent’ reading of crimes against humanity does not, however, need to be seen as a simple choice between two mutually exclusive interpretations: crimes that would qualify for the ‘extent’ reading could also fulfil the ‘intensity’ criteria and vice versa. Kuschnik therefore argued: ‘Due to the dualistic concept in semantic and conceptual understanding, neither the component of humaneness nor humankind may be excluded to determine humanity in international criminal law, but need to be seen as two sides of the same coin’ (Kuschnik 2010: 514). In this context Manske highlights that the case of ‘The Prosecutor vs. Drazen Erdemovic’ prompted different readings by some judges in the Appeals Chamber of the International Tribunal for the Former Yugoslavia (Manske 2003: 29–31; 333–338). The sentencing judgment had stated: ‘Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim that essentially characterises crimes against humanity.’¹ In support of this view, Judges McDonald and Vohrah in a Joint Separate Opinion argued that ‘[crimes against humanity] consequently affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group or location. On this score, the notion of crimes against humanity laid down in current international law constitutes the modern translation of the concept propounded way back in 1795 by Immanuel Kant, whereby “a violation of law and right in one place [on the earth] is felt in *all* others” (emphasis added).’² In contrast to this argument, Judge Li, in a Separate and Dissenting Opinion, argued that ‘it is not true to say that a crime against humanity is one against the whole of mankind’,³ referring to the 1949 quote by Schwelb discussed above. The Prosecutor eventually withdrew the count of crimes against humanity in the face

1 The Prosecutor v. Drazen Erdemovic (Case No. IT-96-22-T), 29 November 1996, Sentencing Judgement: para 28. Note that ‘extent’ in this quote is closely tied to the gravity of inhumane acts (‘intensity’) whereas the following sentence (‘But ...’) then emphasises the ‘extent’ reading introduced above.

2 The Prosecutor v. Drazen Erdemovic (Case No. IT-96-22-A), 7 October 1997, Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah: para 21.

3 The Prosecutor v. Drazen Erdemovic (Case No. IT-96-22-A), 7 October 1997, Judgement, Separate and Dissenting Opinion of Judge Li: para 28.

of Erdemovic's plea of guilty with respect to the count of murder as a violation of the laws or customs of war.⁴

In relation to both the 'intensity' and the 'extent' reading of crimes against humanity, one further aspect is clear: namely that crimes against humanity imply a strong obligation to respond. If such crimes go unchallenged, every human being on earth is less secure than he or she was before. What has been proven to be possible in the criminal act against one member of humankind, enlarges the scope of threats against all members of humankind. The combination of Kant's reasoning with Arendt's argument links a philosophical position from the late 18th century with the bitter practical experience of human suffering at the beginning of the 20th century, which obviously shapes the current debate and legal practice concerning humanity as a collective entity in international relations and international law.

3.

The first uses of the term 'humanity' in legal texts can be traced back to the 'Lieber Code' in 1863 as well as the Hague Peace Conferences (see Schabas 2009: 17ff; Schabas 2010; Manske 2003). While these efforts were concerned with the amelioration of human suffering in war, the tripartite declaration of 24 May 1915, issued by the governments of France, Great Britain and Russia against the background of reports of massacres of Armenians, introduced a new usage of the term. The declaration stated that '[i]n the presence of these new crimes of Turkey against humanity and civilisation, the allied Governments publicly inform the Sublime Porte that they will hold personally responsible for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres' (quoted in Schabas 2010: 139). The dual meaning of humanity as referring to the intensity and extent of the crimes committed is accentuated by the fact that the wording of that declaration underwent some changes as the original draft from Russia had spoken of 'crimes committed by Turkey against Christianity and civilisation' (cf. Sarafian 2003). While the British draft omitted the reference to 'Christianity and civilisation', 'only' speaking of 'these fresh crimes', the eventual Russian and French versions of the declaration changed 'Christianity' to 'humanity'. Although Sarafin (2003) argues that this change is merely 'a matter of word play' against the background that Muslims could take offence at the appeal to Christianity, the use of the term and the fact that it seems to have suggested itself easily to replace the reference to 'Christianity' is nonetheless noteworthy. 'Christianity' is of course associated both with 'Christendom', the collective body of Christians throughout the world, and with a particular religion which lays down certain standards

4 For further documentation of the case see also www.haguejusticeportal.net.

of behaviour. However, the double reference to ‘Christianity and civilisation’ (the latter not spelt with a capital letter) does suggest that civilisation probably refers more to a standard of behaviour (the ‘intensity’ of the crimes, as discussed above) whereas Christianity probably refers more to the group concerned (‘extent’). The newly introduced ‘humanity’ could therefore be read not only as a re-enforcement of the appeal to civilised behaviour but rather as a supplement to cover both the intensity and extent of ‘these new crimes’. The governments obviously felt that their complaint would not necessarily need to make reference to or have to be legitimised by Christianity as a religion practised by a particular group of people but could also be supported by the appeal to humanity as a whole.

Such considerations of a conceptual nature have only limited use for concrete judicial work. The relevant documents in international law from the 1945 Nuremberg Charter up until the Rome Statute of the International Criminal Court of 1998, rather than defining crimes against humanity in the abstract, therefore set out to define them by listing certain elements of crimes. In this context, the criterion that the acts are ‘committed as part of a widespread or systematic attack directed against and civilian population, with knowledge of the attack’ (Art. 7 (1)) emerges as a necessary condition for the prosecution of perpetrators of a number of crimes detailed, most recently in the Rome Statute, in a list of 11 items from murder to ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’ (Art. 7 (1) (k)). The overall wording seems to lean more towards the ‘intensity’ dimension of crimes against humanity – consciously speaking of ‘inhumane acts’. The adjective clearly separates humane from inhumane *behaviour*. Such an interpretation is supported by the fact that the ‘Elements of Crime’, adopted by the Assembly of State Parties to the Rome Statute in September 2002, further explains in footnotes 29 and 30 that the use of the term ‘character’ in Article. 7 (1) (k) ‘refers to the nature and gravity of the act’ (ICC ASP/1/3 Part II-B; see also Kuschnik 2010: 504). And yet, at the same time, the Rome Statute pays tribute to the ‘extent’ dimension of humanity, although it employs another term. Article 5 of the Statute reads: ‘The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.’ Although the terminology differs, it can be argued that ‘international community’ relates to the notion of humanity as humankind.

The term ‘international community’ introduces yet another rather vague notion. But in contrast to ‘humanity’ it is used rather quite frequently in a number of legal texts (Tomuschat 1995; Paulus 2001). Tomuschat argues that in contrast to philosophical theory, international law can directly observe a multitude of ‘statements by states which unequivocally

cally and in plain language profess in their collectivity to represent an international community’ (Tomuschat 1995: 8; author’s translation).⁵ One of the most important occurrences in international law is its inclusion in Article 53 of the Vienna Convention on the Law of Treaties 1969 which established the notion of ‘ius cogens’ – that is, norms ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted (...)’. The concept of ‘ius cogens’ is closely linked with obligations, ‘erga omnes’, derived from the 1970 Barcelona Traction judgment by the International Court of Justice. In that judgment the Court specified obligations erga omnes as ‘obligations of a State towards the international community as whole’ which ‘[b]y their very nature [are] the concern of all States’ because ‘all States can be held to have a legal interest in their protection’ (ICJ 1970: 32). In the judgment of the ICJ these obligations can derive from, for example, ‘the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination’ (ICJ 1970: 32). Here, then, emerges an interesting link between the effort to define crimes against humanity and the international community as a manifestation of humanity as humankind: a philosophical notion of humankind as affected by and concerned with these crimes helps to narrow down the specific peculiarities of such crimes. And the elements of these crimes, at the same time, can help to define or even constitute what represents the normative core of the international community. In this perspective, the effort to define and eliminate crimes against humanity is inherently linked to the effort to define and constitute the international community. Once again a reference to the history of ideas sheds light on this particular context.

4.

In 1946 Hermann Broch, German writer and close observer of the phenomenon of totalitarianism, which he witnessed from exile in the United States, wrote an article entitled ‘Remarks on the Utopia of an “International Bill of Rights and Responsibilities”’ (Broch 1946: 243–277; translated from German, as all quotes that follow below).⁶ In that essay, Broch made a number of pertinent observations that tie in with Kant’s thought as well as the work of Hannah Arendt (with whom he also shared a correspondence at the time). Broch described his response to the founding of the United Nations as well as the initiation of the work for a ‘Universal Declaration of Human Rights’ by the Human

5 ‘(...) Äußerungen der Staaten selbst, die sich sehr eindeutig und ohne Umschweife dazu bekennen, in ihrer Gesamtheit eine internationale Gemeinschaft zu bilden.’

6 ‘Bemerkungen zur Utopie einer “International Bill of Rights and Responsibilities”’

Rights Commission under the leadership of Eleanor Roosevelt. For him, these efforts had ‘traces of a newly awakened human world conscience’ (Broch 1946: 243).⁷ Referring to President Roosevelt’s ‘Four Freedoms’ he understood the efforts to establish a new structure for world organisation as being founded upon the categorical recognition of human liberty and human dignity, which presupposes the permanent and unqualified protection of the physical and psychological integrity of man as an ultimate good’ (Broch 1946: 243).⁸ The prospective universal declaration was, for him, an expression of two insights: ‘[P]ositively it displays the unifying commonality, the common human denominator among all the different national manners and aspirations; negatively it displays the equally common rejection of anti-humaneness in any form of fascism’ (Broch 1946: 243).⁹ The United Nations structure in that perspective resembled a founding act of a ‘collective of nations’ (Broch 1946: 248)¹⁰ similar to the social contract framework of Kant transferred to the international level. Broch points out that ‘in contrast to the establishment of communities on the *a priori* of the use of force, there are some rare examples of the establishment of communities under the *a priori* of moral convictions’ (Broch 1946: 248)¹¹ and counts both the founding history of the United States as well as the fledgling efforts of the United Nations in this context (the continuity in the opening words of the US constitution and the preamble of the UN Charter being an obvious manifestation of that parallel development).

Much as Arendt did, Broch saw the denial of fundamental rights as a transgression against humanity as humankind. The bitter experiences of the World Wars and the Holocaust initiated a unifying impulse to realise the commonality of humankind regardless of national or political allegiances. In contrast to Arendt, who did not put much faith in the potential of international structures for the protection of human rights (the fate of internally displaced persons for her was a clear indication to stress the importance of the ‘right to have rights’ (Arendt 1949) which is coincidental to living in a specific national community),

7 ‘(...) Züge eines wiedererwachten human Weltgewissens (...)’

8 ‘(...) der unbedingten Anerkennung von Menschenfreiheit und Menschenwürde, um derentwillen die physische und psychische Integrität des Menschen stets und uneingeschränkt als oberstes Gut gewahrt zu werden hat.’

9 ‘(...) [P]ositiv genommen lässt er die verbindende Gemeinsamkeit, den gemeinsamen Humanitäts-Nenner unter all den verschiedenen nationalen Verhaltensweisen und Strebungen sehen; hingegen negativ genommen zeigt er die nicht minder gemeinsame Absage an die Antihumanität jedweden Fascismus.’

10 ‘Nationen-Kollektiv’

11 ‘(...) [i]m Gegensatz zum Apriori der Gewaltanwendung gibt es einige wenige Beispiel für Gemeinschaftsgründungen, die unter einem Apriori der moralischen Grundanschauungen von sich gegangen sind.’

Broch was very much in favour of international efforts to secure human rights and freedoms (Lützel 2003: 85ff.). In that vein, he had sent his essay to Eleanor Roosevelt (Broch 1946: 276–77, fn 3). Broch, who had also written a draft resolution on a new League of Nations in 1936–37 and was a driving force behind the manifesto ‘The City of Man’ of 1940, in which a number of intellectuals called for the establishment of a world democracy under the leadership of the United States (Broch 1940; Lützel 2003), would not rest with the disillusionment of Arendt but stressed instead ‘the utopian dimension [of his proposal] that was aimed at a change in international politics’ (Lützel 2003: 85). Far from establishing a fully-fledged world state whose very existence would endanger individual freedom and national self-determination, Broch’s proposals closely resemble in their scope and structure the ‘federation of free states’ that Kant had advocated in the second definitive article of his essay on ‘Perpetual Peace’: ‘The right of nations shall be based on a federation of free states’ (Kant 1795: 115). In much the same way as Kant, Broch saw the membership of that federation as growing over time. As the norms and principles underlying the establishment of the international community gradually gained acceptance worldwide, the membership of the federation would be enlarged (Broch 1946: 270). Once again, a path of reasoning that seems to run through different centuries and political experiences re-emerges.

For the context of crimes against humanity, Broch’s thoughts hold a further contribution. Broch was very aware of the problems of enforcing international human rights, which, as a rule, could come into conflict with national sovereignty. In between the two options of either safeguarding an international bill of human rights (as a way to prevent the re-emergence of totalitarianism) or safeguarding national sovereignty (as a way to prevent major wars between states), Broch discovered a third principle that could help to realise his utopian hope. The best hope for the realisation of human rights, in his view, lay ‘in supplementing [the International Bill of Rights] with a “Bill of Responsibilities” sustained by criminal law and especially a “law for the protection of human dignity”’ (Broch 1946: 246).¹² Broch did in fact make concrete proposals for the wording of such criminal laws, including definitions of laws for the protection of human dignity (Broch 1946: 260) as well as a ‘crimes against human dignity’. Indeed, his proposals show an interesting similarity with what has been the substance and development of international criminal law in the decades since then. The UN Charter as well as the Universal Declaration of Human Rights and the Convention on the Prevention and

12 ‘(...) wenn [the International Bill of Rights] durch eine strafgesetzlich gedeckte “Bill of Responsibilities”, u.z. vor allem durch ein “Gesetz zum Schutz der Menschenwürde” ergänzt wird.’

Punishment of the Crime of Genocide, whose adoption preceded that of the Universal Declaration by just one day, form the moral and ethical core of a new international community built on sound philosophical and legal reasoning but also on the practical consequences of the catastrophes of war and totalitarianism (Dicke 1998; see also Fröhlich 2005). As Morsinck has shown, this dynamic can be observed in detail when we look at the origins of the Universal Declaration of Human Rights. Each and every article of the declaration has of course a whole history of struggles and ideas behind it but for the drafters of the Charter and the political representatives who adopted it, each and every article also represented the experience of injustice and denial during the Second World War (Morsinck 1999). The notion of crimes against humanity in this context points to the fact that a number of international norms and principles were created to a large extent by bitter experiences of what goes against humanity rather than by defining in the abstract what the origin, legitimacy and limits of these norms and principles are. Social momentum, political consensus and legal manifestations of these norms and principles were created by the reaction against the assault on humanity.

But these declarations for Broch were just a first step to be followed up by a second step that established an institution for criminal law at the international level. Here, then, emerges the central place that international criminal law and especially the prevention and prosecution of crimes against humanity have. Rather than being just another detail in international legalisation, the identification of and effort to deal with crimes against humanity emerge as the cornerstone upon which a new international order has to be built. The problems encountered and the progress made in this regard also define the state of an international community.

5.

In 2002, then UN Secretary-General Kofi Annan was asked to define the term ‘international community’. In the context of Broch’s reflections it is noteworthy that Annan described the efforts of the International Criminal Court as ‘the international community at work for the rule of law’ (Annan 2002: 31). Annan also referred to further evidence in efforts for humanitarian aid, development and collective security in which an international community manifests itself. The question of what does in fact constitute the international community prompts no easy answer. In a series of articles of a special issue of *Foreign Policy* different authors pleaded variously for the United Nations, the United States and the European Union but also international public opinion or civil society as being (for good or bad and mostly self-proclaimed) embodiments of ‘the international community’ (*Foreign Policy* 2002). Ellis argues that the existence of ‘an’ international community would require that this community could (a) act as a unitary

actor, (b) possess a specific legal-institutional structure, and (c) intentionally articulate and pursue specific interests (Ellis 2009: 14). Although he is sceptical about the concrete existence of ‘an’ international community, he also argues that ‘it is only recently that the international community has found some agency and autonomy in the structures of international organisations’ (Ellis 2009: 4) and points to the UN structure as a manifestation of the international community. Drawing on the work of the ‘English School’ of international relations (cf. Jones 1998) Ellis at the same time stresses the fact that at the core of any ‘international community’ there are common norms and values that form the basis of its ‘interests’. This insight from international relations theory can be linked to debates in international law on the question of whether the UN Charter can be seen as the constitution of the international community (cf. Fassbender 1998; Paulus 2001: 285–328).

In the search for the substance of those norms and values that form the political ‘interests’ or the legal ‘constitution’ of the international community, the ideas of Kant, Arendt and Broch offer a number of insights. The aim of these reflections has been to uncover a specific path in legal and political philosophy that opens up new perspectives on the context of crimes against humanity, humankind and the international community. Focusing on the continuity of that path and the space available here necessarily means neglecting some differences and details (for example, the differences in the use of human rights versus human dignity; international society versus international community; the differences between an international community of states or a transnational community of civil society; the difference between humankind being either ‘concerned’ or ‘affected’ by certain crimes; the implications of the different readings of the legitimacy of and responsibility for international interventions). These difficulties and open questions notwithstanding, the path identified opens up a perspective on the current workings of the International Criminal Court as well as the state of humankind as a collective entity and the international community as a legal manifestation of humanity which can be observed with all its difficulties and challenges in the ongoing efforts to prevent and prosecute crimes against humanity.

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War rape, social death and political evil

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In face of the challenge, ‘how to respond to genocides and other crimes against humanity’, legal scholars and practitioners pose questions as to the nature of the crime, the ways in which responsibility is assigned or distributed, and the appropriate legal response to atrocities. Historians and social psychologists may ask questions about the motivation of perpetrators and the processes leading to atrocities. Literary and cultural theorists, as well as some psychologists and historians, probe the nature of trauma and memory. Philosophers may ask questions such as, what is the central harm? And what concepts of ethics and politics best articulate the nature of these harms?

Here I discuss philosophical contributions to understanding sexual atrocities in war-time. Sexual violence in wartime is not new to the 20th century. We find references to it in Homer’s *Iliad*, as well as references to capturing women in war in the Hebrew Bible. Not until the 14th century did European leaders announce standards of chivalry to forbid rape, though these rules were rarely enforced. The license to rape was considered a major incentive for being a soldier. Not until the 19th century did humanitarian law protect noncombatants, including women. In the 20th century, mass rape occurred during the Rape of Nanking, which refers both to the rape of 20,000–80,000 Chinese women by Japanese soldiers in 1937 and the killing orgy that took 350,000 lives in a few weeks. During World War II, there were numerous instances of rape committed against women, with over 100,000 reported rapes in Berlin alone during the last two weeks of the war (Askin 1997: 52). The French army allowed Moroccan soldiers to rape Italian women. And there was evidence of major Nazi sexual crimes against French women, though the Nuremberg tribunal did not mention rape in the final judgment.² Rape did take place in Auschwitz, though there has been a conspiracy of silence about it (Krystal and Niederland 1968: 341). In the 1990s, war rape took place not only in Europe (with an estimated 20,000–50,000 women raped in the former Yugoslavia), but during the genocide in Rwanda,

1 This was the theme of the seminar held at the Dag Hammarskjöld Foundation on 17 March 2010, where I presented a shorter version of these remarks. The full version has been published as ‘War Rape and the Political Concept of Evil’, in *Evil, Political Violence, and Forgiveness*, edited by Andrea Veltman and Kathryn Norlock (Lanham: Lexington Books, 2009). The text is published here with kind permission of the publisher in a modified version.

2 ‘Rape and Genocide in Rwanda: The ICTR’s Akayesu Verdict’, <http://homepages.uc.edu/thro/rwanda/RwandaRapeCase2.htm>, accessed 27 October 2003, p. 4.

when 500,000 to 800,000 Rwandans were massacred, the majority of them Tutsi, and at least a quarter of a million women were raped. In the Democratic Republic of the Congo (DRC), every armed group has discovered that rape is a cheaper weapon of war than bullets. A Human Rights Watch specialist noted that women have had their lips and ears cut off and eyes gouged out after they were raped, so they cannot identify or testify against their attackers.

Until recently, sexual violence in wartime has been characterised by physical invisibility – in the double sense that civilian casualties are often invisible in official casualty statistics and in the sense that rape does not always leave visible signs on the bodies of the victims. With this physical invisibility has gone political invisibility. What is new in the late 20th century is the *political visibility* of war rape, which has had decisive consequences for international law. The United Nations resolution leading to the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) contained the first-ever condemnation of war rape by the Security Council. Richard J. Goldstone, chief prosecutor for both the ICTY and International Criminal Tribunal for Rwanda (ICTR) (1994–96), notes that despite the fact that rape is a war crime that has occurred for centuries, it had never received sufficient attention even to justify definition. The Rwanda tribunal took a major step by defining rape as ‘a physical invasion of a sexual nature committed on a person under circumstances which are coercive’.³ In the statute of the International Criminal Court (1998), gender crimes are no longer subsumed under outrages to personal dignity, but are expressly named as crimes against humanity and as war crimes in both national and international armed conflict.⁴

In the wake of these historical, political and legal developments, some feminist philosophers also have turned their attention to sexual violence in wartime, reflecting on questions such as: what is the central harm of war rape? And how is enforced impregnation genocidal? Not only are these topics long overdue for philosophical inquiry, but they may also shed light on central topics such as the nature of the political, the significance of groups in national and international contexts, and the meaning and scope of the concept of genocide.⁵

3 Goldstone (2002: 278, 283–5) considers this a progressive definition, though notes that it might go too far in not requiring penetration by a sexual organ to constitute rape.

4 Kelly Dawn Askin (1997: 349) is critical of this subsumption of rape into the category of crime against humanity: ‘Thus, while it is of great significance that rape was specifically listed as a crime against humanity, it is nevertheless trouble that a vicious and devastating act of sexual assault would need to be committed for a particular reason before redress might be rendered.’ Hence, she argues for the need to add gender to the list of criteria for the protection of groups, and thus eliminate the problem of determining why a sexual assault occurred (ibid: 355).

5 I address these issues in my article, ‘War rape, natality, and genocide’, forthcoming in the *Journal of Genocide Research*.

The American philosopher Claudia Card develops the notion of social death to analyse the harms of war rape and enforced impregnation as a strategy of war, such as took place in Bosnia in the 1990s. She draws on Orlando Patterson's concept of social death, developed in his analysis of slavery, to elucidate the genocidal nature of rape and enforced impregnation. In this article, I discuss the strengths as well as the limitations of this use of the concept of social death, and argue that it does not adequately address the political consequences of such rapes. To do so, I suggest that one introduce another concept, that of political evil. I draw the notion of political evil from Hannah Arendt's analysis of totalitarianism and the death camps as attacks on the principles of political life by which rights are guaranteed. Revisiting Hannah Arendt's concept of natality, I suggest that enforced impregnation in war is a paradigmatic example of political evil. The attack on human birth is also a direct attack on the principles of political life.

The problem of evil in ethics

Philosophical work on the problem of evil has been substantial over the last decades, and gives credence to Susan Nieman's claim (2002) that the problem of evil remains central to philosophers' concerns. Berel Lang (2005: 179ff) sums up some of the ethical questions that are raised by the Holocaust, and that inflect contemporary discussions of evil: What is the role of intention in Holocaust perpetrators, or in perpetrators of other evils? Do perpetrators know the harm and suffering that their actions will bring to victims, and do they willingly bring about such harm? Or do perpetrators lack self-reflection, as Arendt claims when she describes Adolf Eichmann's evil as banal (Arendt 1994: 252)? What factors interfere with willing what is morally right? Does self-interest interfere, as Immanuel Kant suggested, or do modern social processes of bureaucratisation and dehumanisation interfere, as Zygmunt Bauman (1989: 102) suggests? Ethicists also address responses to wrongdoing and they ask: What is the status of punishment and reparations? Should one prioritise reconciliation over punishment? When is separation rather than reconciliation the desirable goal? Does forgiveness contribute to the processes of reconciliation, or can it undermine these processes (Minow 2002: 58)? What are the effects on the survivors of the pressure to forgive? And Thomas Brudholm (2007) asks: What is the role for negative emotions such as resentment in response to past atrocities? How can one acknowledge the moral remainders – what is ultimately left undone by even the best moral responses? All of these questions address the motivation of the perpetrators of evils, the harms done to victims, the responses by both perpetrators and victims to past harms, the societal role in contributing to the harms done to individuals and in recognising and responding to past harms. In addi-

tion, the problem of evil has raised more general questions about ethics: does the existence of evil challenge the view of the world as potentially good, well-ordered, and comprehensible? This is the classical problem of theodicy, which was also an overriding concern of Arendt in her study of Eichmann. Can we feel at home in the world – which Arendt ultimately affirmed – or is the world ultimately hostile to human needs and strivings, as echoed in a tragic view of life (Nieman 2002: 303)?⁶

Many of these ethical questions are useful for illuminating processes involved in the sexual atrocities of war rape. If one analyses the war rapes in Bosnia in the 1990s, one can study the attitudes of perpetrators that enabled them to rape both strangers and neighbours, their own former high school students and the most respected members of their towns such as doctors and mayors, four-year old girls as well as 70-year old women. One can learn about the paradoxical logic of hatred, whereby perpetrators have objectified the ‘enemy’, have refused to recognise any possible likeness between the girl or woman they are raping and their own sister, mother or daughter. They are propelled not only by fear of the other group, but by fear of their own group, and of the shame they would suffer, should they fail to rape. One can study the experience of the victims of sexual torture, who carry the enduring marks of these dehumanising acts on their body. This most intimate bodily violation involves a tormenting feeling of shame connected to witnessing one’s own destruction as a subject. Her own body seems to have fulfilled the vile projection of the perpetrator, and has become a foreign enemy to her. And her trauma is magnified profoundly if she becomes pregnant as a consequence of the rape, as happened to thousands of women in Bosnia where forced impregnation became a strategy of genocide (Schott 2003: 87–134).

But the ethical focus on relations between individuals in sexual violence in wartime also leaves many questions unanswered: Why has the raping of women been a repeated pattern of war? Why did Serbian military leaders implement the strategy of enforced impregnation in the war rapes in Bosnia? These questions have led me to think that the evil of war rape must also be understood as political evil.

I take my clue for understanding the political nature of evil from Arendt’s concept of radical evil: ‘What totalitarian ideologies therefore

6 Nieman writes that for Arendt, the lesson of Eichmann was: ‘We have means both to understand the world and to act in it. Arendt compared the feeling of understanding to the feeling of being at home. Our capacity to comprehend what seemed incomprehensible is evidence for the idea that human beings and the world were made for each other.’ (ibid.).

aim at is not the transformation of the outside world or the revolutionising transmutation of society, but the transformation of human nature itself... we may say that radical evil has emerged in connection with a system in which all men have become equally superfluous' (Arendt 1951/1973: 458–9). Arendt analyses the way the Nazi political system radically undermined what is most fundamental in human existence – plurality and spontaneity. Arendt subsequently identifies the essential qualities of the political with the concept of natality. The human condition of natality is 'the new beginning inherent in birth' which can be felt in the world through action 'because the newcomer possesses the capacity of beginning something anew' (Arendt 1958: 9). I will argue that the practice of war rape undermines natality – the capacity for new beginnings – which is fundamental to political life.

Social death and political evil

My claim that war rape is a form of political evil includes three different components. First, this claim implies that war rape is political, a well-established view amongst feminist theorists. Second, this claim implies that war rape is evil, as Card (2002) argues. And third, arguably a new point, this claim implies that the nature of this evil is political.

The first claim is hardly controversial in the context of feminist discussions of rape. Brownmiller (1975) wrote a groundbreaking work that insisted that rape in general should be understood as a political phenomenon and not as inspired by sexual stimuli. Rape should be understood as based on the political motivation to dominate and degrade. The two primary functions of rape are (1) to ensure the continued and necessary protection of women by men; (2) to treat women as political pawns in the conflict between men, by which the rapist could threaten the ownership rights of his enemy. For Brownmiller (*ibid*: 439) rape is 'a deliberate, hostile, violent act of degradation and possession on the part of a would-be conqueror, designed to intimidate and inspire fear'.⁷ Even in the context of an individual case, the meaning of rape is never individualistic; it is always an act committed by a member of the dominant class of men against the subordinate class of women. It is fundamentally an act of violence, and the sexual character of rape is not essential to its legal character.

Radical feminists also have focused on the political nature of rape, though they emphasise its sexual character. Catherine MacKinnon (1989, 172) argues that rape is a phenomenon within the continuum of so-called normal heterosexuality. According to her, in legal, political and social

⁷ See also Ann Cahill's discussion (2001: 16ff).

realms a certain level of coercion is always present in so-called normal heterosexual encounters, and hence consent does not necessarily imply the absence of force. In her account, the political nature of rape is evident in the political nature of heterosexuality, which is socially compulsory and defined by the presence of coercion and force.

Although Brownmiller's account positions rape as an act of violence and MacKinnon's account positions rape as an act of sexuality, both theorists understand rape as a political form of the domination of women by men. In Card's analysis of war rape, the concept of domination also plays a crucial role. Domination in her usage implies power inequalities. Although some forms of dominance may be benevolent, all power inequality contains the potential for oppression (Card 2002: 99). With the domination of one group by another, such as the domination of men by women, or the domination of one population by another in the midst of military conflict, it is reasonably foreseeable that intolerable harm will take place. The power inequalities involved both in the domination of women by men and in the domination of one group by another are contributing factors in war rape. Since war rape involves serious harm, either through death or through seriously diminished potentialities for the survivors, war rape would be a paradigm case of evil.

In addition, Card argues that since the war rapes in Bosnia were coupled with the strategy of enforced impregnation, these rapes were genocidal. The 1948 Genocide Convention defined genocide as 'any of the following acts committed with the intent to destroy, in whole, or in part, a nation, ethnical, racial or religious groups, as such (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group' (Card 2008, 179).

As Card notes, any acts committed with the intent to destroy such a group are sufficient to justify the charge of genocide. She proposes that an important concept in understanding genocidal intent is the notion of social death, a concept that she takes from Orlando Patterson (1982). Social death refers to the loss of vitality that exists through social relations and that creates community, identity and meaning in life (Card 2007: 71). Social death focuses not just on the physical destruction of a group, but on the destruction of the cultural identity that inheres in national, ethnic, racial or religious groups. With the destruction of this cultural heritage comes the destruction of meaningful rituals and

relationships (ibid: 80). When Card argues that the war rapes in Bosnia were genocidal, she means that they produced social death for members of the target group. Paradoxically, although forced impregnation *produces* births by members of the targeted groups, forced impregnation also throws the social identities of the target group into chaos. The prolonged torture of repeated rape turned the victims into something less than human – into living corpses, to use Arendt’s phrase (Card 2008: 182). Card (ibid: 183) argues that the war rapes in Bosnia used sperm as a biological weapon to turn the reproductive system against the people, to poison the *future* of the community, to make the next generation – insofar as they are children of Serbian rapists – unwanted and a permanent reminder of torture.

There are two features of Card’s analysis of social death that I wish to underscore here. First, social death takes place in the context of the *domination* of one group by another. Invoking Orlando Patterson (1982), she describes ‘natal alienation’ as ‘being *born* to *social death*, with individual social connections, past and future, cut off from all but one’s oppressors at the very outset of one’s life’ (Card 2007: 81; original emphasis). Hereditary slavery is a paradigm case of individuals being born socially dead, since slaves are treated as non-persons who are wholly defined by relations of domination. Second, social death destroys *social* ties with family and community that lead to the loss of one’s *cultural* heritage. That is, social death is defined in terms of loss of social relationships and loss of culture.

Here I think it is useful to compare Card’s analysis of social death with Arendt’s analysis of the political evil of Nazism. Would Arendt define the evil of Nazism in terms of the systematically harmful domination of one group by another? And does Arendt analyse Nazism primarily in terms of the destruction of social relations to kin and community, and to the loss of culture?

Arendt would give a somewhat different account of the political nature of evil from the one that Card provides in her analysis of social death. For Arendt, Nazism was indeed evil, and she borrowed from Kant the term radical evil to refer to this new character of totalitarianism in modern politics. Arendt wrote, ‘radical evil has emerged in connection with a system in which all men have become equally superfluous’ (Arendt 1951/1973: 459). The evil that is paradigmatically evident in the concentration camps is a *political* achievement, since it is a political system that establishes the pre-conditions for extinguishing the infinity of forms of human living-together, and hence has doomed human existence (ibid: 443).

In her analysis of Nazism, Arendt does draw on the concept of domination. But what is central for Arendt's notion of domination is not the domination of one group by another, but the total domination represented by the concentration and death camps. Total domination seeks to organise and control the infinite plurality of human beings, both through the indoctrination of the elites and through the terror in the camps (ibid: 438). Hence, totalitarian regimes dominate every aspect of the life of all men, not just of the victims (ibid: 456). Totalitarianism's attempt to make people superfluous is in large part achieved through processes of dispossession of rights. The first form of dispossession is loss of home – a loss of the social texture of life, which establishes a distinct place for one in the world – and the impossibility of finding a new one (ibid: 293). The second dispossession is the loss of government protection, or what Arendt called the killing of the juridical person (ibid: 294, 447). It was this loss that put people outside of any community, and hence outside the human community as such (ibid: 295). If people are deprived of the protection of law, they are not oppressed by another group, but rather 'nobody wants even to oppress them' (ibid: 296). And it is rightlessness that is the pre-condition for physical extermination. Hence, the story of Nazism in Arendt's analysis is not so much the story of the dominance of one collective group over another collective group, but rather the story of the spitting out of one group from society in the process of the political domination over all aspects of life (ibid: 189). This approach raises important questions for other political contexts in which grave harms take place: How do certain members of a political community become dispossessed of rights? Do all members of a political community risk losing rights in different degrees, under the domination of a particular political system?

Arendt's analysis of extermination focuses on the loss of polity (ibid: 297). It is membership in a *political* community that is able to guarantee rights; hence, loss of a political community results effectively in one's expulsion from humanity. Drawing on a phrase from Elaine Scarry (1985), one could say that Card and Arendt have somewhat different understandings of the *unmaking* of individuals and their world.⁸ Whereas Card focuses on the unmaking of the *social* and *cultural* world of individuals and the groups of which they are a member, Arendt focuses on the unmaking of the *political* world.

To understand the meaning of the political for Arendt, it is important to understand the concept of natality, which is a reflection on the capacities that are inherent in human birth. Natality points to the double

8 Scarry (1985, 19-21) analyses how the physical and psychic pain that takes place through torture and war destroys individuals' capacities for language and action, even when they physically survive the torture.

character of human existence as both given and creative. Any new life is dependent on its origins, relations and context, and every new life contains the ‘principle of beginning’ in which human action is rooted. Arendt (1958: 9) writes that ‘the new beginning inherent in birth can make itself felt in the world only because the newcomer possesses the capacity of beginning something new, that is, of acting... Moreover, since action is the political activity par excellence, natality, and not mortality, may be the central category of political...thought.’ When Arendt introduces the notion of natality as central to political life, she focuses on the diversity of the actors in the public space, and the potential for spontaneity, newness and unpredictability in their actions. But since political actors are also dependent on their context, their actions are not impervious to threat. In *Origins of Totalitarianism*, Arendt analyses the threat to human spontaneity posed by total domination.

In the context of the atrocity of forced impregnation in war rape, one also can ask the Arendtian question about the nature of the threat to human spontaneity. As the Norwegian philosopher Arne Johan Vetlesen (2005: 202) has noted, pregnancy-producing genocidal rape robs the victims of their natality, of their capacity to begin something new by giving birth to new beginners. The trauma of rape and the related alienation between mother and child has the consequence of denying the raped women their future-oriented capacity. The violence of rape will hamper both the woman’s ability to embrace the child as her genuine offspring, and the child’s ability to be oriented towards her/his origin. One could add that what is *unprecedented* with enforced impregnation in war rape is that *birth* becomes a weapon of *death*. It is this transformation of birth into death that represents the radical experiment of war rape (Schott 2010). One can add that enforced impregnation in war rape aims to destroy natality as the fundamental feature of the human condition and of political life. War rape can be understood not only as a tool for the unmaking of the social and cultural world, but also a tool for the unmaking of the political world.

When Arendt writes about the elements that ensured the end of the rights of man, she points to the various forms of loss that were inflicted on the Jews: loss of home and impossibility of finding a new home, loss of government protection, loss of belonging to community. It is this loss of home and political status that became ‘identical with the expulsion from humanity altogether’ (Arendt 1951/1973: 297). The victims of war rape have a similar fate. They have lost their homes, they have lost governmental protection, and they have lost the feeling of belonging in this particular community. Because of the sexual nature of this atrocity, they have also lost the feeling of being at home in their own bodies. Moreover, war rape deprives members of

a particular community not only of a future in this community, but because of the traumatic nature of the event, of a future at all. Trauma generally refuses to take its place in history. As Jenny Edkins writes: ‘It (trauma) demands an acknowledgement of a different temporality, where past is produced by – or even takes place – in the present’ (cited in Brudholm 2007: 107). From the perspective of trauma, the future is not the time after the trauma is over; instead, all future moments continue to produce the past trauma. With sexual violence, the future reproduces the trauma that has attacked a woman’s capacity to give birth to new beginners. The story of one woman who was a survivor of multiple rapes in the rape camps in Bosnia illustrates this fate. After she was raped, her husband rejected and divorced her. She remarried, and started a new family. But the new marriage was haunted by a dangerous cycle of sadomasochistic violence in which the husband and wife continually exchanged the role of victim and torturer. Although the couple had a child together, the violence was so destructive that it was impossible for the partners to rear the child (Schott 2003: 100ff). This example illustrates how war rape radically undermines the capacity for new beginnings.

Focusing on the unmaking of the social world – as with the concept of social death – or the unmaking of the political world – as with the concept of political evil – has different implications for the analysis of war rape and forced impregnation. Social death is a comprehensive category that refers to the social chaos that results from atrocities, when social identities and relations become meaningless, and it is impossible for members of a community to create meaningful lives for themselves. Its empirical reference is broad. Social death can include war rapes of women which do not lead to pregnancy. In Card’s analysis, it is the sexual character of rape in a patriarchal culture that explains how rape can ‘drive a wedge between family members’ (Card 2002: 129). Since women often play a central role in maintaining family and community relationships, the alienation from one’s family that often results from rape falls especially heavily on women (Card 2007: 83). In this approach, the shame and humiliation resulting from rape is sufficient to throw the social identities of women into chaos, which disrupts the community in which they play such an important role. One may add that there are many other consequences to rape than pregnancy that also can have serious long-term consequences for women and throw their lives into chaos, such as the developing of fistula, injuries to reproductive organs, infertility and AIDS (Walker 2009: 39).

There are also many other atrocities that also lead to social death. Sexual atrocities against men, which are often underreported because

of men's fear of being feminised or identified as homosexual,⁹ also undermine social identities. Non-sexual atrocities dramatically disrupt the lives of individuals and the communities to which they belong as well. Margaret Walker stresses the gravity of non-sexual offences against women in wartime. Women's loss of livelihood, property rights and wealth undermine their material and social positions. In this sense, there is a danger of focusing exclusively on sexual violence, since women who are raped or sexually tortured also lose economic and material rights. And material losses, such as the displacement of women as refugees, can increase their sexual vulnerability. Walker (2009: 41) argues that it is crucial to understand the 'bi-directional relationships between sexual abuse and material dispossession of women'. Hence, the notion of social death that Card develops can refer to a broad spectrum of factors, both sexual and non-sexual, and to a broad range of experiences of both women and men. Card's use of the concept of social death in referring to mass rape does *not* imply that sexual violations are the worst form of violation, nor that war rape is paradigmatic for understanding other forms of wartime violations. As one legal advisor to the ICTY noted, 'one has to remember that rape is generally not the only crime inflicted against that person on that day. Often in wartime you might have a victim or a witness who has been shot, has seen family members killed before their eyes, been detained, starved or tortured, in addition to the sexual violence inflicted on them' (Walker 2009: 59). While the concept of social death does the work of including a broad spectrum of atrocities that throw social identities into chaos, it also clarifies the genocidal nature of atrocities, even when there is not a total physical annihilation of a community (Card 2007: 80).¹⁰

For Card (2008, 183), forced impregnation belongs to the more general category of social death, while what is specific to it is the use of sperm as a biological weapon. I am suggesting that Arendt's concept of natal-ity gives us another way of understanding what is specific to enforced impregnation in war rape. Forced impregnation undermines a woman's capacity to belong to this particular community; and it undermines her capacity to belong to some future possible community. It threatens the capacity of a child born from violence to belong to this community, as

9 For a discussion of the 'taint' of homosexuality in relation to male/male rape, see Sandash Sivakumaran (2005).

10 Card (2007: 71) also uses the concept of social death to distinguish it from mass death, since not all forms of mass death result in the social death of a community.

the trauma of her/his origins may reappear in unexpected moments.¹¹ But the violence of forced impregnation also undermines the principle of beginning that Arendt maintains is implicit in the notion of human birth. The principle of beginning draws attention to the way in which human beings are dependent on a public world in which they can act and speak, without being determined by it. And it is this public world which ought to guarantee the political rights of its members (Benhabib 2004: 68).¹² When the human condition of natality is so transformed that it threatens the viability of the public world, then it also undermines the ability of a political community to guarantee rights.¹³

Arendt's analysis also contributes to an understanding of the political processes leading to genocidal harms in terms of dispossession of rights rather than in terms of the domination of one group by another. The genocide in Bosnia, like the genocide against the Jews, began as a conflict within the nation-state. The first steps towards genocide included *producing* the expulsion of a group from the common political body. By focusing on dispossession and expulsion instead of domination, one avoids the danger of positing conflict as taking place between two or more homogeneous groups, whose differences in identity are defined in advance of the conflict. Instead, focusing on dispossession reveals how identity-defining differences are produced by the conflict. In ex-Yugoslavia there were many families with mixed ethnic and religious differences. Whereas some of the families managed to escape the military conflict during the war, other families were split and individuals forced to choose between individual survival and family loyalty. The genocide in Rwanda also split many families that were both Hutu and Tutsi. Focusing on dispossession as the source of severe harm underscores the vulnerability to the loss

11 Jasmila Zbanic's film 'Grbavica' explores this trauma. The story of the single mother Esma, who has told her 12-year old daughter Sara that her father died as a martyr in defence of Bosnia, reaches its climax when Sara is to go on a school trip. If she can produce evidence of how her father died, she will be able to go on the trip for free. But her mother is unable to produce this evidence. As a prisoner in a camp who had been repeatedly raped, she finally erupts and shouts to Sara, 'You are the daughter of a chetnik!' <http://www.chicagopublicradio.org/content.aspx?audioID=2422>, accessed 18 January 18 2008.

12 She argues in the strong normative sense for the guarantee of the right to have rights. Since the nation-state cannot provide this guarantee, international bodies must. Although for Arendt, 'citizenship was the prime guarantor for the protection of one's human rights, the challenge ahead is to develop an international regime which decouples the right to have rights from one's nationality status'.

13 Peg Birmingham (2006: 4-6) argues that natality provides the ontological foundation for the universal principle of humanity in Arendt's thought, and 'humanity itself must guarantee the right to have rights, or the right of every individual to belong to humanity'. I am suggesting that it is the public world or community - variously concretised in local, national or transnational terms - that guarantees political rights

of rights that all individuals may face in different degrees. Studies of perpetrators in the genocide in Bosnia have repeatedly emphasised their own fear of vulnerability, of losing house, family and security, if they did not participate in atrocities (Schott 2003: 104–6).

To sum up, enforced impregnation in war rape deprives individuals of their capacity to belong to a particular community, and deprives them of the possibility of having a meaningful future in another community, as Card argues in her discussion of social death. Enforced impregnation also undermines the condition of human natality, and in this sense threatens political rights as such. These two dangers are closely linked. The social and cultural chaos implicit in social death provides the conditions for the expulsion from humanity and the deprivation of any political guarantees of rights, including the right to life. Social death implies a threat to rights of the particular individuals who have lost their social and cultural order. It also implies a threat to rights more generally, since any group may be vulnerable to such attacks, revealing the fragility of the guarantees of rights. It is in this sense that I am suggesting that enforced impregnation in war rape is a distinctively *political evil* by being fundamentally anti-political. My use of the notion of political evil points both to the harm to individuals' political rights, and also to the irremediable harm caused to the concept of the political and the concept of rights. With the concept of political evil, I am underscoring that the magnitude of harms cannot be understood solely through the cumulative harms to individuals, or to the social chaos of community, but also must be understood in terms of the threat to the principle of rights, that should be guaranteed by the political world.

Concluding reflections

War rape must be understood in a political frame of reference, as feminist theorists have long argued. War rape is also evil, as Claudia Card has argued. Moreover, enforced impregnation in war rape is a form of specifically political evil, by which I mean that it undermines the conditions of the political as such. Like Card's use of the concept of social death, my use of the concept of political evil has a broad empirical sphere of reference. It includes, for example, the Nazi death camps, which were also an attack on natality, and hence an attack on a fundamental feature of the human condition. In this sense, enforced impregnation in war rape is not a unique form of political evil. But the directness and the poignancy of this attack on human birth makes it a paradigmatic example and gives it a special symbolic power to represent what is at stake in political evil. What is unique and unprec-

edented in enforced impregnation in war rape is the transformation of human birth into a weapon of mass destruction. For Card, the uniqueness of this phenomenon is explained by the use of sperm as a biological weapon. Drawing on Arendt, one can see the uniqueness of this atrocity in the attack on the role of human birth in embodied life, and in the attack on the principle of beginning that is embedded in human birth, and that is central for the viability of political life.

I have also suggested that the harms of political evil can be better understood through the paradigm of the dispossession of rights than through the paradigm of dominance. By implication, the harms of war rape are also better understood in terms of the dispossession of rights than through the domination of one ethnic group over another, and/or the domination of men over women. The domination paradigm is the classic paradigm held by feminist theorists, and it is the position held by both Card and Walker as well. In focusing instead on the dispossession of rights, one brings into focus a woman's loss of rights in the broad sense used by Arendt, not in a narrow juridical sense, nor in the sense of property rights, or rights to one's own body, which feminists sometimes invoke. A woman who has been raped in war loses the right to a home, a community, a public world where she can act and speak meaningfully, and which is the precondition for any other rights at all. Such an approach also calls attention to the trajectory by which a woman's neighbour or former high school teacher can be turned into an enemy rapist, through his fear of losing these same rights. Looking to the dispossession of rights does not undercut a critique of the unequal distribution of power, but it looks to the mechanisms that distribute power unequally and that make all members of a community potentially vulnerable. Nor does this approach undercut an ethical judgement of the evils of war rape. But it does suggest that in order to understand the full extent and repetition of this evil, one must look to the way in which it radically undermines political rights.

Finally, one might ask how understanding war rape as political evil clarifies the appropriate responses to this atrocity. I have three suggestions. First, one should emphasise the importance of recovering women's rights on all levels: economic, sexual, juridical, and their participation in the political world. The process of public recovery of rights can counteract what is still a powerful tendency to treat rape as a personal trauma that is so shameful that it is best kept hidden. Second, one should strengthen consciousness of rights more generally in the community. This focus on public consciousness will help bring perpetrators to justice, which will enable women returning to their

communities to reconstruct a normal daily life. This focus on rights can also diminish the fear by the perpetrator group that their rights may be vulnerable in the future, and help to break, as Minow stresses, the cycle of hatred. Third, one must protect natality in the double sense of the creation of new lives and of the principle of beginning that underlies the possibility of new values, meanings, and actions, which are central to political existence and rights.

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How to respond to genocide and others crimes against humanity

A commentary on Robin May Schott's presentation

Jan Axel Nordlander

These comments are based mainly on my experiences as Sweden's human rights ambassador, and should be seen very much as a practitioner's views.

The horrific effects of sexual violence as a weapon of war are perhaps nowhere as present as in the Democratic Republic of the Congo. There are tens of thousands of mutilated, violated women, damaged physically and psychologically for life. In 2007 there were 27,000 such cases in North Kivu alone. The ages of patients at Panzi hospital range between three and 75. According to John Holmes, head of the Office for the Coordination of Humanitarian Assistance (OCHA), the sexual violence there is the worst in the world.

And yet, even more disturbing is the fact that systematic acts of sexual violence are no longer committed only by the army and the militias, but have spread across society. Sexual brutality against women, and sometimes men, has become the norm. Even UN soldiers have committed sexual assaults, thus casting irreparable doubt on the world organisation.

The collective rape by the Burmese army of more than 100 Shan women, as part of a strategy of ethnic cleansing, was documented in 2001. Still today, the international community – all of us – has failed to bring the perpetrators to justice.

Gender specific violence in war occurred during World War II and was committed by Nazi and Soviet troops. It reached a new peak in Bosnia/Herzegovina, with 40,000 victims. It continued in Rwanda, in Liberia and it victimised 50,000 in Sierra Leone.

Sexual violence as a weapon in war occurs predominantly in fragile states, where the risk of penalty is small and where moral values have been severely undermined or have broken down. It also occurs where

authorities ignore or depreciate sexual violence as a crime – because it is (usually) directed at women.

Sexual violations have a symbolic meaning; they cause a tearing apart of social relations. A violated woman is often ostracised by her family, rejected by her husband. Violations harm the identity both of the individual and the group to which she belongs, not to speak of frequent serious health consequences such as HIV/AIDS and fistula. As Dr Schott states in her presentation, *it endangers the future of the abused women in their community*. But also for those spared, war brings increased vulnerability caused by displacement. In refugee camps the overwhelming majority of the population always consists of females and children.

We have an ample international legal framework to put an end to sexual violence in war and generally against women. There is the Genocide Convention, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the declaration by the General Assembly on Elimination of Violence against Women of 1993, Security Council resolutions 1325 on women in conflict situations and 1820 on women, peace and security, and there are decisions by International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY) and other tribunals.

All these legal instruments are of course intended for prevention, for protection and for putting an end to impunity. But how can we protect if the state is imploding? And how can we stop impunity if the judiciary depends on the political power, is corruptible – and male?

Legislation is not enough. There is a need for scripts, for condemnations, but also for political and moral support from national leaders in order to reshape or restore moral norms. We must and we do contribute to the training of officers and troops, not least international forces.

Great resources have been invested in medical care and rehabilitation by the international community, and rightly so. But reintegration, to fight the shame, the stigma, is as important, and it has been largely ignored. Dr Schott has called for recognition of the fact that rape is not only a personal trauma to be kept hidden, but an attack on society. She has launched the concept of *social death* and suggested public recovery of rights. These are ideas that deserve thorough consideration.

In a post-conflict society, reconciliation is of the essence. Crimes must be punished, guilt must be admitted, truth recovered. This can

be done in many different ways, as experience shows. But I believe that punishment is also an element in prevention; it influences norms, sets standards and acts as a deterrent.

To create an enemy, it is helpful to dehumanise her, or him. Dr Schott, in her presentation, introduced the very interesting concept of *dispossession of rights* as part of the political process leading to atrocities. She also postulated that dispossession of rights is a better explanation for atrocities than domination of men over women. For my part, I see it as an additional – albeit important – explanation. But I believe that the overall subordination of women plays a crucial role in forming the attitudes that make sexual violence explode.

Women's empowerment, their education and political participation, their access to justice, to economic power, to influence, should be promoted and implemented in parallel with changing the attitude of men; to make men stop regarding women as their property.



Insufficient legal protection and access to justice for post-conflict sexual violence

Diana Amnéus

Taking the Crimes against Humanity (CAH) initiative as a point of departure, this article discusses the normative weaknesses in the international legal rules protecting against sexual and gender-based violence (SGBV)¹ against women under and after armed conflict, and identifies the legal lacunae, systemic deficiencies and its consequences for the protection against and prevention of post-conflict SGBV. The main argument constitutes a critique against the gendered construction of the definition of CAH that disregards the transgression of the public/private divide in the special instruments for the regulation of women's human rights developed in the 1990s. We should not only rely on the domestic judicial enforcement mechanisms in fragile post-conflict states for the prosecution of this pervasive violence, nor that the international human rights machinery determines that the state has failed to comply with the principle of due diligence to protect, investigate and prosecute such crimes, when the state simply does not have the judicial capacity or resources to offer the survivors access to justice and legal redress. In order for the international community to have a responsibility to protect through international assistance and capacity building to such a state under the Responsibility to Protect (R2P) framework, post-conflict SGBV must constitute a grave crime in international law. By not recognising post-conflict SGBV by non-state actors (NSA) as a crime against humanity, the continuing human security threats to women and the girl child after armed conflicts are invisibilised and marginalised.

¹ Gender-based violence (GBV) is a form of gender discrimination falling under Article 1 of the Convention on the Elimination of All Forms of Violence Against Women (1979) according to its monitoring Committee, who formulated a definition on GBV in General Recommendation No. 19 (1992) to the CEDAW Convention (para. 6): '[...] violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.' This definition has been subject to critique since it does not include gender-based violence against men. It is important to acknowledge that men and boys may also be victims of GBV, including sexual violence. See for example the research done by Uganda's Makerere University's Refugee Law Project at the Faculty of Law, which has documented sexual abuse on men: http://www.refugeelawproject.org/audio_recordings.php (accessed 10 September 2010).

SGBV under and after armed conflict – social death and other forms of alienation

Despite the many peace agreements, including the accord signed in January 2008 armed conflict has persisted in North Kivu in the Democratic Republic of the Congo (DRC). Civilians have borne the brunt of the violence between the regular Congolese army (FARDC) and the armed group of the National Congress for the Defence of the People (CNDP), as well as a number of local mai-mai militia and the Democratic Forces for the Liberation of Rwanda (FDLR). Sexual violence and mass rapes have repeatedly been used as a weapon of war during the Congo wars, and more than a quarter of a million rapes have been reported during the DRC conflict. Last year alone, it is estimated that 15,000 women were raped in the DRC, but the figure is likely much higher as many survivors do not report rape out of fear of being stigmatised within their communities (Amnesty International 2010). The most recent reports of mass rapes in the North Kivu province give witness to systematic attacks in a dozen villages between Walikale and Kibua, between 30 July and 2 August 2010, encompassing more than 300 rapes of women and girls, but also rapes committed against men and boys (Hilsum 2010). Government security forces and the United Nations peacekeeping operation MONUSCO, stationed nearby, failed to protect them. In October, new mass rapes were committed in the same villages, this time allegedly by DRC troops themselves (BBC 2010). The prosecutor of the International Criminal Court (ICC) in The Hague is now sending a team to investigate the mass rapes (Hilsum 2010). The sexual violence was committed within an armed conflict and most likely constitutes war crimes or crimes against humanity when carried out as a systematic or widespread attack against a civilian population. Margot Wallström, the Special Representative on Sexual Violence in Conflict, who visited the DRC in September–October called for ‘perpetrators to be excluded from any amnesty provisions or post-conflict advancement’ and warned of the long-term consequences of abuses for a nation’s ethos.²

After the eruption of the armed conflict in the Darfur region of Sudan in 2003 an enormous humanitarian crisis followed as a result of the outrageous and persistent attacks against the civilians. Continuous raids against villages, markets, water wells, as well as large-scale killing, forceful evictions and displacements, burning and destruction of houses and public facilities, extra judicial executions, arbitrary arrests and detentions, looting, torture and other assaults but also rapes

2 ‘Mass rape victims now endangered by DRC army: UN official’, *People’s Daily*, 15 October 2010; <http://english.peopledaily.com.cn/90001/90777/90855/7167243.html> (accessed 31/10/2010)

of women and girls have led to 400,000 deaths, numerous injuries and left 2.5 million people displaced from their homes in Darfur. In 2009 the African Commission of Human and People's Rights had the opportunity to make determinations on the alleged gross, massive and systematic violations of human rights by the Republic of Sudan against the indigenous Black African tribes in the Darfur region (in particular the Fur, Masalit and Zaghawa tribes) in the two cases brought to it by communications from the Sudan Human Rights Organisation (the SHRO Case) and the Centre on Housing Rights and Evictions (the COHRE Case), consolidated in 2006.³

The allegations in this joint case held the Sudanese government accountable for forming, recruiting, arming and sponsoring actions by nomadic tribal gangs of Arab origin who were members of the Arab militia forces known as the Murhaleen and the Janjaweed, involved in suppressing the rebellion in Darfur. With regard to the rapes and sexual violence, the Commission found that Sudan did not act diligently to protect the civilian population in Darfur, in particular in and outside camps for internally displaced persons (IDPs) against the violations by its forces, official authorities or by third parties, to investigate and prosecute the perpetrators or provide immediate remedies to the victims, and that it therefore had violated *inter alia* Articles 5, 6 and 7(1) of the African Charter of Human and People's Rights.⁴ The principle of due diligence and state responsibility for acts by non-state actors was thus applied and confirmed in this case with reference to several judgments by the European and Inter-American Courts of Human Rights.

Apart from the established state responsibility for the gross violations of human rights committed in this case, the mass atrocity crimes in Darfur are at the same time also being investigated for individual criminal responsibility at the ICC with regard to Sudan's President

3 Communications 279/03 – Sudan Human Rights Organisation & the Sudan, 296/05 – Centre on Housing Rights and Evictions/The Sudan, Adopted during the 45th Ordinary Session, held between 13 and 27 May 2009, Banjul, The Gambia, Report of the African Commission on Human and People's Rights (ACHPR), Executive Council, Seventeenth Ordinary Session, 19-23 July 2010, Kampala, Uganda, EX. CL/600(XVII), 2010, pp. 111-147.

4 *Ibid.*, pp. 151-157, 168, 174-178, 180. The rapes were found to be in violation of the right to the respect of the dignity inherent in a human being, the prohibition on all forms of exploitation and degradation of man including torture, cruel, inhuman or degrading punishment and treatment (Article 5), as well as the right to liberty, and security of person (private and public individual security) (Article 6), and the right to have one's cause heard, including the right to an appeal to competent national organs against acts of violating one's fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force (Article 7(1)).

Omar Al-Bashir. Two arrest warrants have been issued on him for individual criminal responsibility as an indirect (co-)perpetrator, which include five counts of crimes against humanity (including rape), two counts of war crimes and three counts of genocide.

Common to these two mentioned cases is that the SGBV was committed in times of armed conflict, and was thus extensively used as a tactic or weapon of war between the warring parties or as a systematic and widespread attack on the civilian population. Such sexual violence and rape is committed in public and/or in front of family members, and is used to humiliate, terrorise, demoralise, displace, control and destroy communities from within. Pregnancies, HIV/AIDS and other serious health complications follow from the rapes and assaults, including sexual slavery and enforced prostitution, which are often widespread in conflict areas.

During the seminar ‘How to Respond to Genocide and Other Crimes Against Humanity’ at the Dag Hammarskjöld Foundation on 17 March 2010, Robin May Schott presented her paper on sexual violence against women in war and discussed the vital question: ‘What is the central nature of the harm?’⁵ She emphasised the importance of understanding the nature of the harm of SGBV in armed conflict and how we understand and construct the notion of ‘humanity’. With reference to the work of Hannah Arendt and building on the concept of social death coined by Orlando Patterson in his work on slavery, later developed in Claudia Card’s analysis on genocide and social death, Schott argued convincingly that SGBV under armed conflict is not only a crime against the individual but a threat to the political community and the concept of humanity itself (Patterson 1982; Card 2007). Notwithstanding that such assaults do not lead to physical destruction of the individual, they lead to the social death of the survivors, implying loss of identity and family ties as well as other meaningful social relations, loss of employment, property and other material rights in society and a role and identity in the political community. The consequences are devastating not only for the individual but also for whole communities who suffer when the female pillars upholding cultural identity and family unities are targeted and socially disintegrated. Survivors of this weapon of war or weapon of mass destruction shift to a rightless status in society, stigmatised and rejected – no longer regarded or respected as part of humanity itself. The state of social death has been described in relation to genocide in the following words by Card (2007: 80):

5 See her chapter in this volume.

To use Orlando Patterson's terminology, in that event, they may become 'socially dead' and their descendants 'naturally alienated', no longer able to pass along and build upon the traditions, cultural developments (including languages), and projects of earlier generations (1982: 5-9). The harm of social death is not necessarily less extreme than that of physical death. [...] In my view, the special evil of genocide lies in its infliction of not just physical death (when it does that) but social death, producing a consequent meaninglessness of one's life and even its termination.

Card (ibid: 76) furthermore explains how social vitality is destroyed when social relations (organisations, practices, institutions) of the members of a group are irreparably damaged and demolished, and that such destruction is a commonly intended consequence of war rape which has aimed at family breakdown.

The case law of the two *ad hoc* Tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Court for Sierra Leone have confirmed in their case law that sexual and gender-based violence, including rape may constitute war crimes, crimes against humanity and elements of genocide (Eriksson 2010; Askin 2005; Gardam 2001). The Tribunals have convicted perpetrators of gender crimes who have aided and abetted, ordered, instigated, planned, encouraged or otherwise facilitated the crimes, as well as superiors who have failed to take adequate steps to prevent, halt or punish sex crimes committed by subordinates (Askin 2005: 152). The definitions on crimes against humanity and genocide codified in the ICC Statute include SGBV committed in peacetime when the defined criteria for these crimes are present. In the case of a crime against humanity the SGBV must be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.⁶ The text of Article 7(2) of the ICC Statute refers to state policy and organisational policy, implying that the policy of the state – and not of an organisation – needs to be present to constitute a CAH. The state nexus in the definition thus rules out SGBV committed by non-state actors (Bassiouni 2005). This interpretation was confirmed by Professor William Schabas as well as the Former Under-Secretary-General for Legal Affairs, Hans Corell, at the Dag Hammarskjöld Foundation seminar in March 2010 in Uppsala.

⁶ Rome Statute of the International Criminal Court, 17 July 1998, 37 ILM 999, Article 7(i)(g): 'Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity.' 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.

Studies on post-conflict SGBV show that SGBV continues to be widespread, persistent and structural in many post-conflict societies. Most of the few available data on sexual violence in conflict and post-conflict areas comes from case studies or interviews with victims/survivors communicated through population-based surveys in refugee camps or other post-conflict settings conducted in a few countries including Colombia, Liberia, Rwanda, Sierra Leone and East Timor.⁷ The recent Universal Periodic Review of Liberia in the Human Rights Council undertaken in November 2010, seven years after the peace accord was signed, affirm that rape and sexual violence remain the most frequently committed serious crimes in Liberia, and that the victims of this violence are predominantly female children under the age of 15 years.⁸ Also, in its 2009 concluding observations on Liberia the Committee on the Elimination of All Forms of Violence (CEDAW) noted with grave concern the ‘extent, intensity and prevalence of violence against women, especially sexual violence, which occurred both during and after the armed conflict’.⁹

While approximately 75 per cent of all women in Liberia were raped (of which the majority gang raped) during its 14-year internal armed conflict (1989–2003) women and female children are still widely subjected to SGBV.¹⁰ The Liberian national report submitted for the Universal Periodic Review states:

7 ‘In-depth study on all forms of violence against women’, Report of the Secretary-General, 6 July 2006, UN Doc A/61/122/Add.1, 2006, para. 226. This is a form of violence, which is underdocumented, and increased surveillance and monitoring are urgently needed. A Gender-based Violence Tools Manual for Assessment and Program Design, Monitoring and Evaluation has been developed for standardised population-based surveys designed to measure multiple forms of gender-based violence in conflict-affected settings around the world. Four countries have been piloted: Liberia, East Timor, Uganda and Sierra Leone; *ibid.*, Table 1 under para. 146.

8 Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with para. 15 (b) of the annex to Human Rights Council resolution 5/1. Liberia, Ninth session, Geneva, 1–12 November 2010, UN Doc A/HRC/WG.6/9/LBR/2, 2010, para. 27; see also UNMIL, Office of the Gender Adviser, Fact-Sheet Sexual and Gender-Based Violence in Liberia, Monrovia, August 2010.

9 Concluding observations of the Committee on the Elimination of Discrimination against Women, Liberia, 20 July – 7 August 2009, UN Doc CEDAW/C/LBR/CO/6, 2009, para. 22.

10 *National Plan of Action for the Prevention and Management of Gender Based Violence in Liberia (GBV-POA)*, Gender Based Violence Interagency Taskforce, Republic of Liberia, Monrovia, 2006, Chapter 2.0; Omanyondo (2005, 12, 26ff.). While women are overrepresented among rape victims, sexual slavery and sexual abuse (in particular for victims aged 15–19), more men than women faced sexual abuse, implying stripping, and various forms of humiliation in nudity (Truth and Reconciliation Commission 2009b: 272).

In the aftermath of the conflict, women continue to suffer the physical, emotional, psychological and economic effects of the conflict, face high incidents of rape and sexual violence, and confront significant traditional and cultural challenges to maintain meaningful participation in public and political spheres.¹¹

The first quarterly report from the Ministry of Gender and Development (MoGD) reveals that during the period January to April 2010 (4 months) 973 cases of SGBV were reported across the country, consisting mostly of rapes (67 per cent) and domestic violence (18 per cent) (Republic of Liberia 2010).¹² Montserrado County, where the capital of Liberia is situated, remains the highest reporting area, accounting for over 64 per cent of the reported SGBV. Most of the reported assaults (61 per cent) targeted young girls between six and 17 years. The quarterly report furthermore asserts that the most common perpetrators are known to the victims and survivors as neighbours, boyfriends, community members, husbands and guardians. The perpetrators of post-conflict SGBV thus shift from being combatants and ex-combatants during the armed conflict to persons known to the survivor and their parents, often residing in the same neighbourhood or community (*ibid.*).¹³ Family members and close relatives are often reported to be the perpetrators of SGBV, especially rape.

Having visited Monrovia in September and October 2010 to study the country's and the international community's efforts to combat the SGBV, the special prosecutor's office, the Liberian National Police and specialised clinic personnel corroborated that most reported cases concern child rapes and that the adult cases of rape and sexual violence are not reported unless the violence leads to severe medical complications. Stigmatisation, risk of abandonment, economical restraints, the culture of impunity, the lack of trust of the law enforcement mechanisms, gaps in legal protection, health and psychosocial services as well as the low level of capacity to offer effective judicial remedies by the courts make women refrain from reporting.¹⁴ Many

11 National report submitted in accordance with para. 15 (a) of the annex to Human Rights Council resolution 5/1, 23 August 2010, UN Doc A/HRC/WG.6/9/LBR/1, 2010, para. 71.

12 GBV in this report encompasses all forms of GBV including rape, domestic violence, abandonment, gang rape, sexual assault, attempted rape, physical abuse, and female genital mutilation.

13 However, in the 2005 WHO study on SGBV in Liberia (Omanyondo 2005), the rebels committed approximately 47 per cent of the sexual assaults, armed forces 42 per cent, and the husbands and intimate partners stand for 34 per cent of SGBV cases during and after the civil war up until 2005 (*cf.* the variations in different counties), Chapter A.2.1.

14 National Plan of Action on Gender Based Violence in Liberia (2006), Chapter 3.0.

Liberian women face stigmatisation (62,8 per cent), rejection (27.1 per cent) and divorce (23.3 per cent) as a consequence of SGBV.¹⁵

Post-conflict peace is in reality only a ‘relative peace’ for many women and children due to the endurance of these human security threats, in particular in the private sphere. Margot Wallström asserts that women will not enjoy peace if rape persists and states that

[...]law will not deliver justice for women if no reparations are made... Change must ultimately be felt in the lives of women walking to the market in Eastern Congo, collecting firewood outside a camp in Darfur, or lining up to vote in a village of Afghanistan. Their security is the true measure of success (IRIN 2010).

A crucial question is whether the same mechanism of ‘social death’ that follows from rape and other sexual assaults in armed conflict also occurs when such violence is committed after an armed conflict? Does SGBV committed by known or closely related persons lead to social death to the same extent as when used as a weapon of war in armed conflicts? A 2005 WHO study on SGBV and health facility needs in Liberia conveys that the physical, psychological, social and economic consequences of SGBV experienced by the respondents who had experienced SGBV were profound and long-term, and included vaginal medical complications, sexually transmitted infections and HIV/AIDS, disturbances and irregularities of menstruation and urination, loss of reproductive capacity, abdominal and back pains, chronic illness and tiredness, pregnancies, shame, guilt, fears of rejection and more violence, sexual aversion, frustration and worries, insomnia, feelings of sadness or hatred, stigmatisation by the family and community, public humiliation, divorces, loss of livelihoods and property, school dropouts, poverty, vulnerability to sexual exploitation, prostitution and trafficking (Omanyondo 2005: Ch. 3.0).

Victims and survivors of SGBV in post-conflict Liberia risk facing alienation, rejection and abandonment from their families and communities unless they keep silent about the assaults. Most women’s coping strategies with SGBV in Liberia seem to be to simply bear and harbour the pains, assaults and horrors they have experienced within themselves, without receiving psychosocial assistance and other remedies and redress. The projection of guilt and shame on the victim/survivor rather than on the perpetrator is a well-known ‘ruler technique’ (Amnéus et al. 2005) with serious negative effects on

15 UNMIL, Fact-Sheet Sexual and Gender-Based Violence in Liberia (2010).

the individual, which in these cases are upheld by the communities through the stigmatisation of the victim/survivor. The negative consequences of this sexual violence not only affect the individuals but also involve the families and communities, the social infrastructure of society.

The CEDAW General Comment No. 19 claims that violence against women impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law including the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, the right to equal protection under the law and in time of armed conflict, the right to liberty and security of person, the right to equality in the family, and the right to the highest standard attainable of physical and mental health.¹⁶ The WHO study and other research show that post-conflict SGBV clearly affects women's health and impairs their ability to participate in family life and public life on a basis of equality.

Access to domestic justice and remedies for post-conflict SGBV – the case of Liberia

Despite the new sharpened rape law that was adopted in 2005 for the purpose of addressing the high incidence of rape against girls and women in post-conflict Liberia,¹⁷ the Special Court for Rape and other Forms of Violence established in Monrovia in September 2008,¹⁸ and the ongoing implementations of the 2006 National Gender Based Violence Plan of Action (2006), the 2007 Liberia National Action Plan for the Implementation of United Nations Resolution 1325 (Republic of Liberia 2009), and the Joint Government/UN programme on SGBV, women are not in general gaining access to justice or effective judicial remedies for these persistent sexual assaults.¹⁹ The report of the Truth and Reconciliation Commission of Liberia

¹⁶ General Recommendation No. 19 Violence against women, CEDAW 11th session, 1992.

¹⁷ An Act to Amend the New Penal Code Sections 14.70 and 14.71 and to provide for gang rape, approved 29 December 2005, Ministry of Foreign Affairs, Monrovia, Liberia, 17 January 2006.

¹⁸ An Act Amending Title 17 of the Revised Code of Laws of Liberia, known as the Judiciary Law of 1972 by adding thereto a new chapter to be known as Chapter 25 establishing Criminal Court 'E' of the first judicial circuit, Montserrado County, and special divisions of the circuit courts of other counties of the republic to have exclusive original jurisdiction over the crimes of rape, gang rape, aggravated involuntary sodomy, involuntary sodomy, voluntary sodomy, corruption of minors, sexual abuse of wards and sexual assault respectively, approved 11 September 2008, Ministry of Foreign Affairs, Monrovia, Liberia, 23 September 2008.

¹⁹ National report, Liberia, Human Rights Council, A/HRC/WG.6/9/LBR/1 (2010), para. 74;

(TRC) on women and the conflict acknowledges that the weak implementation of the rape law is a major concern, and that the legal infrastructure in all of Liberia's 15 counties is weak and ill equipped to provide access to justice for SGBV victims (Truth and Reconciliation Commission 2009b: 62). Domestic violence is furthermore not criminalised in Liberia.

The Special Court (Criminal Court E) has during its one-and-a-half years of operation deliberated on nine cases in all, of which only five cases led to convictions, all on first-degree rape. The majority, but not all, of the suspected perpetrators of rape in the current case dock of Criminal Court E are non-state actors, known by or related to the victims.²⁰

The CEDAW Committee stated in 2009 in its concluding observations on Liberia that

[...] it remains concerned about the lack of a comprehensive legal framework to prevent and eliminate all forms of violence against women and the lack of adequate services and protection for victims of violence. [...] It is also concerned that the police, judiciary, and health care providers lack capacity to respond adequately to violence against women and girls in spite of efforts to train and sensitize them. It also notes that there is an excessive backlog of cases in the courts, resulting in a lack of access to justice for victims and the prevalence of impunity of perpetrators.²¹

The Committee urged Liberia to prioritise the adoption and implementation of a comprehensive legal framework to address all forms of violence against women, including domestic violence, and make use of its General Recommendation No. 19.

However, the problem of access to justice and effective remedy does not exist only in the field of SGBV. The UN independent expert on technical cooperation in Liberia reported already in 2006 that the weak and dysfunctional judiciary resulted in the repeated postponement of cases, lack of fair trials standards, and in 2009 the UN Secretary-General stated that serious challenges are posed by the weakness of rule of law institutions in Liberia, including the legal, judicial and

20 Interview with George Sagbeh, Prosecutor at the Special Prosecutor's SGBV Unit, Monrovia, 29 September 2010.

21 CEDAW Concluding Observations, Liberia (2009), paras 22, 24.

correction sectors.²² The Office of the High Commissioner for Human Rights (OHCHR) has also pointed to numerous continuing challenges including lack of infrastructure, basic equipment and legal references, poor administration and caseload management, corruption and the need for law reform. Thus seven years after the peace accord, Liberia is still struggling at the bottom of the 2010 World Justice Project Rule of Law Index (Agrast et al. 2010: 21ff., 60ff.) – in company with Kenya and Nigeria – suffering from a rule of law deficit and showing a vast need to advance those dimensions, including efforts to address government accountability, corruption, crime and violence, regulatory enforcement, and access to justice.

The gross human rights violations or serious violations of humanitarian law, including the mass rapes and sexual violence committed during the civil war, have not yet been prosecuted. The final report of the TRC was presented in December 2009 but its recommendations and list of perpetrators for prosecution have not been followed up to this date.²³ However, a Human Rights Commission was established at the Liberian Ministry of Justice in August 2010 and has been entrusted with the task of implementing the TRC recommendations.²⁴ Many commentators believe that this work will not come into operation until the next presidency, due to the fact that the incumbent president and the current head of the Supreme Court are on the TRC list recommended for public sanctions, among those individuals found to have supported, financed, directly or indirectly by action or inaction the warring factions and armed groups that are believed to have committed war crimes, egregious domestic law violations, gross violations of human rights and humanitarian law violations (Truth and Reconciliation Commission 2009a: 361).

Access to justice for post-conflict SGBV through international law?

The facts and arguments above show that treating post-conflict SGBV as an ordinary crime under domestic law is an insufficient and inappropriate strategy for the provision of access to justice in

22 Human Rights Council, Working Group on the Universal Periodic Review, Liberia (2010), A/HRC/WG.6/9/LBR/2, para. 33.

23 See the determinations and recommendations on accountability for extraordinary tribunal, domestic criminal prosecutions, public sanctions, national Palava Hut Program, and economic investigation and prosecution in the Liberia TRC report, Volume II (2009) (Chapter 11 et seq); Summary of the OHCHR, Liberia UPR, A/HRC/WG.6/9/LBR/3 (2010), para. 32.

24 Interview with James Verdier, Rule of Law Officer, UNDP, Monrovia, 1 October 2010.

fragile, post-conflict developing states, in particular when the SGBV has been widely used as a weapon of war during the armed conflict and continues to be widespread and pervasive. What other judicial remedies are available for these women and girls when the state lacks the necessary domestic judicial capacity and well-functioning criminal system to enforce its national laws and effectively prosecute widespread post-conflict SGBV?

The domestic justice system is unlikely to have the capacity necessary to prosecute all cases of SGBV as ordinary crimes on an individual basis since its prevalence is entrenched and structural. Arguably, other more efficient means and methods to combat SGBV en masse should be provided by international law in the same vein, as with other mass atrocity crimes. Victims and survivors of structural and widespread SGBV in fragile post-conflict states should have a right to access to justice and means of redress and remedy despite the incapacity of the domestic criminal justice system to provide legal remedies. What means of redress can the international legal order offer these women and girls to address this pervasive and devastating harm, deeply affecting their health, lives and severely impairing their abilities to enjoy their human rights.

To begin with, the peacetime international legal protection against violence against women (VAW) or gender-based violence (GBV) is suffering from normative deficiencies since much of the special regulation on human rights applicable to SGBV is based on non-legally binding soft law instruments.²⁵ There is no global legally binding treaty that explicitly outlaws SGBV or VAW as such as a human rights violation and the general human rights treaties have not been constructed to take into consideration the manifold variants of SGBV and VAW committed in the private sphere, where much of this violence takes place in parts of the world where women are relegated to this sphere.²⁶ Not all states or legal scholars therefore accept that SGBV or VAW are a violation of human rights in the first place. These flaws naturally affect the national implementation of the human rights law. Despite these normative weaknesses, post-Cold War jurisprudence of human rights treaty monitoring bodies, and judgments from regional human rights courts and commissions ascertain that SGBV, may con-

25 See CEDAW General Recommendation No. 19 (1992); Declaration on the Elimination of Violence Against Women, GA Res. 48/104, 20 December 1993, UN Doc A/48/104, 1993; Report of the Fourth World Conference on Women, Beijing, China, 4-15 September, Annex 1, Beijing Declaration and Platform for Action, A/CONF.177/20, 17 October 1995, UN Doc A/CONF.177/20, 1995.

26 The CEDAW Convention lacks any explicit regulation on violence.

stitute a human rights violation, including that of torture or cruel and inhumane treatment, when the state nexus is present.²⁷

Furthermore, many international human rights bodies, except the Committee against Torture, have also quite recently in the 21st century begun to determine that when SGBV has been committed by non-state actors it should also be seen as a human rights violation by the state, provided that the state has failed to fulfil the ‘principle of due diligence’.²⁸

The principle of due diligence has independently, since its first application in the 1988 Velasquez case of the Inter-American Court of Human Rights (IACtHR),²⁹ been developed and reaffirmed through case law in the European Court of Human Rights (ECHR), IACtHR, the African Commission on Human and People’s Rights (AfComHPR), Human Rights Commission, and CEDAW, and by UN Special Rapporteurs since the new millennium also in cases dealing with SGBV.³⁰ The cases mainly treat SGBV in peacetime but there are also several cases relating to armed conflicts in countries in Latin America and Africa.

The principle of due diligence as such is seen as separate from the law on state responsibility based on the ILC Draft Articles on State Responsibility since due diligence obligations follow directly from the specific treaties that the state has ratified. The obligations to exercise due diligence thus vary from one context to another depending on the object and purpose of the relevant treaty or other rule giving rise

27 See, for example, *Aydin v. Turkey*, (Application No. 57/1996/676/866), Judgment of 25 September 1997; *Communications 279/03 Sudan Human Rights Organisation & The Sudan, and 296/05 - Centre on Housing Rights and Evictions/The Sudan*, Adopted between 13 and 27 May, 2009; *Raquel Martí de Mejía v. Perú*, Case 10.970, Report No. 5/96 (IAComHR), 1 March, 1996; *IA Court H. R., Case of González et al. ('Cotton Field') v. Mexico*, Preliminary Objection, Merits, Reparations and Costs. Judgment of 16 November 2009, Series C No. 205, 2009; *Saadia Ali v. Tunisia*, Communication No. 291/2006, CAT/C/41/291/2006, 21 November, 2008.

28 See, for example, *Ms. A. T v. Hungary*, CEDAW Communication No. 2/2003, 26 January 2005; *The Vienna Intervention Centre (5/2005) v. Vienna (CEDAW)*; *M.C. v. Bulgaria*, Application No. 39272/98, Judgment of 4 December 2003; *Opuz v. Turkey*, Application No. 33401/02, Judgment, 9 June 2009; *Case of González et al. ('Cotton Field') v. Mexico (IACtHR)*.

29 *Velasquez Rodriguez Case*, (Series C), No. 4, Judgment of 29 July, IACtHR, 1988.

30 *Bourke-Martignoni (2008, 47ff.)*; ‘Integration of the Human Rights of Women and the Gender Perspective: Violence against Women: The Due Diligence Standard as a Tool for the Elimination of Violence against Women’, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Erturk, UN Doc E/CN.4/2006/61, 20 January 2006.

to the primary obligations.³¹ Bourke-Martignoni (2008: 60) claims that there is growing recognition that states should ensure a minimum level of due diligence in ‘preventing, protecting, investigating, prosecuting, punishing and providing redress’ for acts of violence against women.

The General Assembly Declaration on the Elimination of All Forms of Violence against Women (1993) asserts that states have an obligation to ‘exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons’.³² The CEDAW General Comment (GC) No. 19 on violence against women provides that SGBV constitutes discrimination against women under Article 1 of the CEDAW Convention and that such discrimination under the Convention is not restricted to action by or on behalf of governments but that states may also be responsible for private acts by persons, organisations or enterprises if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.³³

Although these instruments have soft law status the CEDAW’s jurisprudence³⁴ and regional human rights case law of the ECHR and IACtHR³⁵ confirm this transgression of the public/private divide of human rights law with regard to SGBV by non-state actors. This case law upholds that SGBV may be considered a human rights violation also when committed by non-state actors provided the state is found to have failed to prevent, investigate, prosecute, punish and provide remedies. Unfortunately, the regional human rights case law is only legally binding for the states concerned, while other states are not

31 ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001’, Report of the International Law Commission. Fifty-third Session (23 April-1 June and 2 July-10 August 2001), A/56/10 2001, p. 34; Eriksson (2010, 233).

32 Declaration on the Elimination of Violence Against Women (1993), Article 4(c).

33 See CEDAW General Recommendation No. 19 (1992), para. 9: [...] (see articles 2(e), 2(f) and 5). For example, under article 2(e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.’

34 See, for example, the Vienna Intervention Centre against Domestic Violence and the Association for Women’s Access to Justice on behalf of Banu Akbak, Gulen Khan, and Melissa Özdemir v. Austria, Communication No. 6/2005, 21 July 2006.

35 See, for example, *Opuz v. Turkey* (ECHR); *Case of González et al. (‘Cotton Field’) v. Mexico* (IACtHR).

legally obliged to implement these decisions at the domestic level. It may be argued that the principle of due diligence, however, has attained international customary law status.

The international obligations of states to respect, ensure, and implement human rights law whether based on treaty, customary law or domestic law have also been acknowledged in the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law.³⁶ On the other side of the coin, victims of human rights violations hold a right to an effective remedy, which has been affirmed in various human rights treaties.³⁷ States furthermore have an obligation in the promotion and protection of human rights to undertake prompt, thorough, independent and impartial investigations of violations and take appropriate measures in respect of the perpetrators, in particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.³⁸

However, the content and scope of the principle of due diligence and its obligations remain vague and contested.³⁹ The principle is applied gradually and contextually, meaning that its application is dependent on the legal, social, and political environment in the state concerned.⁴⁰ The Special Rapporteur on violence against women concludes in her report on the due diligence standard that what is required to meet the standard of due diligence will necessarily vary according to the domestic context, international dynamics, nature of the actors concerned and the international conjuncture.⁴¹ It may be argued that the varying level of obligations of the principle certainly affects its application in a post-conflict situation.

³⁶ General Assembly Basic Principles and Guidelines on the Right to a Remedy (2006), p. 4. I (i).

³⁷ *Ibid.* See preambular para. 1 and operative para. I, referring to Article 8 UDHR, Article 2 ICCPR, Article 6 CERD, Article 14 CAT, Article 39 CRC etc.

³⁸ 'Promotion and Protection of Human Rights: Impunity', Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher, UN Doc E/CN.4/2005/102/Add.1, 8 February 2005, principle 19.

³⁹ Eriksson (2010, 254ff.); 'The Due Diligence Standard as a Tool for the Elimination of Violence against Women', E/CN.4/2006/61, paras 14, 103.

⁴⁰ Velasquez Case (IACtHR); Bourke-Martignoni, 'The History and Development of the Due Diligence Standard, in *Due Diligence and Its Application*', p. 50.

⁴¹ 'The Due Diligence Standard as a Tool for the Elimination of Violence against Women', E/CN.4/2006/61, para. 103.

Is the level of obligations to exercise due diligence lower for fragile, post-conflict states due to their inherent incapacity to uphold law and order and a society based on the rule of law? To what extent may the principle be useful also for post-conflict SGBV by non-state actors? There are arguably differences between post-conflict SGBV and peacetime SGBV due to its continuing systematic, widespread and structural prevalence after armed conflicts. The amended rape law in Liberia 2005 was introduced two years after the peace accord in order to address the continuing horrendous widespread sexual assaults on women after the war. The referred case law on SGBV and the principle of due diligence above may not necessarily be applicable to the same extent to fragile post-conflict, developing states. The jurisprudence of CEDAW has until now only dealt with European cases on SGBV, and no post-conflict cases.

As mentioned earlier, the application of the principle is closely linked to the specific treaty where the primary obligations are laid down. In the case of Liberia, the African Charter of Human and Peoples' Rights should be the reference point. The Charter admits no derogations of its obligations at any times, including during armed conflict.⁴² The recent Darfur-Sudan cases from the African Commission on Human and Peoples' Rights illustrate that state responsibility may be incurred for failure to take due diligence to prevent rapes also during armed conflict.⁴³ But in these cases the government was also indirectly or directly involved in the alleged human rights violations in Darfur, including rape, why its value of guidance for situations of post-conflict SGBV committed by non-state actors may be somewhat diminished.

Taking the case of Liberia as a point of departure for examining existing means of access to justice provided for by international human rights law for post-conflict SGBV, the following options appear on the table. Firstly, the individual complaints mechanism of the CEDAW for SGBV constituting discrimination under Article 1 is unfortunately not available yet for Liberian women to test the application of the principle of due diligence due to lack of ratification. Secondly, Liberia is also a signatory but unfortunately not yet a state party to the African Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2003). The Protocol transgresses the public/private divide and is next to the Inter-American Convention

42 See Article 27 of the African (Banjul) Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc CAB/LEG/67/3 rev.5, 21 I.L.M 58 (1982).

43 Communications 279/03 and 296/05 v. Sudan (AfrComHPR).

on the prevention, punishment and eradication of violence against women (1994) the only regional treaty that explicitly outlaws various forms of violence against women. Thirdly, an individual complaint to the African Commission or Court of Human and Peoples' Rights under the African Charter on Human and People's Rights may, however, be a viable option. A (larger) group of survivors and victims of post-conflict SGBV in Liberia could arguably join their cases (similar to class action) and complain to the African Commission or Court about lack of access to justice and claim that Liberia has failed to take due diligence to prevent, investigate, prosecute and provide remedies for the SGBV crimes committed against them under domestic legislation. Until now, this channel for redress for post-conflict SGBV in Africa has not been used by women or women's organisations. It may be worthwhile exploring it.

Whether such a case could actually provide the redress and remedies that these survivors need and foster sufficient comprehensive state action, reforms and developments in the criminal justice system to prevent and prosecute future SGBV is another issue. In any case individual private perpetrators will not get the necessary signal from the international legal order that will end the prevailing culture of impunity for such violence.

The *national implementation* of the international legal protection against SGBV will continue to be problematic as long as the international community does not address the underlying *normative deficiencies* for the protection of SGBV, in particular for post-conflict situations. The existing soft law for the determination of SGBV as sex-based discrimination as well as its demands to transgress the public/private divide to be used in relation to the principle of due diligence are *post hoc* constructions directed to address these normative deficiencies in international human rights law. Even though these developments have had importance for case law of some international and regional human rights bodies this has unfortunately not amend the normative deficiencies in hard law affecting national implementation of human rights standards with regard to SGBV. Instead, they have in fact provided 'double qualifiers' for determining state responsibility for human rights violations involving post-conflict SGBV rather than amending the underlying problem. It is thus not enough to prove the sexual violence itself but also that this violence constitute a form of gender discrimination and furthermore that the state has failed to take due diligence in the particular case to prevent, investigate, prosecute, punish and provide a remedy.

Even if the African Commission or Court found that Liberia has failed to take due diligence to protect women against the SGBV and failed to prosecute perpetrators, the domestic capacity to harmonise its justice system to international human rights standards and implement its own national action plans and undertake the necessary changes in the judicial, criminal, political, and health spheres to be able to fulfill its obligations are still lacking due to the fragile post-conflict state it is currently experiencing. Are there any alternatives for approaching the problem and can any other international legal mechanisms provide an effective remedy available for post-conflict SGBV survivors?

Other international efforts to address violence against women under and after armed conflict

Despite these lacunae and deficiencies in the international normative protection against SGBV committed in peacetime, more progressive actors of the international community have made several attempts to find alternative ways to address the problem of sexual violence in conflict and post-conflict situations. The landmark Security Council Resolutions 1325 and 1820 on women, peace and security, and now also the most recently adopted Resolution 1960 (16 December 2010)⁴⁴ set out concrete measures that are to be taken to protect women from sexual violence under and after armed conflict. Resolution 1325 has an emphasis on sexual violence under armed conflict and is thus less concerned with the post-conflict situations, but calls on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including acknowledging the special needs of women and girls during post-conflict reconstruction.⁴⁵ The question is whether this statement in itself is providing a new normative platform, rather than solely an encouragement to take positive steps in this direction?

Resolutions 1820 and 1960 address *post*-conflict sexual violence in so far as it is used or commissioned 'as a part of a widespread or systematic attack against civilian populations'.⁴⁶ This formulation alludes to the definition of crimes against humanity, defined in the ICC Statute, thus addressing only such SGBV that amounts to a grave crime in international law. Furthermore, Resolution 1820 provides that the

44 SC Res. 1960, 16 December 2010, UN Doc S/RES/1960, 2010.

45 SC Res. 1325, 31 October 2000, UN Doc S/RES/1325, 2000, para. 8 (a).

46 SC Res. 1820, 19 June 2008, UN Doc S/RES/1820, 2008, para. 1.

Peacebuilding Commission can play an important role ‘by including in its advice and recommendations for post-conflict peacebuilding strategies, where appropriate, ways to address sexual violence committed during and in the aftermath of armed conflict’,⁴⁷ and it urges member states, UN entities and financial institutions to support and strengthen national institutions, in particular judicial and health systems in order to provide sustainable assistance to victims of sexual violence in armed conflict but also in post-conflict situations.⁴⁸

The only references to post-conflict SGBV in the newly adopted Security Council Resolution 1960 is where the Security Council notes with concern that only limited numbers of perpetrators of sexual violence have been brought to justice, while recognising that in conflict and in post-conflict situations national justice systems may be significantly weakened.⁴⁹ It furthermore requests the Secretary General to establish monitoring, analysis and reporting arrangements on conflict-related sexual violence, including rape in situations of armed conflict and post-conflict and other situations relevant to the implementation of Resolution 1888 (*ibid.*, para 8).

However, these resolutions do not introduce new standards of legal protection but link only the gravest forms of such sexual violence to voluntary international assistance and capacity building by the international community to support the improvement of the domestic justice and health systems to offer access to justice for those crimes. One can here draw parallels to the second pillar of the Responsibility to Protect (R2P), which provides for such international assistance when a state is manifestly failing to protect its own population against crimes against humanity, war crimes, genocide or ethnic cleansing.⁵⁰ Moreover, although these Security Council resolutions are binding on UN member states according to Article 24 of the UN Charter, these are generally not regarded as international treaties with normative obligations for states to undertake national implementation strengthening the legal protection against SGBV. These international efforts to highlight and address sexual violence under and after armed

47 *Ibid.*, para. 11.

48 *Ibid.*, para. 13.

49 S/RES/1960 (2010), preamble. This last reference to post-conflict SGBV in relation to resolution 1888 deals with forms of peace-time sexual violence used or commissioned as a part of a widespread or systematic attack against civilian populations, i.e. crimes against humanity.

50 See ‘Implementing the Responsibility to Protect’, Report of the Secretary-General, 12 January 2009, UN Doc A/63/677, 2009.

conflict are unfortunately not sufficient to enhance the international normative protection against post-conflict SGBV or increase the options for access to justice for survivors and victims of such violence. Furthermore, the ambit and scope of application of these resolutions on the protection against SGBV after armed conflict is thus limited to post-conflict sexual violence that forms part of widespread and systematic attacks on the civilian population amounting to crimes against humanity.

Now, the definition on crimes against humanity, as provided for in the ICC Statute, only includes certain forms of sexual violence, namely that has a state nexus, thus excluding SGBV by non-state actors. This narrow interpretation of the definition on crimes against humanity was confirmed and upheld by William Schabas and Hans Corell at the Dag Hammarskjöld Foundation seminar in March 2010, when discussing this particular dilemma.⁵¹ My question raised during the seminar was to what extent these forms of widespread, structural and pervasive forms of post-conflict SGBV, as in the case of Liberia, would fall under the Draft Convention on Crimes Against Humanity. The definition in the Draft Convention is identical to its definition in the ICC Statute and the CAH Initiative has decided to keep to the same definition for purpose of coherent application in the future.

Accepting this interpretation, one must realise that the positive gender developments in international criminal law codified in the ICC Statute do not cover or address the most prevalent forms of post-conflict SGBV, as evidenced in the case of Liberia. The harm of social death for such violence is not adequately captured by the definition of crimes against humanity, and it has not integrated the achievements within human rights law to transgress the public/private divide (which is also non-existent in international humanitarian law).

The critique one could present against the draft definition of crimes against humanity for leaving out structural and widespread violence by non-state actors affecting not only the individual but also families and communities at deeper levels and impairing the empowerment and full realisation of women's human rights, are unfortunately outside the scope of this article. But my hope is that the article has at least presented a strong case and arguments for the need to reconsider these issues within the Crimes Against Humanity Initiative.

51 Cf. Eriksson (2010, 570).

When the state is indirectly aiding, abetting or silently even encouraging such crimes by tolerance, ignorance and acquiescence of widespread SGBV, which becomes accepted institutionalised practices of violent sexual behavior within its society, those acts and destructive cultures should arguably not only be attributable to the state, but also incur individual criminal responsibility under international criminal law for specific key actors and representatives of the state which have by acts or omissions contributed to a culture of impunity. It may be local politicians, village councils, police officers, prosecutors, judges and lawyers, as well as prison and detention guards and other refusing to report and investigate SGBV assaults and allow access to justice for its victims. Moreover, also private, non-state actors should be able to attain individual international criminal responsibility for grave forms of SGBV such as gang rapes and child rapes.

The pass over from war to peacetime and disarmament, demobilisation, reintegration and rehabilitation (DDR) processes shift the status of rebels, members of militia and organised gangs to private, non-state actors. Should the same perpetrator's continued sexual assaults and rapes go unrecorded from international criminal law, just because the SGBV is not used as a weapon of war? The argument that it is more important to keep the same definition to uphold coherence of international law will thus be made at the expense and burden and suffering of women. Is it more important to value coherence higher than the restitution of women's humanity or could international law overcome its gender-blindness and stretch out to integrate the forms of mass atrocities that women face into the concept of crimes against humanity and include women into the conception of humanity itself? I believe international legal scholars have the capacity and creativity to overcome this barrier, and it would not be the first time the definition of crimes against humanity has developed in history. By allowing to be influenced by the developments in international human rights law transgressing the public/private divide, the definition on crimes against humanity could truly serve the protection of all of humanity, also women's.

Concluding remarks

The Secretary-General mentions under the second pillar of its report on the implementation of the R2P that international assistance and capacity building is important also to support survivors of systematic sexual violence and women's NGOs in order to provide redress and remedies for them.⁵² There is evidently a mismatch in the international legal and policy regimes on post-conflict SGBV and international law, where the law as usual is logging behind – in this case the latest international policy developments on R2P and Security Council actions on SGBV. UN member states appear generally to be less open to efficiently outlawing and dealing with this violence than the Security Council, the UN Secretariat and the Secretary-General himself. More and stronger international and national normative commitments to spur efficient domestic implementations and international remedies are needed to sharpen the attention on access to justice and means of redress for these atrocities targeting women en masse around the world.

52 The Secretary-General' R2P report, para. 26.

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Idealism and realism – Negotiating sovereignty in divided nations

The 2010 Dag Hammarskjöld Lecture

Francis M. Deng

It is always a great pleasure to be back in Sweden. I have often said that an ambassador to a country is the ambassador not of his country alone but also of the country where he is accredited. And therefore it gives me a great pleasure to return to a country where I was ambassador at a rather young age – my first diplomatic posting – and therefore quite a formative one. I'll tell you a little anecdote that shows perhaps the extent to which I was raw, and I say it without being too embarrassed. I went to present my credentials in Norway and as I was talking to the Director General of the foreign ministry he said: 'Mr Ambassador, why did you choose Sweden as your seat for your mission in Scandinavia?' I replied: 'It was a choice made by my government, not mine. But isn't Sweden the centre of Scandinavia?' And he got up and said: 'Mr Ambassador, you come to my country to say Sweden is the centre?' And I said: 'I'm talking geographically of course.' He said: 'Even geographically – if you consider Iceland – Sweden is not the centre.'

In preparing for this lecture I thought about how to relate it to the core values that Dag Hammarskjöld stood for. And although the title we were using is still appropriate ('Genocide Prevention – A Challenge of Constructive Management of Diversity') I had to adapt it a little bit to sharpen my message. Genocide prevention and the challenge of managing diversity are internal principles for governance. But the role of the international community, which is also critically important, does not figure in the original title, even though it is implicit. And so I have adjusted the title of my lecture to 'Idealism and Realism: Negotiating sovereignty in divided nations'.

I consider that the ideals that Dag Hammarskjöld stood for in terms of peace, justice, respect for human rights for all, and caring for the vulnerable – instead of simply catering for the interest of the state – to be ideals that continue to inspire all of us who are called upon to serve humanity within the United Nations. I should say that Dag Hammarskjöld and what he stood for is not only a challenge and an

inspiration for all those who serve within the United Nations, but has clearly become the standard by which all the consecutive Secretaries-General are evaluated.

My second emphasis has to do with what I consider the gap between aspirations and realities. By the gap I mean that although the ideals of the United Nations, which Dag Hammarskjöld spearheaded and symbolised, are universal, our performance leaves a great deal to be desired, and unfulfilled promises. And why is that so? I believe it's because the United Nations, itself not yet entirely united, is an organisation of nations that are internally acutely divided, of nations where the stratification means that some groups enjoy all the rights and privileges of citizenship, and others are excluded, neglected and even persecuted.

Unprotected by their countries, where can those excluded groups turn, but to the international community? But when they do, a narrow concept of sovereignty as a barricade against the outside world is invoked and used by the states to prevent involvement from the outside world. It would not help to be confrontational, because we do know that when governments assert their sovereignty they have the upper hand. And, very often, international actors are forced to cave in and follow the will of the state, and in a sense compromise the rights of the vulnerable under state sovereignty.

The challenge then becomes one of how to negotiate sovereignty, how to engage governments in a constructive dialogue that would bridge sovereignty and responsibility, that would turn sovereignty from being a barricade against the outside world, into a positive challenge of a state's responsibility for its people. To me, that is a challenge I have faced in my two mandates: both as special representative of the Secretary-General on internally displaced persons from 1992 to 2004 and since 2007 as special advisor for the prevention of genocide.

My appointment to both positions happened in a somewhat similar way: I was surprised by a telephone call from Boutros-Ghali. He said my name had come up and that he was pleased to appoint me as his special representative for internally displaced persons. I said I was honoured and flattered, but could he have his people give me more details as to what the position meant and what it would entail before I could give him my final word. And he said: 'Come on, Francis, I know you very well.' Boutros-Ghali had been Egypt's minister of state for foreign affairs when I was Sudan's minister of state for foreign affairs and we had worked very closely together. He said: 'I know

how concerned you are with these issues. This is not only a crisis that affects many around the world, it is a problem that Africa suffers from the most, and in Africa it is your own country, the Sudan, that is the worst affected. And in the Sudan, it is your own people in the southern Sudan that are the worst hit. I cannot see how you can say ‘no’. So I’ll tell them that you have accepted. And if later on you still want to discuss, we can discuss further.’

He was right. I don’t know the statistics today, but at my time there were some 25 to 30 million people internally displaced around the world in some 50 countries. People forced by conflict to flee their areas of normal residence or homes, but who had not crossed international borders. Had they crossed international borders they would have been refugees, and they would have been the subject of protection and assistance by the High Commissioner for Refugees under the 1951 Convention. These people not only needed the protection and assistance that refugees also need, but because they remained within their national borders, and in the zone of conflict, they were even more vulnerable than those who had crossed international borders. Yet, because they were internally displaced, the international community had no access to them, and therefore they could not avail themselves of protection or assistance from the international community. And because their displacement was considered an internal issue, falling under the sovereignty of the state, it was considered very sensitive, and the UN mandate on internal displacement was a very controversial one, which in the end was accepted only with major compromises.

I was aware of that, and therefore, from the very beginning I had to think seriously: How do I deal with this very sensitive issue? If I was to be seen as confrontational, adversarial, and in a sense getting into a kind of conflictual relationship with the state, doors would be closed and I would not have the opportunity to gain access to the needy populations. I would not be in a position to engage the governments, and therefore we would not be helpful to the people who were desperately in need. I decided to build on work I was doing at the Brookings Institution, looking at African conflicts in the context of the Cold War. During the Cold War, as we all know, we used to look at regional and even internal conflicts as proxy wars of the superpowers. And they were to be managed – sometimes resolved, sometimes aggravated – by the superpowers. With the end of the Cold War the superpowers withdrew, and we had to begin to see the conflicts in their proper context – as regional or internal. This was a positive development; they were no longer distorted as proxy wars. But by the same token we had to reapportion responsibility; we

could no longer depend on the superpowers as their interests were no longer involved. We had to find internal solutions, whether domestic or sub-regional or continent-wide.

But issues could not be left entirely to the states to manage, because in an age of concern with human rights and humanitarian issues, no state could say: ‘This is an internal issue and it does not matter how I mismanage my situation, it’s none of your concern.’ The world is watching closely, and, if necessary, would get involved. And so, after a series of studies – regional studies, country-specific studies – we produced a volume with the title, *Sovereignty as responsibility*. Sovereignty as responsibility meant that the state had to take care of its citizens and – if it needed support – call on the sub-regional, regional or continental organisations, or ultimately the international community. But if it did not do that, and its people were suffering and dying, the world would not watch and do nothing. They would find a way of getting involved.

I decided that the concept of sovereignty as responsibility was the most constructive way of engaging governments. And so, once I assumed the position of special representative for internally displaced persons, I used that as my normative basis. The first five minutes with the president or the minister concerned were crucial in my sending the message across to them: ‘I realise that this is an internal matter that falls under state sovereignty; I’m respectful of your sovereignty. But I do not see sovereignty negatively, as a barricade against the outside world. I see it as a very positive concept of state responsibility for its people. And if it needs support, to call on the international community.’

The subtext, in the right spirit of solidarity with the government, would be: ‘But in this day and age of concern with human rights and humanitarian issues, the world will get involved in one way or another. So the best way for you to protect your sovereignty is not only to protect your own people and take care of them, but to be seen to be doing so, and to call on the international community if necessary. That’s how you gain internal legitimacy; that’s also how you gain external legitimacy and a respected place in the international community.’

I have to say that this approach was relatively successful in engaging governments. And I had to do it not just as a job, but as a mission. You come to the affected area within a country with United Nations-labelled planes and cars, all the symbols of UN involvement, and you

go to see all these desperate people and they see in you the concern of the world. And the faith they have is: ‘If only the world knew, our plight would be addressed’. And so if you go with all this evidence of international concern and then you leave and nothing happens to them, the hope they had, the faith they had in the international community, would disappear, and their optimism would turn into despair. They would be worse off than if we had not gone in the first place. Therefore I would plead on their behalf, with the colonel in the battlefield, the officers, the police and the administrators, and up the ladder, to the state powers, the president and the ministers.

I always asked the displaced populations: ‘What message would you want me to take back to your leaders?’ Invariably, in all parts of the world where I went, the response was the same: ‘We have no leaders there, those are not our leaders.’ In one Latin American country, the spokesman said, ‘Those people see us as criminals not citizens, and our only crime is that we are poor.’ In a central Asian country I heard a similar answer, but explained in ethnic terms: ‘None of our people is in that government.’ In an African country the prime minister is said to have said to a senior UN official: ‘The food you give to those people, those internally displaced populations, is killing my soldiers.’ Such comments draw attention to the vacuum of responsibility that these people face and for which they need the international community; and the international community – because of the barricades of sovereignty – is usually denied access. My point is: We cannot live on ideals that cannot be fulfilled. We have to aspire to the ideals, but we have to deal with the reality on the ground. And the reality on the ground is that we need the cooperation of the member states to fulfil our mission.

Then comes my next mandate on genocide prevention. Genocide, even more than that of internal displacement, is a very sensitive notion. It is a concept about which both those who perpetrate genocide and those called upon to prevent or stop it are usually in denial. That is why we usually recognise genocide after the fact, in historical terms. It’s an issue we would assume the world would be clearly united in preventing and punishing. But by the same token, it’s an issue often seen as too sensitive for comfortable conversation, too difficult to touch, and therefore, the general response is denial.

This mandate came to me in a very similar way to the one on internal displacement; I got a surprising e-mail saying: ‘Secretary-General

Ban Ki-moon is about to make a decision to appoint a special advisor on the prevention of genocide. Your name is on the list, perhaps at the top of the list, and he wants to know, if he were to ask you, whether you would consider accepting.’ I said: ‘This comes to me as a total surprise. But if I were asked, I would take it as a call of duty and a service to humanity, which I cannot take lightly.’ Two days later I met the Secretary-General, and four days after our meeting my appointment was announced.

After the initial feelings of being honoured and flattered I quickly started to worry about what I had put myself into. How could I deal with this very sensitive issue? Again, I decided to look at practical ways of being able to do what needed to be done. I thought the best way was first of all to de-mystify the notion of genocide, to regard it not as something that is untouchable, something too difficult to deal with, but as a problem that is the result of extreme identity-related conflicts. Conflicts that target specific groups of people, identified either by the factors specified in the 1948 Convention, which include national groups, racial groups, ethnic groups or religious groups, or for that matter by some other criteria.

But it is not the mere fact of being different that causes genocidal conflict. It is the implications of these differences in terms of how much people are differentiated and stratified. Whereas some groups enjoy the dignity and rights of citizenship, others are marginalised, discriminated against, excluded, de-humanised and denied the dignity and the rights that normally should accrue from citizenship. It is the reaction of these extremely marginalised groups – those discriminated against, those who are excluded – that generates the conflict. A conflict of resistance to the indignity, a conflict emanating from despair, from having no constructive, peaceful ways of promoting your interest of achieving equality and a sense of belonging to the nation, which then generates a counter-reaction by the state.

Escalation then becomes a zero-sum situation. And this means it’s either you or me, in terms of survival. It is paradoxical that the existential threat that the more powerful feel from the weaker, which then motivates them to react with a genocidal onslaught, creates a dynamic that the groups in conflict cannot manage. It usually takes a third party to mediate. Of course, the irony of all this is that the subjectivity with which people define themselves, as opposed to the objective realities, often means that what divides people has a lot to do with myth rather than reality. The people at war are often not as divided as they think they are.

I've been to Bosnia at the peak of the conflict, I've been to Central Asia, to many countries in Africa, and usually when you look at the people in conflict, it's not easy to tell whether they are as different as they think they are. I remember going to Burundi, addressing groups, some of whom looked typical Tutsis, in the way we are told Tutsis look, and some of whom looked typical Hutus. I asked the foreign minister of the country after all these meetings: 'Can you always tell a Tutsi from a Hutu?' His response was: 'Yes, but with a margin of error of 35 per cent.' And that margin of error is everywhere. But if you then take the challenge as one of how to manage diversity, to promote a sense of equality, a sense of belonging to the nation on an equal footing, a sense of pride in being a citizen, because you feel you enjoy the dignity and rights associated with citizenship – this is a challenge which no self-respecting government can question, can oppose. This is a challenge which should be a topic of constructive discussion with any government.

The concept of sovereignty as responsibility, recast in the 2005 outcome document of the Summit of Heads of State and Government as 'the responsibility to protect' has three pillars: the responsibility of the state to protect its own populations; the responsibility of the international community to assist the state to enhance its capacity to discharge its national responsibility; and the responsibility of the international community to take collective action under the UN Charter when a state is manifestly failing to protect its own populations. Measures under this last pillar range from diplomatic intercession to the imposition of sanctions, and, in extreme cases, to military intervention.

We have developed a Framework of Analysis that gives us eight sets of categories or factors that we look at in determining what the level of risk of genocide is. And they are all very practical issues that range from the existence of identity groups, to the extent to which there are circumstances that could be conducive to conflict, the presence of armed groups and arms and so forth, the factors that tend to constrain prevention. And on to whether there are actions being carried out that are reflective of genocide, and evidence of the intent to destroy a people, in part or in whole, which is a definition of genocide. We also consider other triggering factors such as elections, and if they tend to be seen as winner takes all. If it is perceived that the winner will take whatever power, resources and services that come from victory, the stakes become very high. This is in contrast to the notion of elections being seen as the core of democracy in a state, and in some fashion giving a position of respect and dignity to the opposition.

In many third world countries elections are simplistically viewed out of context, and not ascribed the kind of values associated with democracy in other parts of the world. Once the Framework of Analysis is widely accepted, it can make governments stand in front of the mirror and ask themselves some tough questions: How are we performing? Where are we weakest? Where do we need to reform? And it becomes a tool for self-scrutiny and a way of achieving the objectives that any self-respecting government should want: namely of addressing the issues and preventing the kind of atrocities that usually precede genocide. I see this as a constructive approach, which frankly in my own work appears to be gaining ground.

Contrary to what people expected I was invited, for instance, to the African Union (AU) to address the Peace and Security Council and the Panel of the Wise, which adopted the Framework of Analysis to be incorporated into the AU's early warning mechanism. I have been invited to a number of countries in Africa, and have also engaged in meetings around the world, carrying this message of constructive management of diversity as a tool for prevention of genocide and other mass atrocities. Many of my colleagues said I would not be able to make frequent flyer mileage, because I would not be invited to visit countries. But I have to say that so far the delicate balance between asserting the need for international protection for the vulnerable and the need for constructive engagement on the part of governments seems to be working.

I know that this is not the approach favoured by those who believe that on these matters we should cry out loud, stand on the mountain-top and preach what is right and condemn what is wrong. However, when we do that, we might satisfy our conscience, but how much can we help the people who need to be helped in a practical way? I also think that a regional approach is critically important, because countries in the same region quite often share the problem. Crisis in one country overflows into the neighbouring countries in the form of refugees, carrying their baggage of political crisis that can destabilise the whole region.

Let me conclude by saying that I consider my mandate an impossible one, but one that must be made possible. The way to make it possible is for my office to play the role of a catalyst: a catalyst that can then raise awareness, generically, and specifically in given situations, mobilising those with capacities for action; in a sense a collaborative

approach that involves everyone. Because if we take genocide prevention of the type that I have talked about, as constructive management of diversity, to minimise disparities, to promote equality and inclusiveness, then there is room for all the agents of the United Nations and other actors beyond the United Nations. And that, in essence, is what we are trying to do.

So, to end with the essence of the title that I chose: I'm trying to bridge the gap between our aspirations for the ideal and our engagement with the realities on the ground. It is one thing to say to governments that in the name of human rights we will override their sovereignty; to threaten that if they violate human rights the world will move in and will stop them from doing it by whatever means necessary. It is another thing to say: 'Sovereignty itself means responsibility, and the dignity you enjoy in the international community, the respect you have, your legitimacy at home and abroad, has a lot to do with the degree to which you discharge the positive responsibilities of sovereignty.' The notion of sovereignty as responsibility has now evolved into the responsibility to protect, with the three pillars outlined earlier as shared between the state and the international community.

Unfortunately, the responsibility to protect is being seen more and more in terms of the third pillar: that is, when all else fails and the world is forced to use coercive means to control the situation. But that is an absolute last resort. Even the third pillar has non-coercive measures that can be taken.

I therefore end by saying: Let us of course continue to press for greater reform. We have made a great deal of progress. We have to keep pushing for progress, sing the inspiration of Dag Hammarskjöld, who strove and eventually sacrificed his life, in pursuing the ideals of the United Nations, in protecting the vulnerable, the weak, from the strongest. Let us hopefully move the progress forward towards an ideal that we know we will not achieve soon, but which inspires us to continue to struggle, to press on. In the meantime let us find some practical ways of working with governments to minimise the negative impact of sovereignty and to make sovereignty a concept of responsibility.



The Responsibility to Protect – True consensus, false controversy

Mónica Serrano

While critics have claimed that the Responsibility to Protect (R2P) is a North–South polarising issue and is therefore controversial, this is a deliberate misrepresentation in a rhetorical war led by a small minority of UN member states. This chapter in a first section briefly reviews the evolution of this emerging norm from its inception in the 2001 report by the International Commission on State Sovereignty and Intervention (ICISS), to its endorsement in 2005 by more than 150 heads of states in the 2005 World Summit Outcome Document, to its more recent configuration in a three-pillar structure. The next part seeks to identify the main criticisms that have been levelled at R2P. It touches on some of the myths and allegations that have long accompanied R2P, as well as on the chief legitimate concerns underlying the shift towards implementation. The third and concluding section critically assesses the implications of a normative strategy that has put a premium on unanimity and unqualified consensus.

A norm is born: the genealogy of R2P

Although R2P has not yet achieved the status of a legally binding norm, it has emerged as a key feature of today's ambitious normative international landscape. As with other successful normative enterprises, a number of factors help explain the way in which R2P has managed to travel a long journey in a comparatively short time. At least three come to mind:

- (1) an emerging norm with the power to inspire sympathy and capture the imagination of people around the world;
- (2) the determined commitment of a significant number of states and the no less important contribution of prominent moral entrepreneurs;
- (3) the articulation and mobilisation of an effective advocacy network, involving complex transnational civil society and trans-governmental sets of connections, actively engaged in regular exchanges of services and information.¹

¹ These ingredients have been critical in a number of normative ventures, ranging from the drug control regime, to nuclear non-proliferation, to the building of human rights regimes. The literature on these regimes is vast. See among others Nadelmann (1990), Martin and Sikkink (1993), Keck and Sikkink (1998), Finnemore and Sikkink (1998), Serrano (1992 and 2003).

R2P was first conceived by the ICISS as a formula to reconcile sovereignty and human rights (International Commission on Intervention and State Sovereignty 2001; see also Weiss and Hubert 2001, Evans 2008). Through the 1990s there had been signs of a groundswell of opinion moving in the direction of rebalancing sovereignty and human rights, but it was only with the articulation of R2P that the decisive impetus was given to a consensual doctrine.² Indeed, an important motivation underlying the work of the commissioners was the need to overcome the impasse reached in ongoing debates on humanitarian intervention – as exemplified by the verdict of the Independent International Commission on Kosovo (2000). In the opinion of this commission, NATO's intervention had been illegal, but still legitimate.³

As such, R2P epitomised the response to the challenge posed by former UN General Secretary Kofi Annan in the aftermath of the genocide in Rwanda and NATO's hotly contested intervention in Kosovo in 1999. In an impassioned address to UN member states, the then Secretary-General put in a nutshell the thorny dilemma confronting the UN and the international community of member states:

...the inability of the international community in Kosovo to reconcile these two equally compelling interests – universal legitimacy and effectiveness in defence of human rights – can only be viewed as a tragedy.

It has revealed the core challenge to the Security Council and to the United Nations as a whole in the next century to forge unity behind the principle that massive and systematic violations of human rights – wherever they may take place – should not be allowed to stand. (Annan 1999: 39)

Although it has become commonplace to associate R2P with the ICISS's early efforts to forge consensus behind the principle that massive and systematic violations of human rights should not be allowed, observers have rightly identified the 2005 agreement on the

2 In 1991 in a speech delivered at the University of Bordeaux Javier Perez de Cuellar, then UN Secretary-General, referred to what appeared to be an 'irresistible shift in public attitudes towards the belief that the defence of the oppressed in the name of morality should prevail over frontiers and legal documents'. Also in 1991, Thomas Pickering, then US Ambassador to the UN, mentioned the 'shift in world opinion toward a re-balancing of the claims of sovereignty and those of extreme humanitarian need' (both quoted in Roberts 1993: 437).

3 The literature on humanitarian intervention is extensive. See among others Roberts (1993 and 2000), Ayooob (2001), MacFarlane (2002), Weiss (2007), Barnett and Weiss (2008), Thakur (2006), Bellamy (2009).

responsibility to protect as the turning point for norm crystallisation. In September 2005 at the World Summit, more than 150 heads of state endorsed, by consensus, the principle of the responsibility to protect.⁴ The 2005 agreement on the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity was the first milestone after years of advocacy by public figures, moral entrepreneurs, scholars and civil society. The actors converged to encourage not just a change in terms of both the domestic and international responses of member states, but also a deeper reconfiguration of the institutional responses. Underlying these efforts was the attempt to achieve a major shift in age-long understandings of sovereignty.⁵

The adoption of the principle of R2P in paragraphs 138 and 139 of the Outcome Summit Document was a watershed in terms of the normative evolution of this principle. The individual and collective responsibilities embodied in these paragraphs carried with them the regulatory elements and vectors for action (structural sequences) for protecting populations at risk of mass atrocities.⁶ In other words, these obligations provided the foundations for a new international norm premised on two basic principles: state responsibility and non-indifference. As important as this was the conceptual and definitional shift that lay at the heart of paragraphs 138 and 139. By linking the scope of prevention and protection to four crimes, the 2005 agreement significantly redefined R2P. In marked contrast to the ICISS broad framework of humanitarian protection, it introduced a harder focus on preventing and halting mass atrocity crimes – genocide, major war crimes, crimes against humanity and ethnic cleansing.

4 Although in its voyage to the World Summit R2P faced both the challenge of a coalition of recalcitrant states and the obstinate position of the US delegation, the wholehearted support provided by a number of actors, most notably Canada and the UN Secretary-General, Kofi Annan, paved the way to its adoption in the Outcome Summit Document. See among others Evans (2008), Thakur and Weiss (2009) and Strauss (2009).

5 The worldwide legal and political recognition granted to human rights has long reinforced the view that a government's treatment of its citizens can be a matter of legitimate concern. It has also conveyed the message that the protection of internationally recognised human rights is a precondition of international legitimacy. The literature on the way in which human rights have conditioned sovereignty is again extensive. See among others Donnelly (2007), Hurrell (2007), Roberts (2004) and Luck (2009).

6 The structural sequence for action was outlined as follows: first, states have an obligation to protect their populations from genocide, war crimes, crimes against humanity and ethnic cleansing; second, the international community should assist them in upholding this responsibility; third, the international community has a responsibility to use the appropriate diplomatic, humanitarian or peaceful means to protect populations. And if states are manifestly failing – that is, if they are unable or unwilling to protect their populations from these crimes, and if peaceful means prove to be inadequate – the R2P requires that the international community be prepared to take collective action in a timely and decisive manner through the Security Council (General Assembly, World Summit Outcome, 24 October 2005 (A/RES/60/1), paragraphs 138 & 139, p.30).

In the years that followed, many continued to puzzle over the direction in which this would take R2P. Some grumbled about the perceived watering down of the normative enterprise. However, to the extent that paragraphs 138 and 139 drew up the boundaries of R2P around these four crimes, there is no doubt that the World Summit Outcome Document contributed to bolstering the internal consistency of the norm. Thus, in terms of its formulation, by confining the norm to the most heinous crimes, the 2005 agreement had clearly added to the norm's clarity and specificity.

In terms of its substance, there was no question that R2P continued to aim to provide an answer to gross and systematic violations of human rights deeply offensive to any sense of common humanity and human dignity. As such R2P – like human rights more generally – sought to travel across cultural boundaries and ultimately aspired to universality.

Like other norms, the emergence and evolution of the R2P cannot be divorced from its surrounding historical circumstances and the dilemmas faced in world politics. Three years after the 2005 agreement, the effects of 9/11 and the war on Iraq still loomed ominously on the horizon. Yet, as the General Assembly (GA) engaged in this and subsequent normative discussions, the intensity and frequency of ethnic and internal conflict in many quarters of the world continued to confront the UN with inexorable challenges. The shattering evidence accompanying real conflicts added to the validity of the arguments of those seeking to alter the practices of international institutions. Not surprisingly, a number of glaring failures faced by the UN on the ground prompted the Security Council to issue three resolutions – S/RES/1674 (2006) and S/RES/1894 (2009) on the protection of civilians in armed conflict, and S/RES/1706 (2006) expanding the mandate of the UN mission in Sudan to include Darfur. Not only did these resolutions reaffirm the normative tenet of the R2P, they also contributed to redefining the terms of international engagement in international emergencies.⁷

Notwithstanding this, by 2007, when Secretary-General Ban Ki-moon decided to put his personal prestige behind this normative trans-

7 S/RES/1674 of 28 April 2006 reaffirmed the provisions of paragraphs 138 and 139, while S/RES/1706 of 31 August 2006 indirectly referred to the R2P by explicitly quoting resolution 1674. At the open debate on 11 November 2009, the Council marked the 10th anniversary of the Council's involvement in this issue by adopting resolution 1894, the first thematic resolution on protection of civilians since resolution 1674 of 2006. Although the explicit or indirect reference to R2P has been welcomed by some advocates, experts have also pointed to the problematic relationship between the agendas for the protection of civilians and the broader remit of the R2P (see Strauss 2009: 305-307).

formation, doubts about the prominence and transnational resonance of the R2P norm still floated in the air. As the Secretary-General appointed Francis Deng as his Special Adviser for the Prevention of Genocide and Edward C. Luck as Special Adviser for the conceptual, political and institutional development of the responsibility to protect, many still feared the risk of ‘buyers’ remorse.⁸ Although there was far greater readiness to canvass criticism and to acknowledge difficulties, the publication of the Secretary-General’s report, *Implementing the Responsibility to Protect*, in January 2009 marked a change in the tide.

For some years, debates around the responsibility to protect appeared to be no more than an academic sideshow. However, both the decision of the Secretary-General to include R2P among his top priorities and the invocation of the norm in a number of crises reanimated political dynamics around R2P. Indeed, occluded references to R2P in the successful mediation effort in preventing mass atrocities in Kenya in early 2008 were soon followed by the flawed invocation of R2P by France in the context of cyclone Nargis in Burma in May 2008, and by Russia in its assault in South Ossetia in August of that year. Whether rightly applied as in Kenya, or misused as in Burma and Georgia, these cases demonstrated the practical relevance of the R2P norm in real time world politics (see Badescu and Weiss 2010, Serrano 2010 and Bellamy 2010).

As the circulation of the Secretary-General’s report paved the way to the first General Assembly debate since the adoption of the World Summit Outcome Document, the political and strategic questions about the future of R2P again came to the fore. While R2P continued to enjoy considerable appeal, the challenge to build and deepen the consensus around it seemed formidable. Many doubted that the conditions were ripe to buttress R2P’s normative foundations. Some of these arguments were justified partly because of the uncertainty surrounding the level of support for the norm, and the alleged greater danger that political polarisation could pose to the 2005 consensus. But before critics realised, the reactivation of R2P was well in train, exemplified by the interest that the Secretary-General’s report sparked both among R2P supporters and opponents.

8 These decisions, as the intention to institutionalise the collaboration between the two Special Advisers, were communicated to the Security Council in late August 2007. The decisions were justified on three bases: the agreements embodied in paragraphs 138 and 139 of the 2005 World Summit Outcome Document; the obvious link between large-scale atrocities and threats to peace and security; and the recommendations of the advisory committee for the prevention of genocide. In this letter the Secretary-General underscored that due to the ‘complementarity of the prevention of genocide and mass atrocities and the responsibility to protect’ and for reasons both of ‘efficiency and of the complementarity of their responsibilities, they [the two Special Advisers] will share an office and support staff’. S/2007/721.

Not only did the Secretary-General’s carefully drafted report reaffirm the understanding of R2P as confined to the four crimes; it significantly contributed to the substantial narrative of R2P. The report unpacks the commitments set forth in paragraphs 138 and 139 of the World Summit Outcome Document and proceeds to reframe them in a three-pillar institutional architecture:

- Pillar 1, the enduring responsibility of the state;
- Pillar 2, the responsibility of the international community to assist states to fulfil their national obligations;
- Pillar 3, the commitment to timely and decisive collective action, in ways that are consistent with the UN Charter

The publication of the Secretary-General’s report and the active engagement of the two Special Advisers, assisted by two key civil society organisations, unleashed a vigorous process of R2P socialisation.⁹ Indeed, the circulation of the report, the efforts of the Special Advisers to explain and promote the proper understanding of R2P and above all the expectation of a debate in the General Assembly set off a wave of R2P talk in New York and in some capitals around the world (Serrano 2010: 8–10).

The formal but lively R2P debate in 2009 in the General Assembly and the negotiation of the first GA resolution on the responsibility to protect were followed a year later – in August 2010 – by an enthusiastically constructive informal interactive dialogue. As in 2009, the informal dialogue in 2010 was based on a second report by the Secretary-General.¹⁰

The Responsibility to Protect and its critics

Despite expectations to the contrary, the engaged and constructive debate in the General Assembly in the summer of 2009, as the subsequent informal interactive dialogue in August 2010, appeared to give extra substance to the significance of the 2005 commitment. Indeed, the debate, the adoption by consensus of the first resolution on R2P by the General Assembly on 14 September 2009, together with the animated interactive dialogue in August 2010, all offered

⁹ These organisations are the Global Centre for the Responsibility to Protect and the International Coalition for the Responsibility to Protect; see Luck (2010 and forthcoming).

¹⁰ *Early Warning, Assessment, and the Responsibility to Protect*, Report of the Secretary-General, UN document A/64/864, 14 July 2010.

clear signs of the degree of sympathy enjoyed by R2P among the UN membership.¹¹

Perhaps the best way to highlight the importance of both the 2009 debate and the 2010 interactive dialogue is by referring to the way in which these deliberations have helped dispel some of the myths that have long dogged R2P. First and foremost, in both sessions the legend that this is a North-driven agenda was eloquently opposed by numerous voices from different regions and latitudes. These included countries like Argentina, Armenia, Bosnia Herzegovina, Chile, Croatia, East Timor, El Salvador, Guatemala, Israel, Nepal, Peru, Rwanda, Sierra Leone, the Solomon Islands and Uruguay among others that had gone through the tragedy of experiencing egregious mass violations of human rights.

Secondly, both sessions have made clear a greater degree of convergence around R2P than many had imagined, bringing to the fore a shared understanding of the norm that sets it apart from humanitarian intervention. This general understanding confirmed the 2005 agreement around four crimes, together with the three-pillar architecture outlined in the Secretary-General's report.

Thirdly, both the 2009 debate and the 2010 interactive dialogue also made clear a considerable degree of recognition of R2P as an ally of sovereignty; in other words, as a bolsterer of states' capacities to exercise their sovereignty responsibly. Echoing the normative underpinnings and the principle of 'complementarity' associated with the International Criminal Court, a significant number of member states endorsed R2P's legal anchorage in existing international legal obligations and standards. Along these lines, the debate also made manifest a growing understanding of mass atrocities as threats to international peace and security.

Fourth, taken together, these deliberations in the General Assembly suggest that the consensus on R2P within the membership has broadened and that perceptions about its legitimacy have also evolved. A careful reading of all the statements delivered in both debates reveals a complex and changing universe. While it would be risky to over-read the statements delivered by India and Egypt – two countries that had

11 For full assessment of the July 2009 debate see the Global Centre on the Responsibility to Protect, *Implementing the Responsibility to Protect. The 2009 General Assembly Debate: An Assessment*. August 2009. A full account of the informal 2010 interactive dialogue can be found in Global Centre for the Responsibility to Protect, 'Early Warning, Assessment, and the Responsibility to protect: Informal Interactive Dialogue of the General Assembly held on 9 August 2010, September 2010.

been previously identified as sceptics – their constructive interventions in the 2010 informal interactive dialogue appear to suggest that consensus around R2P continues to widen and deepen

Setting this interpretation involves difficult judgements, but if there is one clear message that emerged from the debates, and in particular from the 2010 interactive dialogue, it is the readiness of the great majority of those participating to move on to questions of implementation and – as the representative from Guatemala put it – to codify the uses of the three pillars.

None of these positive interpretations should blind us to the unsettled issues and the lingering legitimate concerns voiced by numerous delegations in both the 2009 formal debate and the 2010 interactive dialogue. Many of these anxieties concern the risks of implementation and have been addressed on numerous occasions by the Special Advisers, scholars and R2P supporters. However, the respective roles of the General Assembly and the Security Council, and the risk of selectivity and misuse continue to generate disquiet among the member states.

It is thus tempting to paint a post-GA debate picture in which there is a constant expansion of the consensus around R2P. However, the debate, the intense negotiations leading to the adoption of resolution A/RES/63/308, and the deliberations accompanying the 2010 informal dialogue, have also shed light on some of the main obstacles that can hamper the consolidation of R2P as a global norm. Indeed, while the public sessions in the GA and the negotiation of the resolution have helped set the R2P record straight, these processes also brought to the fore the presence of a small and vocal minority determined to hijack the consensus around R2P.

In both the 2009 and 2010 debates, and during the negotiations on both the resolution and in the more recent budgetary negotiations in the Fifth Committee, a small group of countries led by Cuba, Nicaragua, Iran, Pakistan, Sudan and Venezuela – but also including Algeria, Bolivia, the Democratic Republic of Korea, Libya, Ecuador, and Syria – has made clear its determination to derail progress on R2P. In the 2009 debate, Cuba, Nicaragua, Sudan and Venezuela openly joined the then President of the General Assembly, Miguel D’Escoto, in calling R2P into question, and sought to reverse its progress.

In fact, it was the fear of leaving the official recording of the GA debate in the voice of the concept note and concluding remarks by

Miguel D’Escoto that prompted a group of countries, led by Guatemala, to embark on the negotiation of resolution A/RES/63/308 on the responsibility to protect. In the words of the Guatemalan Ambassador, Gert Rosenthal, the resolution sought to record ‘that we received the report of the Secretary General, that we held a very fruitful debate and that we wish the debate to continue’. Yet, the coordinated efforts by Bolivia, Cuba, Ecuador, Iran, Nicaragua, Sudan, Syria and Venezuela obstructed the securing of more constructive language and succeeded in editing the text to remove the word ‘appreciation’.

It is true that this short three-paragraph resolution, led by Guatemala and co-sponsored by 67 member states from every region of the world, was adopted by consensus on 14 September 2009.¹² On the other hand, a price for consensus had had to be paid.

The strategy of consensus

Overall there is much to learn about a normative strategy that, until recently, has put a premium on unanimity and unqualified consensus. Given the consensual nature of the momentous 2005 agreement, it is easy to see how this became the default strategy pursued by leading R2P actors.

The constructive tone in the 2009 debate and the 2010 interactive dialogue reflects an understandable optimism about their outcome – and the end of uncertainty surrounding R2P. Unfortunately, it should not be read as a signal that unanimity is within sight.

The record of two debates in the General Assembly, as that of the negotiations leading to resolution A/RES/63/308 in 2009 and the more recent budgetary negotiations at the end of 2010, leave constitute some important lessons. Clearly, the emphasis on unanimous agreement permits tiny minorities to win preponderant voices.

The trends observed in all these processes are not necessarily about significant polarisation. They all relate to the very unusual way in which a small minority may take cover behind procedural arguments to block critical dialogue. The minority becomes stronger because the strategy pursued so far has not been one aimed at broadening the consensus, but one of chasing unanimity. Perhaps more importantly,

¹² See UN document A/RES/63/308 14 September 2009 and Global Centre for the Responsibility to Protect, *Summary of Statements on Adoption of Resolution RES/A/63/L80 Rev.1*, September 2009.

because half a dozen countries continue object to R2P, observers go on concluding that R2P is controversial.¹³

The significance of their voices lies not in the numbers, but in the fact that by upholding procedural arguments they claim to represent the staunchest defenders of the UN system. As the recent vote on the negative amendment put forward by Venezuela in the budgetary negotiations for the joint office makes clear, the practical problem of determining who shall count as comprising the consensus and the dissensus is anything but easy to solve.¹⁴ While 17 countries supported the Venezuelan amendment, 51 countries abstained. Indeed, to the extent that the road to implementation will most likely be uneven and paved by uncertainty, unanimity will not be in sight. As political actors move to implementation, this cannot be viewed as a linear process in which setbacks and problems will be merely temporary. More uneasiness and disquiet seem likely in the short term. In the long, the R2P would not be the only norm to have won through sound and fury.

13 See Charlie Rose, Interview with Susan Rice, US Ambassador to the United Nations, available at <http://www.charlierose.com/view/interview/11420> (accessed 27 January 2011).

14 The Venezuelan amendment received 17 votes in favour, 51 abstentions and 68 votes against. Fifty-six delegations were absent. Along with Algeria, Cuba, Nicaragua and Venezuela, those who voted in favour of the proposed amendment were Bolivia, the Democratic Republic of Korea, Ecuador, Iran, Lao People's Democratic Republic, Libya, Mauritania, Myanmar, Qatar, Solomon Islands, Sudan, Syria and Zimbabwe.

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Forging a convention for crimes against humanity

Leila Nadya Sadat

During the trials of the German and Japanese leaders by the Allies following World War II, crimes against humanity emerged as an independent basis of individual criminal liability in international law. Although the so-called ‘Martens Clause’ of the 1907 Hague Convention Respecting the Laws and Customs of War on Land referenced the ‘laws of humanity, and...the dictates of the public conscience’ as protections available under the law of nations to human beings caught in the ravages of war, this language was too uncertain to provide a clear basis for either state responsibility or criminal liability under international law (see *inter alia* Sadat 1994). Subsequently, crimes against humanity were specifically included in the Charters of the International Military Tribunals at Nuremberg¹ and Tokyo² to address depredations directed against civilian populations by the state – including the state of the victims’ nationality. Indeed, it was in many ways the most revolutionary of the charges upon which the accused were convicted for its foundations in international law were so fragile.³ Following the trials, the Nuremberg Principles embodied in the IMT Charter and Judgment were adopted by the General Assembly in 1946,⁴ and codified by the International Law Commission in 1950.⁵ Thus, ‘crimes against humanity’, whatever their uncertain legal origin, had apparently found a firm place in international law as a category of offences condemned by international law for which individuals could be tried and punished. The codification of the crime of genocide, itself a crime against humanity, lent some

1 Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 58 Stat. 1544, 82 UNTS 280.

2 Charter for the International Military Tribunal for the Far East, 19 January 1946, amended 26 April 1946, TIAS. No. 1589, 4 BEVANS 20.

3 The other was the crime of waging an aggressive war.

4 *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal: Report of the Sixth Committee*, UN GAOR, 1st Sess., pt. 2, 55th plenary meeting at 1144, UN Doc. A/236 (1946) (also appears as GA Res. 95, UN Doc. A/64/Add.1, at 188 (1946).

5 Documents of the second session including the report of the Commission to the General Assembly, [1950] 2 YB Int’l L. Comm’n 374, UN Doc. A/CN.4.SER.A/1950/Add.1.

truth to this assumption; however, the important achievement of the Genocide Convention's adoption and entry into force in 1951⁶ was overshadowed by Cold War politics. Indeed, no trials for genocide took place until 1998, when Jean-Paul Akayesu, mayor (*bourgmestre*) of the town of Taba, was convicted by the International Criminal Tribunal for Rwanda (ICTR) for his role in the slaughter that had engulfed Rwanda in 1994.⁷ Crimes against humanity percolated into the legal systems of a handful of countries that had domesticated the crime, such as France, and certain elements of their prohibition could be found in new international instruments prohibiting torture and apartheid.⁸ Scholarly articles periodically appeared as well. But the promise of 'never again', as many have observed before me, was repeatedly dishonoured as the mass atrocities committed in the second half of the 20th century unfolded before the eyes of the world, bloody in their carnage and the human toll they exacted, and shocking in their cruelty and barbarism.⁹ There was little accountability of any kind exacted from those responsible for these crimes against humanity – *ces crimes contre l'esprit* – whether committed by government officials or military leaders, rebels, insurgents or low-level perpetrators. The Nuremberg promise remained unfulfilled.¹⁰

6 Convention on the Punishment of the Crime of Genocide, GA Res. 260 (III) A, 78 UNTS 277, entry into force 12 January 1951 (9 December 1948) [hereinafter Genocide Convention].

7 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para 494 (2 September 1998).

8 See International Convention on the Suppression and Punishment of the Crime of Apartheid, GA Res. 3068, UN Doc. A/RES/3068 (18 July 1976); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/Res/39/46 (10 December 1984); Organization of American States, Inter-American Convention to Prevent and Punish Torture, 28 February 1987, OASTS No. 67; Council of Europe, European Convention for the Punishment of Torture and Inhuman or Degrading Treatment of Punishment, 1 February 1989, ETS 126.

9 Bassiouni (2010: 6) has suggested that between 1945 and 2008, between 92 and 101 million persons were killed in 313 different conflicts, the majority of whom were civilians. In addition to those killed directly in these events, others died as a consequence, or had their lives shattered in other ways – through the loss of property, through victimisation by sexual violence, through disappearances, slavery and slavery-related practices, deportations and forced displacements and torture.

10 In 1989, the Cold War ended with the fall of the Berlin Wall and this began to change. The International Criminal Court project, which had lain fallow, was restarted with the introduction of a resolution into the General Assembly by Trinidad and Tobago, leading a coalition of 16 Caribbean nations, and work on the Draft Code of Crimes continued at the International Law Commission. See *Report of the Commission to the General Assembly on the work of its forty-eighth session, [1996] 2 YB Int'l L. Comm'n 15-42, UN Doc. A/CN.4/SER.A/1996/Add.1*; see also Sadat (2002).

One of the most horrific examples of post-World War II crimes against humanity was the Cambodian ‘genocide’, discussed by Gareth Evans in the lecture he gave on the occasion of the Experts’ Meeting of the Crimes Against Humanity Initiative in June 2009. From 1975 to 1979, the Khmer Rouge regime killed an estimated 1.7 to 2.5 million Cambodians, out of a total population of 7 million (cf. Etcheson 2005: 118–120). Although now popularly referred to as a ‘genocide’, legally that is a difficult case to make. Indeed, there has been a great deal of criticism and worry generated by the decision of the co-prosecutors of the Extraordinary Chambers for Cambodia to bring charges of genocide against several former high-ranking leaders of the Khmer Rouge regime, for fear that the charges will not be legally possible to prove.¹¹ For the most part, individuals were killed, tortured, starved or worked to death by the Khmer Rouge not because of their appurtenance to a particular racial, ethnic, religious or national group – the four categories to which the Genocide Convention applies – but because of their political or social classes, or the fact that they could be identified as intellectuals (cf. Power 2002: 87–154). While theories have been advanced suggesting ways that the Genocide Convention applied to these atrocities¹² and an argument can certainly be made that some groups were exterminated *qua* groups – such as Buddhist monks, whose numbers were reportedly reduced from 60,000 to 1,000 (Power 2002: 143) – most experts agree with Evans’ chilling assessment that:

[F]or all its compelling general moral authority the Genocide Convention had absolutely no legal application to the killing fields of Cambodia, which nearly everyone still thinks of as the worst genocide of modern times. Because those doing the killing and beating and expelling were of exactly the same nationality, ethnicity, race and religion as those they were victimizing – and their motives were political, ideological and class-based...the necessary elements of specific intent required for its application were simply not there. (Evans 2011, forthcoming)

Once again, the international community had failed both to prevent the commission of mass atrocities and to provide the legal tools neces-

¹¹ Order on Request for Investigative Action on the Applicability of the Crime of Genocide at the ECCC, 002/19-09-2007-ECCC-OCIJ, 28 December 2009 (see Maguire 2010; Schabas 2001).

¹² See Hannum (1989), describing the mass atrocities in Cambodia as an ‘auto genocide’.

sary to react to their occurrence.¹³ As war broke out in the former Yugoslavia, and the Rwandan genocide took place with the world watching in horror, the international community reached for the Nuremberg precedent only to find that it had failed to finish it. This made the task of using law as an antidote to barbarism a difficult and complex endeavour. The uncertainty in the law was evidenced by the texts of the Statutes for the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which contained different and arguably contradictory definitions of crimes against humanity, a notion difficult to square with the idea of universal international crimes.¹⁴ Cherif Bassiouni (1994: 457) underscored this problem in an important but little-noticed article, in which he lamented the ‘existence of a significant gap in the international normative proscriptive scheme, one which is regrettably met by political decision makers with shocking complacency’.

With the adoption of the International Criminal Court (ICC) Statute in 1998, crimes against humanity were finally defined and enshrined in an international convention. The ICC definition is similar to earlier versions, but differs in important respects, such as the requirement that crimes against humanity be committed ‘pursuant to a State or organizational policy’.¹⁵ However, it was a convention that *by its own terms* did not purport to represent customary law, but only law defined for the purposes of the Statute itself.¹⁶ Moreover, even if the ICC definition ultimately represents customary international law, it applies only to cases to be tried before the ICC. While presumably ICC state parties can and will adopt the ICC definition as domestic law (and are encouraged to do so pursuant to the principle of complementarity), the ICC Statute provides no vehicle for inter-state cooperation. Putting it more simply, the adoption of the Rome Statute advanced the normative work of defining crimes against humanity considerably,

13 The international community eventually negotiated an agreement with the Cambodian government to establish a court known as the Extraordinary Chambers in the Court of Cambodia for the trial of a handful of former Khmer Rouge leaders in 2003. Agreements between the United Nations and The Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, UN-Cambodia, 6 June 2003, 43 UNTS 2329.

14 The IMT Statutes for Tokyo and Control Council Law No. 10, *supra* notes 1 and 2, also differed slightly from the Nuremberg definition.

15 Rome Statute of the International Criminal Court art. 7(2)(a), 17 July 1998, UN Doc. A/CONF.183/9 [hereinafter ICC Statute].

16 See, for example, ICC Statute, art. 7(1) (‘for the purpose of this Statute, “crime against humanity” means...’). Whether it has *subsequently* come to represent customary international law was debated during the course of this Initiative (cf. Mettraux 2011, forthcoming; Ambros 2011, forthcoming).

but did not obviate the need to fill the lacunae in the legal framework as regards the commission of atrocity crimes, most of which are crimes against humanity, and not genocide, and many of which are crimes against humanity, and not war crimes. As the *ad hoc* Tribunals begin to close down, shoring up the capacity for national legal systems to pick up cases involving crimes against humanity appears imperative if the small gains achieved during the past two decades of international criminal justice are not to be reversed. This is particularly true as regards crimes against humanity, for, recent experience demonstrates that crimes against humanity have been committed and charged in all situations currently under examination before the international criminal tribunals (and the ICC) to date.

The case of *Bosnia vs. Serbia* before the International Court of Justice (Goldstone 2011, forthcoming) again evidenced the difficulty this normative gap engenders. For the debate in that case, centering upon whether the mass atrocities in Bosnia committed during the 1990s constituted genocide, missed the point. Although the Court recognised that many serious violations of the laws of armed conflict and crimes against humanity had been committed by Bosnian Serb troops, because the Court's jurisdiction was limited to genocide,¹⁷ these other crimes were not before them and they 'slipped off the table' (Goldstone 2011, forthcoming). Of the nearly 200,000 deaths, 50,000 rapes estimated to have occurred, and the 2.2 million forcibly displaced as a result of the Serb ethnic cleansing campaign,¹⁸ genocide was held to have been proven only in the massacre of some 8,000 Muslim men and boys in Srebrenica in July of 1995.¹⁹ What was missing was a convention on crimes against humanity that would have given the International Court of Justice jurisdiction not only in respect of the crime of genocide but for crimes against humanity, as well.²⁰

17 Genocide Convention, *supra* note 6, Art. IX.

18 These are estimates of the number of deaths, rapes and forcibly displaced as a result of the armed conflict in Bosnia (Amnesty International 2009: 5). Some critics claim that these numbers are overestimates and have been politicised.

19 Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 ICJ 91, para 297 (26 February 2007). In its recent June 2010 judgment, the ICTY found that there is enough DNA evidence to identify at least 5,336 individuals but evidence continues to be discovered, so the numbers could be as high as 7,826. Prosecutor v. Popović, Case No. IT-05-88-T, Judgment, para 664 (10 June 2010).

20 Article 26 of the Proposed Convention does this. See Proposed International Convention on the Prevention of Crimes Against Humanity, documented as appendix 1 in Sadat (2011a, forthcoming). Of course, the same can be said for the actions brought to the Court by Croatia and Serbia, as well. See Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), 2008 ICJ 118 (18 November 2008).

Thus, in 2008, the Whitney R. Harris World Law Institute, under my direction, launched the Crimes Against Humanity Initiative. As the Commentary to the Proposed Convention explains (Sadat 2011b, forthcoming), the Initiative had three primary objectives: (1) to study the current state of the law and sociological reality as regards the commission of crimes against humanity; (2) to combat the indifference generated by an assessment that a particular crime is ‘only’ a crime against humanity (rather than a ‘genocide’); and (3) to address the gap in the current law by elaborating the first-ever comprehensive specialised convention on crimes against humanity.

The Initiative has progressed in phases, each building upon the work of the last. The forthcoming publication of a book (Sadat 2011a), including the expert papers commissioned by the project and the Proposed Convention in English and in French, represents the culmination of the first three phases of the Initiative: *preparation* of the project and methodological development (I); *private study* of the project through the commissioning of the papers, the convening of expert meetings and collaborative discussion of draft treaty language (II); and *public discussion* of the project with relevant constituencies and the publication of the Proposed Convention (III). Ambitious in scope and conceptual design, the project is directed by a Steering Committee of renowned experts, and has drawn upon the Harris Institute’s connections, particularly overseas, to assemble a truly extraordinary international effort on the elaboration of a Proposed Convention on crimes against humanity.

During Phase II of the Initiative, papers written by leading experts, were presented and discussed at a conference held at the Washington University School of Law on April 13–14, 2009, and then revised for publication.²¹ They addressed the legal regulation of crimes against humanity and examined the broader social and historical context within which they occur. Each chapter was commissioned not only to examine the topic’s relationship to the elaboration of a future treaty, but to serve as an important contribution to the literature on crimes against humanity in and of itself.

The papers ranged from technical discussions of specific legal issues such as modes of responsibility, immunities and amnesties, enforcement and gender crimes to broader conceptual treatments of earlier codification efforts, the definition of the crime in the Rome Statute and

21 One paper was commissioned subsequent to the April meeting based upon the emphasis in that meeting on inter-state cooperation as a principal need to adopt the Convention (Olson 2011, forthcoming).

customary international law, and the phenomenon of ethnic cleansing. Several of the papers contrasted the ICC and *ad hoc* Tribunal definition of crimes against humanity and were very helpful to the discussions as the drafting effort progressed; the same can be said for the many other contributions which addressed specific topics such as crimes against humanity and terrorism, universal jurisdiction, and the Responsibility to Protect. David Crane's contribution outlining 'Operation Justice' in Sierra Leone represents an outstanding case study of 'peace and justice' in action; likewise, Cherif Bassiouni's exposé on 'revisiting the architecture of crimes against humanity' is a magisterial account of the crime's development during the past century.

In discussing the scholarly work more questions were raised than answered. What was the social harm any convention would protect? Atrocities committed by the state, or a broader concept that would include non-state actors? Would a new legal instrument prove useful in combating atrocity crimes? How would any new instrument interact with the Rome Statute for the International Criminal Court? The lengthy discussions that transpired are memorialised in the *Comprehensive History* included in the volume and will no doubt continue after this book has been published, but it should be emphasised that the discussion and elaboration of the Convention's provisions are deeply intertwined with the academic work accomplished at the same time.

As the initial scholarly work was undertaken, a preliminary draft text of the Convention, prepared by Cherif Bassiouni, was circulated to participants at the April meeting to begin the drafting process. As the Initiative progressed, nearly 250 experts were consulted, many of whom submitted detailed comments (orally or in writing) on the various drafts of the Proposed Convention circulated, or attended meetings convened by the Initiative either in the United States or abroad. Between formal meetings, technical advisory sessions were held during which every comment received – whether in writing or communicated verbally – was discussed as the Convention was refined. The Proposed Convention went through seven major revisions (and innumerable minor ones) and was approved by the members of the Steering Committee in August 2010 in English.

It is to be hoped that the Proposed Convention will begin, not end, debate. Elaborated by experts without the constraints of government instructions (although deeply cognisant of political realities), it is, in the view of the Initiative's Steering Committee, an excellent platform for discussion by states with a view to the eventual adoption of a United Nations Convention on the Prevention and Punishment of

Crimes Against Humanity. The Proposed Convention builds upon and complements the ICC Statute by retaining the Rome Statute definition of crimes against humanity but has added robust inter-state cooperation, extradition and mutual legal assistance provisions in Annexes 2-6. Universal jurisdiction was retained (but is not mandatory), and the Rome Statute served as a model for several additional provisions, including Articles 4-7 (Responsibility, Official Capacity, Non-Applicability of Statute of Limitations) and with respect to final clauses. Other provisions draw upon international criminal law and human rights instruments more broadly, such as the recently negotiated Enforced Disappearance Convention, the Terrorist Bombing Convention, the Convention Against Torture, the United Nations Conventions on Corruption and Organized Crime, The European Transfer of Proceedings Convention, and the Inter-American Criminal Sentences Convention, to name a few.²²

Yet although the drafting process benefited from the existence of current international criminal law instruments, the creative work of the was to meld these and our own ideas into a single, coherent international convention that establishes the principle of state responsibility as well as individual criminal responsibility (including the possibility of responsibility for the criminal acts of legal persons) for the commission of crimes against humanity. The Proposed Convention innovates in many respects by attempting to bring prevention into the instrument in a much more explicit way than predecessor instruments, by including the possibility of responsibility for the criminal acts of legal persons, by excluding defences of immunities and statutory limitations, by prohibiting reservations, and by establishing a unique institutional mechanism for supervision of the Convention. Echoing its 1907 forbear, it also contains its own ‘Martens Clause’ in paragraph 13 of the Preamble. Elaborating the 27 articles and six annexes of the treaty was a daunting challenge, and one that could

22 A complete list is found in the table at the back of the Proposed Convention (see Sadat 2011a: Appendix I).

not have been accomplished without the dedication and enthusiasm of many individuals.²³

At the end of the day, however, it is perhaps to Whitney R. Harris, former Nuremberg Prosecutor, that we are most indebted. For it was Whitney who, along with his fellow trial counsel, first prosecuted crimes against humanity at Nuremberg; Whitney who endowed the Institute bearing his name, providing it with the means to carry on his life's work; and Whitney who served as our counsellor, advisor and friend on this project, as with so many before it. I am sorry that he did not live to see it bear fruit.

One cannot embark upon an endeavour such as this without being keenly aware of the currents of history. Here in the heartland of America, calling for the elaboration of an international convention, embodying international legal principles for the settlement of international problems, is not new. The Resolution responsible for the convening of the Second Hague Peace Conference – from which emanated the 1907 Hague Convention – issued from the Inter-Parliamentary Union meeting in St Louis, Missouri, upon the occasion of the 1904 World's Fair.²⁴ Indeed, the participants of the first meeting of the Initiative, in April 2009, gathered in historic Ridgeley

23 I am particularly grateful to Cherif Bassiouni for his extraordinary efforts in leading the drafting effort and his service as a member of the Initiative's Steering Committee, and equally grateful to Hans Corell, Richard Goldstone, Juan Mendez, William Schabas and Christine Van den Wyngaert – the other members of the Steering Committee – for their leadership. Each member brought tremendous energy and expertise to the project, guiding its methodological development and conceptual design, and carefully reading, commenting upon and debating each interim draft of the Proposed Convention extensively. The collegial spirit with which our discussions were carried out and our work engaged helped enormously in keeping us on track, and the collective wisdom and experience of my colleagues made working on this project both delightful and inspiring.

As with all such projects, many supported the effort without being on the front pages of it, so to speak. Of special note are the experts who gave generously of their time and talent, particularly Morten Bergsmo, Robert Cryer, Larry Johnson, Guénaél Mettraux, Laura Olson, Göran Sluiter and Elies van Sliedgredt, who attended one or more technical advisory sessions and contributed extensively to the elaboration of the Convention's text, and the Harris Institute's staff which does a fabulous job keeping the project on track. We could of course not have undertaken this effort at all without the extraordinary support provided by Steven Cash Nickerson, Washington University Alumnus, who gave generously to support the first three phases of the Initiative, as well as the United States Institute of Peace, Humanity United and the Brookings-Washington University Academic Venture Fund for additional, critical financial support.

24 Editorial Comment, 'The Second Peace Conference of the Hague', *American Journal of International Law*, Vol. 1, 1907. The hopes of that second Peace Conference, however, and the 1907 Convention it produced, were soon dashed as European leaders led their countries into the terrible war that followed.

Hall on the Washington University campus for a photograph, which was taken in the same room in which, 105 years earlier, the Inter-Parliamentary Union had issued its call for peace. Nor is it unheard of for a group of experts²⁵ or an academic institution to spearhead an effort such as this. Witness, for example, the Harvard Research project in international law, which produced three draft conventions, published in 1935.²⁶ The authors of that project cautioned that the ‘drafts [were] completed within the limits of a rigorous time-schedule, by men already burdened with exacting duties; and these facts should be borne in mind in any appraisal of the work done’.²⁷ We hope that our work fares somewhat better, although the men – *and women* – who contributed to it, of course, were under the same constraints of busy schedules and deadlines.

What will become of the *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*? Phase IV of the Initiative contemplates a global awareness campaign to help make the Convention a reality. But will states embrace this ‘academic offering’ and take up the challenge to negotiate a convention for the suppression of crimes against humanity? Or will indifference continue to be the hallmark of international policy?

As Whitney R. Harris (2006) admonished us, shortly before his death:

The challenge to humanity is to establish and maintain the foundations of peace and justice upon the Earth for the centuries to come. We must learn to end war and protect life, to seek justice and find mercy, to help others and embrace compassion. Each person must respect every other person and honor the God who made this incredible mystery of human life a reality.

I hope that this Initiative, undertaken by the Institute that bears his name, will contribute to the realisation of these goals.

25 The International Law Association, for example, elaborated a draft statute for an international criminal court in 1926 (International Law Association 1927).

26 ‘Codification of International Law’, *American Journal of International Law*, Vol. 29 (Supp.), 1935.

27 *Ibid.* at 8.

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Ngorongoro

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA
TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA



Genocide on trial – Normative effects of the Rwanda tribunal’s jurisprudence

Alex Obote-Odora

The last 16 years have witnessed significant development in international criminal law. This progress was possible because of the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The article evaluates the normative impact or effects of ICTR jurisprudence on international criminal law. Where relevant, ICTY jurisprudence is referred to, because both the ICTY and ICTR share the same Appeals Chamber.

Since its first judgement in *Akayesu* in 1998,¹ the ICTR has developed a rich jurisprudence covering aspects of substantive, procedural and evidentiary law in international criminal law. Some of the decisions and judgements reached by the ICTR provide important interpretation and elaboration of different aspects of international criminal law, while others raise controversies. There are a number of publications that outline important decisions and judgements of the ICTR.²

There are, as well, some important decisions and judgements of the ICTR which need further clarification. The ambiguity results primarily from the fact that judges of the ICTR are not always unanimous in reaching a decision on some or all issues in a given case. Arguably, dissenting opinions by some of the ICTR Appeals Chamber judges tend to highlight critical issues that require further research and reflection. To that extent, while some of the issues examined in dissenting opinions remain unresolved, they also provide opportunity for law reform and other scholarly discourse. Overall, while absence of unanimity by judges raises challenges, nonetheless it also creates some room for the possibility of remedying some questionable legal positions in the future, and thus may lead to the improvement of international criminal jurisprudence.

¹ *Jean Paul Akayesu v. Prosecutor*, Case No. ICTR-96-4-A.

² All decisions and judgements of the ICTR Trial and Appeals Chamber are available on the ICTR website: www.icttr.org; see also Human Rights Watch (2010).

The current trend in international criminal law suggests that the normative effects of ICTR jurisprudence are positive. Many national jurisdictions have cited ICTR jurisprudence, with approval, in their respective courts.³ However, there are limitations to the use of or reliance on ICTR jurisprudence by national courts or other international criminal courts and tribunals. I will therefore commence by examining such limitations.

The first part of this article discusses the possible limitations of the ICTR jurisprudence. It acknowledges the positive contribution of ICTR jurisprudence in the development of international criminal and humanitarian law. Nevertheless, the article submits that where a judgement is arrived at by a majority of the bench, and there are persuasive dissenting opinions, national courts or international courts/tribunals should carefully reflect on it before adopting that decision or judgement.⁴ Dissenting opinions are part of the Anglo-Saxon (common law) legal system. However, under civil law, (which includes the Scandinavian legal system and Romano-Germanic law), decisions are arrived at by consensus without dissenting opinion. Subsequent decisions in civil law systems are not based on previous decisions or judgements but on the interpretation of the law as stipulated in the relevant statute. This is a fundamental distinction between common and civil law systems. The conduct of cases before the ICTR is primarily based on common law system although some procedural and evidentiary aspects of civil law system, as adopted in its Rules of Procedure and Evidence, are also applied. I will examine two judgements to illustrate the point. The first case relates to commission as a mode of liability and the second to the use of post-indictment communications to cure defective indictments.

The second part examines the normative effects of the ICTR jurisprudence. It reviews prosecutions conducted by national courts for international crimes committed in Rwanda. The judgements of courts of Belgium, Canada and the United Kingdom are reviewed for illustrative purposes, and are not exhaustive. The third part is the concluding reflection. I submit that the normative effects of the jurisprudence of the ICTR are positive. However, to make a

3 See *infra*.

4 I recognise that ICTR jurisprudence is persuasive only, not binding for national courts. Thus, even if the decisions of the ICTR were unanimous, national courts would still have to reflect carefully on the decisions or judgements of the ICTR, on a case-by-case basis, before applying them. This requirement, to a certain extent, is a further limitation on the application of ICTR jurisprudence by national courts and other international criminal courts or tribunals.

determinative conclusion, a longer time-span is needed for effective evaluation of the normative effects of ICTR jurisprudence. Sixteen years is a very short period to assess the impact of precedents and evaluate their influence on the law of states that adopt or rely on ICTR jurisprudence in their domestic courts. It is, however, possible to assess recent trends of the development of international criminal law based on, among other sources, ICTR jurisprudence.

Limitations of ICTR jurisprudence

Due to circumstances under which the ICTR was established, it is only to be expected that its normative impacts are limited. First, 16 years is a very short period to evaluate the impact of jurisprudence, whether on national or international criminal courts. Law is a slow process and it takes many years to properly evaluate the impact of any jurisprudence, not only that of the ICTR. Second, the temporal jurisdiction of the ICTR is severely limited. Prosecution of perpetrators is limited to persons who committed serious violations of international humanitarian law between 1 January and 31 December 1994. Acts committed before January 1994 and after December 1994 – or their omissions – are inadmissible for the purposes of proving the guilt or innocence of the accused. The admission of such evidence is limited to providing context and background.

To that extent, acts or omission underpinning indictments on which judgements are made are limited, uniquely relevant to Rwanda and cover only twelve months. Third, and increasingly, a number of important judgements of the ICTR tend not to be unanimous. Persuasive dissenting opinions tend to erode the forcefulness of the majority judgements. The concern here is not whether the judgement is right or wrong. Rather, when a bench of five judges delivers a judgement, two of whom dissent, to what extent should other courts, national or international, rely on a precedent that suggests uncertainty about the status of the law? Fourth, under Rules 115 and 120 of the Rules of Procedure and Evidence, a convict who is serving, or has served, his sentence may apply for a review of his case if he meets the threshold stipulated in the Rules. If the review is dismissed, he can still apply for a reconsideration of his case. If the review is successful, the decision may be reversed, revised or set aside and a new one filed. In the process of review or reconsideration the Appeals Chamber is at liberty to review substantive, procedural and evidentiary law which may fundamentally affect its earlier 'final' Appeals judgement. The impact of the review process is to undermine the principle of finality of proceedings. Trials at the ICTR will therefore never reach a point

at which it can be stated with certainty that the ‘final’ judgement of the Appeals Chamber in a given case has been delivered.⁵ This in turn impacts on other national and international criminal courts if there are uncertainties as to whether the ‘final’ judgements of the ICTR Appeals Chamber are indeed final and may not be revised after a review or reconsideration. Fifth, the ICTR is due to close in the next two or three years. It is extremely rare, if at all, that national courts close. While the extent to which the ICTR Completion Strategy will impact on ICTR jurisprudence is, in the short term, uncertain, it is possible that it may have a negative impact in the long term, as courts will focus on meeting the completion strategy dateline.⁶ To that extent, evaluating normative effects of ICTR jurisprudence at this stage is provisional and may be correctly described as ‘work in progress.’

I will examine, for illustrative purposes, two judgements reached by the majority of the judges but with persuasive dissenting opinions, in one case from Judge Güney and in the other from Judge Schomburg.⁷ I will note the possible normative effects of ICTR jurisprudence on national and international criminal courts in cases where there are persuasive dissenting opinions from one or two judges out of a bench of five judges. The concluding reflection underscores the challenges of evaluating normative effects of judgements reached by the majority as opposed to ones that are unanimous.

Committing as a mode of liability under Article 6 – An evaluation of its interpretation and elaboration

One of the most significant developments in the prosecution of international crimes, from the Prosecutor’s perspective, is the evolution of the concept of ‘committing’ as a mode of liability under Article 6(1)

5 However, in a case of acquittal, the Prosecutor has only one year within which to apply for a review. If, within one year of the judgement of the Appeals Chamber, the Prosecutor does not apply for a review, the Appeals Chamber judgement may be considered final. Thus, under these circumstances, some ‘finality’ of judgements is definite. See Rule 120(A) on Request for Review.

6 This is a contentious issue. The judges of the ICTR have at every opportunity stated that they will not be bound by the Completion Strategy when discharging their judicial functions. Yet, there is a perception among the Prosecution, the Defence and human rights organisations that, because of the short time left between now and the closure of the ICTR and in view of the large caseload and the diminishing number of staff in Chambers, the rush to conclude trials within the given time-span will affect the quality of judgements delivered.

7 One interesting and persuasive partially dissenting opinion which I will not examine, for reason of space, is that of Judge Mohamed Shahabuddeen in *Nahimana, Barayagwiza & Ngeze v. Prosecutor*, Case No. ICTR-99-52-A, (the Media case), on pp. 350-373.

of the ICTR Statute.⁸ The ICTR Appeals Chamber in the *Gacumbitsi* Appeals Chamber judgement broadened the scope of the definition of 'commit'. The Appeals Chamber achieved this feat by introducing a more flexible approach to the interpretation of what may constitute direct participation in the *actus reus* of a crime.

Under Article 6(1) of the ICTR Statute, a person who has 'committed' any of the crimes enumerated in Articles 2 to 4 of the Statute attracts individual criminal responsibility for the crime, and is subject to judgement and penalty, as provided for in Articles 22 and 23 of the Statute. Similarly, Article 6(3) holds a superior criminally responsible for 'acts...committed by a subordinate', if the pre-conditions for responsibility required by the provision are fulfilled.⁹

The word 'committed' or 'committing' occurs elsewhere in the ICTR Statute as well. Under Article 2(1), the jurisdiction of the Tribunal extends to persons 'committing genocide...or any of the other acts enumerated in paragraph 2(3) of the Statute.' Article 2(2) defines genocide by listing specific acts 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. Article 3 provides for the prosecution of a number of crimes, which it lists, as crimes against humanity, 'when committed as part of a widespread or systematic attack against any civilian population' on the discriminatory grounds identified in the provision. Article 4 encompasses the prosecution of persons 'committing or ordering to be committed' serious violations, which include those listed in the Article, of the provisions of the Geneva Conventions and Additional Protocol II thereto, pertaining to internal armed conflicts, or threats 'to commit' any of the listed acts.

Similar language is encountered in the relevant provisions of the ICTY Statute, notably in the provisions for individual criminal

8 Article 6(1) of the ICTR Statute provides: 'A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.'

9 Article 6(3) of the ICTR Statute provides: 'The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.'

responsibility contained in Articles 7(1) and 7(3).¹⁰ The 1998 Statute of the International Criminal Court (ICC) provides for the punishment of a ‘person who commits a crime within the jurisdiction of the Court’ as stipulated in Article 25 of the ICC Statute, pertaining to individual criminal responsibility, and Article 30, dealing with the mental element of crimes.

The concept of ‘commit’ in Article 6(1) of the ICTR Statute has been generally held to encompass the direct and physical perpetration of the crime by the offender himself. It also encompasses joint criminal enterprise, as a mode of commission of a crime. The ICTY Appeals Chamber, in *Tadic*, recognised that the concept of ‘committing’ a crime ‘covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law’. The Chamber accepted as well that commission of a crime might also occur ‘through participation in the realisation of a common design or purpose’.¹¹

The ICTR Appeals Chamber, with respect to the scope of the term ‘committed’ in Article 6(1) of the ICTR Statute, specifically adopted the *Tadic* definition above, pertaining to Article 7(1) of the ICTY Statute, in *Kayishema and Ruzindana*, and went on to observe: ‘Thus, any finding of direct commission requires the direct personal or physical participation of the accused in the actual acts which constitute a crime under the Statute, together with the requisite knowledge.’¹² The Chamber declined to provide any further detailed definition of what constitutes individual responsibility for the element of ‘committing’ under Article 6(1).

Trial Chambers at both ICTY and ICTR have adopted and applied the *Tadic* definition of ‘committed’ in subsequent cases.¹³ In order to establish that the accused committed a crime, the Prosecution is required to prove that the accused participated directly and physically in the actual acts that constitute the material elements of the crime,

¹⁰ See ICTY Statute, Article 2 (Grave breaches of the Geneva Conventions of 1949), Article 4 (Genocide), and Article 5 (Crimes against humanity). Article 3 (Violations of the laws or customs of war) speaks of the prosecution of ‘persons violating the laws or customs of war’, but the concept of ‘committing’ such violations obviously applies through Article 7.

¹¹ *The Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgement, 15 July 1999 (AC), para. 188.

¹² *The Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-I-A, Judgement (Reasons), 1 June 2001 (AC), para. 187.

¹³ See, for example, *The Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001 (TC), para. 390; *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003, para. 383.

with the necessary intention.¹⁴ There can be several perpetrators of the same crime, so long as the conduct of each one of them fulfils the requisite elements of the definition of the crime.¹⁵

In the case of *Ntakirutimana*, the Trial Chamber focused on proof that the accused himself physically committed genocide by killing and causing harm to Tutsi refugees. On appeal, the Appeals Chamber held that the Trial Chamber erred by failing to go on 'to consider whether the acts of assistance it found to be established also constituted a basis for a conviction of genocide either as a co-perpetrator or as an aider and abettor'.¹⁶ The Appeals Chamber ultimately found that the respondent should have been convicted of aiding and abetting genocide, as well as of committing genocide.¹⁷ However, the Appeals Chamber did not examine further what conduct, beyond direct personal participation in the physical killing or inflicting of bodily harm upon the victims, might come within the definition of 'committed' under Article 6(1), with respect to genocide.

The *Gacumbitsi* Appeals Chamber addressed this issue and went further than the *Ntakirutimana* Appeals Chamber. The *Gacumbitsi* Appeals Chamber adopted a flexible approach to what *direct and physical perpetration* might entail. The Appeals Chamber went beyond what it was prepared to do in *Kayishema and Ruzindana*, and provided a further definition of what conduct can come within the scope of 'committing', as a mode of liability under Article 6(1). The *Gacumbitsi* Appeals Chamber held that, in the context of genocide, direct and physical perpetration *need not mean physical killing*. Other acts can constitute direct participation in the *actus reus* of the crime.¹⁸ This was a radical interpretation of 'committing' from earlier ICTY and ICTR jurisprudence.

The facts of the case in *Gacumbitsi* were examined by the Appeals Chamber in the context of alleged defects in indictment. Gacumbitsi was convicted of committing genocide. He was proved to have killed a man, by the name of Murefu, in April 1994 at Nyarubuye Parish, in Rusumo Commune, Kibungo *préfecture*. The Prosecution

¹⁴ *Semanza*, at para. 383.

¹⁵ See *Kunarac*, *supra*, note 13, at para. 390.

¹⁶ *The Prosecutor v. Ntakirutimana and Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 (AC), paras 490-492.

¹⁷ *Ntakirutimana*, paras 493-509.

¹⁸ *Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 (AC), para. 59.

had not mentioned Murefu's name in the indictment. A majority of the Appeals Chamber (3-2) found that the indictment was defective in this respect.¹⁹ Having found that the burden, in the particular circumstances of this case, rested on the Prosecution to establish that the appellant had suffered no material prejudice to his ability to defend himself, a differently constituted majority of the bench (3-2) held that the defect in pleading had been cured by the provision of timely, clear and consistent information by the Prosecution to the Defence, in relation to the killing of Murefu.²⁰ The Appeals Chamber then went a step further and considered whether Gacumbitsi was correctly convicted of 'committing' genocide.

At this point a comment is necessary. Because the information provided by the Prosecutor was materially different from the allegation pleaded in the indictment, the Chamber ought to have considered, first, whether the defect was so grave that the Prosecutor could only cure it by seeking leave to amend the indictment; or whether the defect could not be cured by post-indictment communication and not a formal amendment. The Appeals Chamber sidestepped the issue of formal amendment and proceeded to discuss whether the defect was cured by post-indictment communication.

The two dissenting judges, however, correctly re-stated the law on amendment of indictment when they opined that the defect could not be cured by the provision of timely, clear and consistent information by the Prosecution to the Defence, in relation to the killing of Murefu.²¹ What was required was a formal amendment of the indictment by leave of the Chamber.

In reaching the conclusion on whether Gacumbitsi should be convicted of committing genocide, a differently composed majority of the Appeals Chamber (4-1) held that, even if the killing of Murefu were to be set aside, the Trial Chamber's conclusion that the appellant committed genocide would still be valid, a finding reached by the Appeals Chamber entirely on its own.²² This finding was based, not on the killing of Murefu, but on other acts of the appellant, done with the requisite intention, beyond his own direct physical participation in the killing of Tutsi refugees. The Appeals Chamber reasoned, as follows:

19 *Gacumbitsi*, paras 46-50.

20 *Gacumbitsi*, paras 51-58.

21 *Gacumbitsi*, paras 51-58.

22 *Gacumbitsi*, para. 59.

...The Trial Chamber convicted the Appellant of 'ordering' and 'instigating' genocide on the basis of findings of fact detailing certain conduct that, in the view of the Appeals Chamber, should be characterized not just as 'ordering' and 'instigating', but also as 'committing' genocide.

As the Trial Chamber observed, the term 'committed' in Article 6(1) of the Statute has been held to refer 'generally to the direct and physical perpetration of the crime by the offender himself.' In the context of genocide, however, 'direct and physical perpetration' need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime. Here, the accused was physically present at the scene of the Nyarubuye Parish massacre, which he 'directed' and 'played a leading role in conducting and, especially, supervising.' It was he who personally directed the Tutsi and Hutu refugees to separate—and that action, which is not adequately described by any other mode of Article 6(1) liability, was as much an integral part of the genocide as were the killings which it enabled. Moreover, these findings of fact were based on allegations that were without question clearly pleaded in the indictment.

The Appeals Chamber is persuaded that in the circumstances of this case, the modes of liability used by the Trial Chamber to categorize this conduct – 'ordering' and 'instigating' – do not, taken alone, fully capture the Appellant's criminal responsibility. The Appellant did not simply 'order' or 'plan' the genocide from a distance and leave it to others to ensure that his orders and plans were carried out; nor did he merely 'instigate' the killings. Rather, he was present at the crime scene to supervise and direct the massacre, and participated in it actively by separating the Tutsi refugees so that they could be killed. The Appeals Chamber finds by majority, Judge Güney dissenting, that this constitutes 'committing' genocide.²³

Thus, the current jurisprudence, based on the majority opinion, is that an accused may be proved to have committed a crime, within the

23 *Gacumbitsi*, paras 59-61. In his dissent, Judge Güney was not prepared to accept what he perceived to be a departure from the established jurisprudence of the Tribunals and an expansion of the meaning of 'committed' in Article 6(1). He likened this expansion to the theory of co-perpetration that the Appeals Chamber had rejected in *Stakic* (i.e. *The Prosecutor v. Stakic*, Case No. IT-97-24-A, Judgement, 22 March 2006 (AC)). In his view, the actions of the appellant could have been examined through the lens of joint criminal enterprise, the problem being that this form of liability had not been properly pleaded: see the Partially Dissenting Opinion of Judge Güney, paras 2-9.

meaning of Article 6(1), if his or her direct participation in the *actus reus* of the crime involves a supervisory role exercised at the crime scene itself, undertaken with the requisite intent, or if it involves some action performed by the accused at the scene of the crime, with the requisite intent, that is as integral to the physical perpetration of the acts constituting the material elements of the crime as the very acts performed by the direct physical perpetrators themselves. In other words, the accused may commit a crime, by acting through the instrumentality of others, at the scene of the crime. He needs not physically commit the crime.

The problem for the Prosecutor then is how should commission through the instrumentality of others be pleaded in the indictment? The Appeals Chamber sidestepped the issue when it held that even if the killing of Murefu were to be set aside, the Trial Chamber's conclusion that the appellant committed genocide would still be valid. Arguably, it may be sufficient, as a matter of pleading, to allege that the accused committed the crime, under Article 6(1), and to plead material facts in the indictment that make it plain that the Prosecution is alleging that the accused acted through the instrumentality of others. Such an approach would appear to find support in the Appeals Chamber judgement (majority view) in *Gacumbitsi*, discussed above, where the Appeals Chamber was prepared, on the basis of facts clearly pleaded in the indictment and found by the Trial Chamber, to characterise the appellant's conduct in a way that was different from the conclusions reached by the Trial Chamber. This was so, even though the point was never specifically argued at the hearing of the appeal. In his dissenting opinion, Judge Güney raised concerns about whether the appellant had ever been put on notice that he risked conviction on the basis found by the majority. Judge Güney's dissenting view is significant because the majority did not address the issue whether (a) the defect in indictment should have been cured through a formal amendment after seeking leave of the Chamber or (b) whether the appellant was provided with a clear, consistent and timely post-indictment communication.

Overall, where the allegation is that the accused physically perpetrated the crime himself, then the requirement is for the Prosecutor to plead the material facts as specifically as possible, including, where feasible, the identity of the victims, the time and place of the events, and the means by which the acts were committed. The same level of detail may not be required, notably with respect to the identity of the victims, in relation to the perpetration of a crime, such as genocide

or extermination, on a mass scale.²⁴ Depending on the circumstances, the latter approach may apply in the case of commission by acts other than direct physical perpetration; but it will always be advisable to plead the material facts as specifically as possible, in order to avoid misleading the accused, with respect to the theory of liability being advanced by the Prosecution.

Over the dissent of Judge Güney, the ICTR Appeals Chamber in *Gacumbitsi* has arguably expanded the scope of what had until then constituted the confines of 'committed', as a mode of liability under Article 6(1), by interpreting the requirement of direct physical participation flexibly. In *Kayishema and Ruzindana*, the Appeals Chamber had earlier left the door open to providing further detail to the definition of 'committed'. This, the Chamber has now done in *Gacumbitsi*.

Under the 'new' definition of 'committed', the Prosecution must still prove that the accused was directly involved, in some significant way, in the acts that constitute the *actus reus* of the crime, and to have had the requisite *mens rea* at the relevant time. How this direct participation is accomplished may depend on the crime. The requirements respecting the commission of genocide or extermination as a crime against humanity may not be identical to those necessary to prove commission of direct and public incitement to commit genocide, for example; but it will be necessary to show some close involvement with the physical perpetration.

In sum, this is a fundamental shift in judicial thinking and provides the Prosecutor with greater opportunity for adducing sufficient evidence to convict persons who do not physically commit the crimes. However, Judge Güney's dissent is persuasive and hopefully the Appeals Chamber will revisit the point in future. Criminal prosecutions require specificity and clarity. If the Appeals Chamber allows flexibility in the interpretation and evaluation of modes of liability, it becomes only a matter of time before such an approach begins to infringe on

²⁴ For the most recent discussion of such issues by the ICTR Appeals Chamber, see *Gacumbitsi*, at paragraphs 49-50 of the Appeal Judgement. In *Ntakirutimana*, paragraph 521, the Appeals Chamber held that a precise identification of 'certain named or described persons' was not an element of the crime of extermination; it is sufficient to establish that mass killing occurred. This approach should affect the level of specificity of pleading. However, where the allegation is that the accused committed genocide, as was the case in *Gacumbitsi*, the majority of the Appeals Chamber appears to be of the view that failure to identify a specific victim, whose identity is in fact known, leads to a defect in the indictment. Recognising that the focus of the crime of genocide is not on the individual, but on the targeted group, Judge Schomburg dissented forcefully on this point: see, in *Gacumbitsi*, the Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, paragraph 9.

fair trial rights. Caution is therefore warranted in application of such cases in national or other international jurisdictions.

ICTR jurisprudence on defective indictments

An indictment is the primary document the Prosecutor relies on in conducting criminal prosecutions. An indictment is required to provide, with specificity and clarity, allegations indicating the crimes with which the accused is charged (Obote–Odora 2001). The *Ntakirutimana* Appeals Chamber in elaborating on Articles 17(4), 20(2) and 20(4)(a)–(b) of the ICTR Statute and Rule 47(C) of the ICTR Rules of Procedure and Evidence (the Rules)²⁵ opined that there is ‘an obligation on the part of the Prosecutor to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven’.²⁶ Further, while recognising that an indictment is the primary charging instrument, ICTR jurisprudence has held that in exceptional situations, if an indictment fails to meet the test of specificity, such a defect may be cured through the Prosecutor’s consistent, clear and timely post-indictment communications to the accused such as pre-trial brief, disclosure of witness statements and other documents.²⁷

The main issue for consideration before the Appeals Chamber in the *Muhimana* case²⁸ was whether there is a limit to the Prosecutor’s right to cure a defective indictment through post-indictment communications. In the *Muhimana* indictment, the Prosecutor alleged that towards the end of May 1994 at Nyakiyabo hill, in the Bisesero area, the accused ordered an *Interahamwe* (named Gisambo) to kill an individual named Mukamera. However, in his pre-trial brief supported by a witness statement attached to the brief, the Prosecutor modified this information and alleged that Muhimana physically murdered the victim in mid-May 1994 on another hill in the Bisesero area. The Trial Chamber was satisfied with the evidence adduced and convicted the accused for the murder of Mukamera.

On appeal, Muhimana impugned his conviction by the Trial Chamber for this murder, alleging that the indictment was defective because it did not give him proper notice of the time and place of the murder,

25 The ICTR Statute and the Rules of Procedure and Evidence are available on the ICTR website: www.ictor.org

26 *Ntakirutimana v. Prosecutor*, Case No. Ictr-96-10-A, para. 25.

27 *Ntakirutimana* Appeals Chamber Judgement, at para. 27.

28 *Muhimana v. Prosecutor*, Case No. ICTR-95-1B-A.

or his role in it. The accused further challenged the variance between the indictment and the post-indictment communications. Furthermore, the accused challenged the Trial Chamber's finding that during trial, he did not object to the variance between the indictment and the post-indictment communications. According to the Trial Chamber, the accused had challenged lack of notice in the indictment in relation to the time and place of the alleged murder, and not as to the nature of his role in that matter.

A brief review of ICTR jurisprudence on curing defective indictments, prior to the *Muhimana* Appeals Chamber judgement, informs us that the failure of the accused to object at trial, as to the variances between the indictment and post-indictment communications at the time when the relevant evidence was adduced (as for example a failure to object to defects in the indictment) was not relevant as an admission as to the truthfulness of the post-indictment communication. Instead, such failure is relevant in determining whether or not the accused should be allowed to raise the objections based on lack of notice for the very first time long after the relevant evidence was adduced (e.g. during closing arguments or during appeal). The underlying doctrine is that of waiver, that is, whether the accused waived his right to object. However, whether or not an accused raised an objection, that point is crucial in determining whether the accused bears the burden of demonstrating that he was prejudiced by the defects in the indictment, or whether the Prosecutor bears the burden of demonstrating that the accused was not prejudiced. In addressing the issue, the Appeals Chamber referred to the *Niyitegeka* judgement as follows:

A party should not be permitted to refrain from making an objection to a matter which was apparent during the course of trial, and to raise it only in the event of an adverse finding against that party. Failure to object in the Trial Chamber will usually result in Appeals Chamber disregarding the arguments on the ground of waiver. In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegations.²⁹

²⁹ *Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-A, Appeals Chamber, para. 190.

Nevertheless, the *Niyitegeka* Appeals Chamber judgement underscores the importance of an accused's right to be informed of the charges against him and the possibility of serious prejudice to the accused if material facts crucial to the Prosecution are communicated for the first time at trial. The jurisprudence thus stresses that the waiver doctrine does not extinguish the right of an accused to raise the objection at a later stage. The *Niyitegeka* Appeals Judgement emphasises:

Waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal. Where in such circumstances, there is a resulting defect in the indictment; an accused person who fails to object at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired. All of this is of course subject to the inherent jurisdiction of the Appeals Chamber to do justice in this case.³⁰

In applying the *Niyitegeka* precedent in the *Muhimana* case, the Appeals Chamber, by majority (Judge Schomburg partially dissenting), held that the indictment was defective, because:

Where an accused is alleged to have personally committed a crime, the indictment must specify the criminal acts physically committed by the accused. An indictment lacking this precision is defective; however the defect may be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge.³¹

The majority view concluded that the indictment failed to allege the correct time and location of the murder, and that Muhimana had physically committed the crime. The Appeals Chamber, also by a majority, held that the defect was not cured because the post-indictment communication did not 'simply add greater detail in the consistent manner with a more general allegation pleaded in the indictment. Rather [it] modifies the time, location, and physical perpetrator, matters that were already specifically pleaded in the indictment, albeit in a materially different manner.'³²

³⁰ *Niyitegeka* Appeals Chamber, para. 200.

³¹ *Muhimana v. Prosecutor*, Case. No. ICTR-95-1B-A, Appeals Chamber Judgement, para. 217.

³² *Muhimana* Appeals Chamber Judgement, para. 224.

On careful analysis of the judgement, it is clear that the issue for determination before the Appeals Chamber was whether the accused's ability to prepare his case was materially impaired by the information provided in the pre-trial brief including the attached witness statement, and therefore whether the defects in the indictment was cured by timely, clear and consistent information. This issue was not directly addressed by the majority view. However, in the dissenting opinion, Judge Schomburg correctly addressed the point when he opined that the accused in this case suffered no prejudice as he was informed of the charges and the possibility to defend himself against a slightly varied charge. The point is significant because even if it is proved that there was a defect in an indictment, if the accused suffered no prejudice, it would follow that his ability effectively to defend himself at trial was not impaired.

Second, the majority view appears to neglect the context in which the crime of genocide was committed. The situation in Rwanda is very complex. First, the majority of Prosecution witnesses who are also victims, on average, suffer from post-traumatic stress disorder due to the very depraved manner in which the crime of genocide was perpetrated in Rwanda in 1994. This state of mind impacts negatively on their memory and view of the world.³³ Second, many Prosecution witnesses are peasants and under-educated or uneducated. During the genocide – those 100 days of mass killings – the witnesses spent most of the time running from one place to another, seeking refuge and spending several days without food, water or shelter. They were disoriented and lost track of time; and many had difficulties remembering which places they passed through when fleeing from the *Interahamwe* or members of the Rwanda Armed Forces (FAR). It is these traumatised individuals whose statements the Prosecutor relies on, in whatever form, to prosecute the perpetrators.³⁴

Significantly, in Rwanda, because of the character of the genocide and the context in which the crime was committed, most witnesses

33 Arguably, on the basis of this observation, there is a risk in accepting the evidence of such witnesses. Trial Chamber judges must therefore caution themselves accordingly, hence the importance of Appeals Chamber judges giving deference to findings of Trial Chamber judges on matters of credibility and reliability of witnesses because they had the advantage of assessing the demeanour of these witnesses in the course of trial.

34 While this observation may open the argument that the majority may have been right and the dissenting opinion wrong, and that the witnesses may have high potential to accuse the wrong person, what I seek to emphasise is that the Trial Chamber judges who watched the witness as s/he testified and was cross-examined, assessed the demeanour of the witness, is in a better position to evaluate the witness than the Appeals Chamber judgements who did not and yet reversed the findings of the Trial Chamber while the dissenting Judge gave deference to the Trial Chamber.

are accomplices. And, it is the evidence of these accomplices, some of whom are detainees or convicts serving long sentences that the Prosecutor relies on in drafting indictments and eventually prosecuting the perpetrators. It is therefore not surprising that there are inconsistencies between prior statements and the testimony of witnesses in court.

Accomplice witnesses, who are associates in guilt or partners in crime with the accused, may have motives or incentives to implicate the accused in order to gain some benefit in regard to their own cases or sentence.³⁵ ICTR jurisprudence has established that accomplice evidence is neither inadmissible nor unreliable *per se*, especially when an accomplice is thoroughly cross-examined.³⁶ However, when weighing the probative value of such evidence, a Chamber is bound to carefully consider the totality of the circumstances in which it was tendered and, when necessary, must approach the evidence with caution in order to ensure a fair trial and guard against the exercise of a possible underlying motive on the part of the witness.³⁷ As a corollary, a Chamber should at least briefly explain why it accepted the evidence of a witness who may have had motives or incentives to implicate the accused; in this way, a Chamber demonstrates its cautious assessment of this evidence.³⁸

Arguably, what was referred to as the Prosecutor's 'modification of the allegation that Muhimana physically murdered the victim in Mid-May 1994' as opposed to the allegation that 'Muhimana ordered an *Interahamwe* (called Gisambo)' was an amendment of the indictment and not a curing of a defect by post-indictment communication. Not having addressed the issue of whether the Prosecutor ought to have sought leave from the Trial Chamber to amend the indictment, the Appeals Chamber proceeded to consider whether the Prosecutor's notice in the pre-trial brief, and during closing arguments, were sufficient to cure the defects. It is in that context that it can be argued that the Appeals Chamber majority judgement appears to have taken an exceptionally strict view of the law by failing to consider the context in which the crime of genocide was committed in Rwanda. On the other hand, in his partially dissenting opinion, Judge Schomburg demonstrated insightful understanding of Rwanda when he opined:

35 *Niyitegeka* Appeals Chamber, para. 98.

36 *Niyitegeka* Appeals Chamber, para. 98.

37 *Muvunyi v. Prosecutor*, Case No. ICTR-00-55A-A, para. 128.

38 *The Prosecutor v. Krajisnik*, Case No.IT-00-39-A, para. 146.

It is unrealistic to believe that the Prosecution is not confronted with changing evidence throughout the whole course of the proceedings. It would be incredible or, at the very least, surprising if the factual basis of an indictment remained unchanged after the finalization of investigations. Even in cases where trial proceedings are already ongoing, it has to be and is possible to add fresh information to the case. As it is at the same time still important to keep the accused informed about the charges against him, it is a generally accepted principle in criminal law, both in the Anglo-Saxon and Romano-Germanic influenced jurisdictions, that such additional information can also be given by an indication that the factual basis and/or the legal assessment might be varied.³⁹

Judge Schomburg further underscored the point that modification of the information or the introduction of new facts must be balanced with other factors, including the need to find the truth and respect the fundamental rights of the accused to be able to prepare his defence.⁴⁰ As Judge Schomburg opined, the accused in this case suffered no prejudice as he was informed of the charges and the possibility to defend himself against a slightly varied charge.⁴¹ Judge Schomburg thus concluded that it is unjustified to acquit an accused under these circumstances, and that the Appeals Chamber should have used the opportunity presented in this case to clarify the jurisprudence.⁴² The argument is persuasive.

Putting the 1994 events in Rwanda in context, it is questionable whether the Appeals Chamber strict approach, as adopted by the majority in this particular case, is always appropriate in prosecuting international crimes before national courts. The Rwanda context – where the crimes were committed 16 years ago – suggests that this may not necessarily be the correct approach. First, most of the Prosecution witnesses are peasants and do not own or wear watches; they do not know the exact or proximate time when the alleged crimes were committed. They do, however, in a general context, remember where the crimes were committed and who were the perpetrators and the victims. Thus, the concept of time is always a live issue at trial and on appeal. Secondly, as a result of severe trauma, the witnesses

39 *Muhimana v. The Prosecutor* (*supra*, note 29) Appeals Chamber Judgement. Partly dissenting opinion of Judge Schomburg on the interpretation of the right to be informed, paras 7-8.

40 *Muhimana*, Judge Schomburg's partially dissenting opinion, paras 12-16.

41 *Ibid*, paras 14-15.

42 *Ibid*, paras. 14-16.

suffer from memory loss. In some cases, during examination-in-chief by the Prosecution or cross-examination by the Defence, the Witness gradually remembers bits of relevant information. Some of this remembered information may be corroborated by other witnesses. It thus appears that the Chamber took a rather strict approach mainly because, unlike in other cases, where post-indictment communications ‘modified’ matters already *specifically* pleaded in the indictment, in this case, the information altered the alleged facts originally pleaded in the indictment. This according to the Chamber was prejudicial to the accused (see also Mugwanya 2008: 451).

Arguably, the most critical test should be whether or not the modification was communicated to the accused in a clear, consistent and timely manner, and that the accused’s right to prepare his defence was not materially impaired. Further, the Appeals Chamber should have taken account of whether the post-indictment communication in this case, or the manner in which the case unfolded, amounted to what may be described as the unpredictable and impermissible moulding of the case as it progressed, thus prejudicing the accused. Dr Mugwanya argues, correctly, that it is questionable whether in the instant case the accused suffered any prejudice, given that he presented a defence to the allegation as contained in the post-indictment communication, and only complained at the end of the trial (i.e. in his closing brief) and did not make a contemporaneous objection when the Prosecution witness AW testified that it was the accused that had physically perpetrated the murder.⁴³

Judge Schomburg’s dissent raises an interesting question about the determination of the normative effects of ICTR jurisprudence where the dissenting opinion, arguably, is more persuasive than the majority view. To what extent would a judgement falling under this category of cases positively impact on national and international courts or tribunals? It is recommended that such decisions are adopted by national and other international courts or tribunals with abundance of caution and on a case-by-case basis.

The *Gacumbitsi* and *Muhimana* Appeals Chamber judgements also raise questions as to whether it is the accused or genocide that is on trial. The prosecution of perpetrators for the crime of genocide before the ICTR has increasingly become so technical, that in some cases, an accused is acquitted, not because the Prosecutor failed to prove his case beyond reasonable doubt, but because the Trial Chamber

43 *Ibid.*, p. 451.

made a grave error of law. The Appeals Chamber in its judgement on *Zigiranyirazo* opined, at paragraph 75:⁴⁴

In reversing Zigiranyirazo's convictions for genocide and extermination as a crime against humanity, the Appeals Chamber again underscores the seriousness of the Trial Chamber's errors. The crimes Zigiranyirazo was accused of were very grave, meriting the most careful of analyses. Instead, the Trial Judgement misstated the principles of law governing the distribution of the burden of proof with regard to alibi and seriously erred in its handling of the evidence. Zigiranyirazo's resulting convictions relating to Kesho Hill and the Kiyovu Roadblock violated the most basic and fundamental principles of justice. In these circumstances, the Appeals Chamber had no choice but to reverse Zigiranyirazo's convictions.

In the paragraph cited above, the Appeals Chamber underscores the serious nature of the Trial Chamber's errors; it highlights the Trial Chamber's inability to apply basic legal principles; and states that Zigiranyirazo was not afforded the most basic hallmarks of a fair trial. However, the Appeals Chamber's statement that it 'had no choice' in the circumstances but to reverse Zigiranyirazo's convictions is not legally correct – at least not without some basic reasoning as to why it had no other choice 'in these circumstances'.

According to Article 24(2) of the ICTR Statute, the Appeals Chamber has the power to 'affirm, reverse or revise the decisions taken by the Trial Chambers'.⁴⁵ Pursuant to Rule 118(C) of the Rules, the Appeals Chamber may order that the accused be retried before the Trial Chamber '[i]n appropriate circumstances'.⁴⁶

The Tribunal's founding documents do not provide any further assistance in terms of what might constitute 'appropriate circumstances' for the purposes of ordering a re-trial, though Rule 118(C) was relied upon by the *Muvunyi* Appeals Chamber in ordering him to be retried for direct and public incitement to commit genocide. Muvunyi's retrial was ordered on one specific count of the indictment against him, based on a speech he gave at the Gikore Trade Centre, and limited to

44 *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Judgement, 16 November 2009 ('Appeal Judgement'); *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-01-73-T, Judgement, 18 December 2008 ('Trial Judgement').

45 Statute of the Tribunal, Article 24(2).

46 Rules of Procedure and Evidence, Rule 118(C).

that specific allegations.⁴⁷ In his re-trial, Muvunyi was convicted and sentenced to 15 years' imprisonment.⁴⁸

By failing to order a re-trial for crimes against the accused, the Appeals Chamber was apparently satisfied in limiting its judgement to a discussion of a technical nature and the conduct of the Trial Chamber. It was not concerned with effective prosecution of a person alleged to have committed the gravest of crimes. The accused, Protias Zigiranyirazo, was a native of Giciye *commune*, Gisenyi *préfecture*, Rwanda. He was the brother-in-law of the late former President of Rwanda, Juvenal Habyarimana. Zigiranyirazo became a Member of Parliament in 1969. In 1973, he was appointed *Préfet* of Kibuye and then served as *Préfet* of Ruhengeri from 1974 until 1989. After his resignation, he studied in Canada and returned to Rwanda in 1993 to work as a businessman.

The Trial Chamber convicted Zigiranyirazo for committing genocide (Count 2) and extermination as a crime against humanity (Count 4) by participating in a joint criminal enterprise to kill Tutsis at Kesho Hill in Gisenyi *préfecture* on 8 April 1994, where assailants attacked and killed between 800 and 1,500 Tutsi refugees.⁴⁹ In addition, it convicted him pursuant to Article 6(1) of the Statute for aiding and abetting genocide (Count 2) at the Kiyovu roadblock in Kigali, where between 10 and 20 persons were killed.⁵⁰ At the first instance, Zigiranyirazo was sentenced to a total effective term of imprisonment of 20 years.⁵¹

It is also significant that the *Zigiranyirazo* Appeals Chamber judgement was unanimous, with no dissenting opinion. The Appeals Chamber did not distinguish the *Zigiranyirazo* judgement from *Muvunyi*, both being Appeals Chamber judgements. Significantly, the Appeals Chamber did not provide a reasoned opinion. The *Zigiranyirazo* Appeals Chamber judgement provides additional challenges in evaluating the normative effects of ICTR jurisprudence on national and other international tribunals or courts.

47 *Muvunyi* Appeal Judgement, para. 171. Muvunyi's other grounds of appeal (1-7; 9-11; and 13) were also granted and his convictions reversed for: genocide (Count 1), direct and public incitement to commit genocide (Count 3) (based on a speech he gave at Gikonko in Mugusa *commune*), and other inhumane acts as a crime against humanity (Count 5).

48 *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-T.

49 *The Prosecutor v. Muvunyi*, paras. 330, 410, 427, 436, 439, 447.

50 *The Prosecutor v. Muvunyi*, paras. 251, 426, 427, 447.

51 *The Prosecutor v. Muvunyi*, paras. 468-472.

Normative effects of the ICTR's jurisprudence

Having observed some of the limitations and challenges of ICTR jurisprudence, we should also note that over the past 16 years the ICTR has delivered some ground-breaking judgements, which have had a noticeable impact. This preliminary conclusion is premised on the fact that there are national jurisdictions which have favourably referred to ICTR jurisprudence in their respective courts.

It is also relevant to note that the *Roundtable on Cooperation between the International Criminal Tribunal and National Prosecuting Authorities* was held on 26–28 November 2008, at Arusha, Tanzania.⁵² One of the papers presented was 'The Challenges of National Prosecutions for International Crimes' by Joseph Rikhof of Canada. The other panellists were Judge Phillip Meire of Belgium and John Lucas of the Netherlands. The discussion focused on the use of ICTR jurisprudence in the prosecution of international crimes before national courts.⁵³ Other issues discussed included cooperation between the ICTR Office of the Prosecutor (OTP) and National Prosecuting Authorities, the sharing of information, jurisprudence and witness protection.

In the last five years in particular, the ICTR has extended assistance to many states in respect of, among others, witness statements, access to OTP database and updated ICTR jurisprudence. These states include Rwanda, Finland, Sweden, Norway, the Netherlands, the United Kingdom, Belgium, Canada, New Zealand, France and the United States. The staffs of the National Prosecuting Authorities regularly visit the offices of the ICTR Prosecutor at Arusha and Kigali in the course of their work through state cooperation with the Rwanda Tribunal as stipulated in Article 28 of the ICTR Statute.

Belgium, the first foreign country to prosecute Rwandan citizens accused of genocide received support from the OTP and also extensively referred to ICTR jurisprudence in the course of trials. Since 2001, eight Rwandan citizens have been prosecuted by the Assize Court of Brussels (*Cour d'assise*) which is composed of professional judges and a jury. In all the trials, the Belgian prosecutors cooperated very closely with the ICTR-OTP in the conduct of investigations in Rwanda including use of the OTP database on rape and other sexual violence.

⁵² See ICTR website - www.ictor.org - and click Events. All papers presented at the Forum and a list of participants is available.

⁵³ *Ibid.*

The judgements delivered by the Belgian courts, following the civil law tradition, are brief and unanimous, unlike the common law tradition, which is generally lengthy and sometimes includes dissenting opinion. The accused Rwanda citizens were prosecuted under the Belgian law on universal jurisdiction : ‘*Loi belge de compétence universelle du 16 juin 1993 relative aux infractions graves aux Conventions de Genève du 12 août 1949 et aux Protocoles additionnels du 8 juin 1977*’ The above Act concerns grave breaches of international humanitarian law.

When the first trial started in May 2001, the Belgian law did not proscribe the crime of genocide but the crimes punishable under the Geneva Convention of 12 August 1949 (incorporated in Belgian law by the Geneva Convention of 16 June 1993, and which provides Belgian courts with universal jurisdiction for crimes committed outside its national jurisdiction) and the Additional Protocols of 8 June 1977. The law was amended in 1999 with the addition of genocide and crimes against humanity to the list of international crimes that Belgium’s national courts have jurisdiction over.

The first four Rwandans prosecuted in Belgium were charged with the crimes of murder and assassination under Belgian and Rwandan penal codes and of war crimes (Common Article 3 of the 1949 Geneva Conventions and Article 4(2) (a) of Additional Protocol II of 1977).

The Rwandans prosecuted in Belgium are: Higaniro Alphonse, a former minister in the Rwanda Government and director of a large firm (SORWAL); Ntezimana Vincent, a professor at the National University of Rwanda; Consolata Mukangango, a nun in a convent in Butare where Tutsi refugees were killed by *Interahamwe*; Julienne Mukabutera, also a nun in the same convent; Etienne Nzabonimana and Samuel Ndashikirwa, both businessmen from Kibungo *préfecture*, Major Bernard Ntuyahaga, ex-FAR, and Ephrem Nkezabera, a former treasurer of the *Interahamwe*.

The first trial started in 2001. It is commonly known as the ‘Butare Four’ because the four accused were from Butare *préfecture* (Reydam 2003). The accused were: Alphonse Higaniro, Vincent Ntezimana, Sister Julienne Mukabutera and Sister Consolata Mukangango. On 8 June 2003, Alphonse Higaniro was sentenced to 20 years’ imprisonment, Vincent Ntezimana to 12 years’ imprisonment, Sister Consolata Mukangango to 15 years and Sister Julienne Mukabutera to 12 years.

The second trial was in 2005. Two businessmen from Kibungo *préfecture*, Etienne Nzabonimana and Samuel Ndashyikirwa, were

prosecuted for crimes committed in Kibungo during the genocide in 1994. They were tried under the same law of 1993 under universal jurisdiction. Etienne Nzabonimana was sentenced to 12 years' imprisonment and Samuel Ndashyikirwa to 10 years' imprisonment.

The third trial was that of former Major Bernard Ntuyahaga of FAR. He was charged, prosecuted and convicted of the murder of 10 Belgian United Nations peacekeepers in Kigali in April 1994 and the murder of an unknown number of Tutsi civilians in Kigali during the genocide in 1994. The judgement was rendered on 5 July 2007 and the accused was sentenced to 20 years' imprisonment.

The fourth trial was that of Ephrem Nkezabera, the former treasurer of the *Interahamwe*. He was sentenced in 2009 to 30 years' imprisonment. Because he was tried *in absentia*, the decision of the Assize Court of Brussels was reversed. A re-trial is expected late in 2010.

In all the four Belgian trials, the courts did not rely solely on ICTR jurisprudence; the Belgian Prosecutors and their Investigators also worked very closely with the office of the ICTR Prosecutor. The two Prosecution Offices collaborated in a number of ways, including the sharing of information and jurisprudence before and during the trials.

Canada is another state where the courts have cited, with approval, ICTR jurisprudence in the course of their trials. In the case of *Leon Mugesera v. Canada*,⁵⁴ the Supreme Court of Canada made favourable references to the jurisprudence of the ICTR. For example, it noted at paragraph 126: 'Though the decisions of the ICTY and ICTR are not binding upon this Court, the expertise of these Tribunals and the authority in respect of customary international law [...] with which they are vested suggest that their findings should not be disregarded lightly by Canadian courts applying domestic legislation, such as sections 7(3.76) 7(3.77) of the Criminal Code which expressly incorporates customary international law.' After this observation, the court further referred to the relevance of the jurisprudence of the ICTR and thereafter proceeded to cite, with approval, the relevant paragraphs

54 *Leon Mugesera v. Canada* (Minister of Citizenship and Immigration), 2005 SCC 40.

in the cases of *Akayesu*,⁵⁵ *Rutaganda*,⁵⁶ *Nahimana et al* (Media case),⁵⁷ *Ruggiu*⁵⁸ and *Kayishem*.⁵⁹

Further still, in the case of *Desire Munyaneza*, the Canadian Court referred favourably to the ICTR jurisprudence. At paragraph 80 it observed: ‘The genocide that occurred in Rwanda between April 6 and mid-July 1994 is public knowledge.’ A fact that was judicially noticed in *Karemera et al*.⁶⁰ The Canadian court at paragraph 84 noted and adopted the ICTR and ICTY’s definition of serious bodily or mental harm. There are several other references where the Canadian court cited, with approval, the ICTR jurisprudence.⁶¹ In preparation of the cases, and during trials, the Canadian prosecutors continued to share information with the OTP and consult its database.

In the United Kingdom, ICTR jurisprudence was also cited, with approval, in the case of *Brown, Mubyanzeza, Nteziryayo and Ugirashebuja v. The Government of Rwanda and the Secretary of State for the Home Department*.⁶² At paragraph 11, the UK court opined: ‘The Trial Chamber of the International Criminal Tribunal for Rwanda [...] has an important place in the arguments before us, and we will explain its provenance and jurisdiction below [...] as found in its trial judgment in the case of *Akayesu*.’ The court made further positive references to the jurisprudence of the ICTR in the cases of *Munyakazi*,⁶³

55 *The Prosecutor v. Akayesu*, Case No. ICTR-96-4, TC, at paras. 84, 133, 134, 140, 143 and 155.

56 *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3, TC, at para 135.

57 *The Prosecutor v. Nahimana et al*, Case No. ICTR-96-11, TC at paras 144, 146 and 147.

58 *The Prosecutor v. Ruggiu*, Case No. ICTR-97-32, TC, at paras 147 and 173.

59 *The Prosecutor v. Kayishema*, Case No. ICTR-95-1, TC, at paras 154, 155 and 156.

60 *Desire Munyaneza, v. Her Majesty The Queen*, 2009 QCCS 2201; No. 500-73-002500-052.

61 See, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4, footnotes 6, 11, 12, 33, 36, 37, 40, 41, 42; *The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44, footnote 7; *The Prosecutor v. Semanza*, Case No. ICTR-97-20, footnotes 14, 15, 21, 31, 35, 39, 44; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1, footnote 18; *The Prosecutor v. Nyitigeka*, Case No. ICTR-96-14, footnote 27; *The Prosecutor v. Karemera et al*, Case No. ICTR-97-24, footnotes 25, 32; and, *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3, footnote 47.

62 Case No.CO/8862/2008,[EWHC 770 (Admin) (8 April 2009); see also Drumbl (2010).

63 *The Prosecutor v. Munyakazi*, Case No. ICTR-97-36, at paras 13, 14, 38 and 42.

Kanyarukiga,⁶⁴ *Hategikimana*,⁶⁵ *Gatete*,⁶⁶ *Kayishema*⁶⁷ and *Ruggiu*.⁶⁸ The UK prosecutors visited Arusha and Kigali for consultations with the OTP and shared information and jurisprudence.

Based on the practice of these states, it is reasonable to make a provisional conclusion that the normative impact or effects of the ICTR jurisprudence, 16 years after the establishment of the Rwanda Tribunal, is positive. This impact is expected to increase as more states prosecute perpetrators of international crimes.

Concluding reflection

The *Gacumbitsi* and *Muhimana* Appeals Chamber judgements are just some of the cases that tend to suggest that the prosecution of perpetrators charged with committing genocide has become increasingly technical. The Trial and Appeals Chambers, proportionately spend more time on issues related to defects in indictment than the narratives on when, how and by whom the 1994 genocide in Rwanda was planned and efficiently executed in 100 days, killing nearly a million persons. Further, the *Zigiranyirazo* Appeals Chamber judgement suggests that where a Trial Chamber has made a grave error of law, invalidating a decision, an Appeals Chamber may not necessarily order a re-trial for the purpose of correcting the error. Instead, the accused is acquitted, not because the Prosecutor failed to effectively present his case, but because of the incompetence of a Trial Chamber. Does the Appeals Chamber's reluctance to order a re-trial have any connection with the ICTR Completion Strategy?

The jurisprudence of the ICTR, notwithstanding the complexities of the reasoning process in reaching decisions and judgements in specific cases, demonstrates positive development of international humanitarian law. There is, however, always room for improvement. Thus, the interpretation and elaboration of the concept of 'committed' stipulated in Article 6(1) of the ICTR Statute by the Appeals Chamber was a bold, radical and progressive move notwithstanding the partially dissenting opinion of Judge Güney. The dissent by Judge Güney provides legal practitioners and scholars with an opportunity

⁶⁴ *The Prosecutor v. Kanyarukiga*, Case No. ICTR-02-78, at para. 43.

⁶⁵ *The Prosecutor v. Hategikimana*, Case No. ICTR-00-55, at para. 44.

⁶⁶ *The Prosecutor v. Gatete*, Case No. ICTR-00-61, at para. 45.

⁶⁷ *The Prosecutor v. Kayishema*, Case No. ICTR-95-I, at paras 46, 47, 49, 64, 69, 75, 77 to 80, 154 and 156.

⁶⁸ *The Prosecutor v. Ruggiu*, Case No. ICTR-97-32, TC, at para. 173.

to reflect further on the status of the law and look for further openings for improving the law. The unanimous decision of the Appeals Chamber in *Zigiranyirazo* should provide an opportunity to reflect on circumstances under which a higher court may order a re-trial. Such precedents should therefore be used with caution by National Prosecuting Authorities since the elements of uncertainty remain.

Similarly, allegations of defects in indictments and questions as to whether such defects have been cured by post-indictment communications continue to be a live issue before the Trial and Appeals Chambers. While the majority view in the *Muhimana* Appeals Chamber judgement may appear to be a very strict application of the law, Judge Schomburg's dissenting opinion is cautious and provides room for further reflection. The majority view, on the other hand, may be understood in the sense that when an accused is charged with serious crimes such as genocide, it is imperative on the Prosecutor to comply strictly with the law and rules on the drafting of indictment. Holding the Prosecutor to a higher standard gives credence to the notion of fair trials and guarantees the rights of the accused.

The importance, relevance and impact of ICTR jurisprudence on international criminal law cannot be overstated. Currently, many institutions of higher learning throughout the world offer courses on international criminal and humanitarian law to their students. The ICTR jurisprudence is one of the primary sources of material used for teaching at these institutions. Students at these institutions are the next generation of international judges, judicial support officials, prosecutors and defence lawyers who will continue to interpret and elaborate on this jurisprudence. Some of these students are future judges and judicial officials in their respective national courts, leaders in governments, non-governmental organisations and teachers of international humanitarian law.

In conclusion, it is noted that it may take many years to develop lasting jurisprudence. Sixteen years is a very short period in the development of legal philosophy. However, there is a great potential for the positive development of international humanitarian law based on, among other sources, the ICTR jurisprudence. Thus, while the signs are positive, this assessment is provisional. It is future judges, prosecutors, defence lawyers and scholars who will be in a better position to evaluate the normative effects of ICTR jurisprudence and determine whether it can stand the test of time.

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Linking peacebuilding and statebuilding – A new paradigm for UN response to fragile situations

Ursula Werther-Pietsch and Anna-Katharina Roithner

The interface between peacebuilding and statebuilding – A new way forward

Different approaches to fragile situations

The international community has – particularly since 2001 – followed various approaches and paradigms of intervention in fragile situations, an area of external engagement which has been attracting increasing numbers of actors in a very short period of time.¹ Apart from peace-keeping and peacebuilding mandates of international missions there is a range of 500 donor organisations and up to 10,000 NGOs working in the field of preventing conflict, mediating and promoting peace, and building capacities for responsive state institutions (Wolfensohn 2010).

The terminology used to describe the work of the international community in this area has changed over the years. The broad term ‘intervention’, first used in the 1970s, is based on the whole spectrum between enforcement and aid: the strong/weak dichotomy encompassed a continuum reaching from successful/functioning to failed/collapsed states and was characteristic of the state-centric discourse. The relatively new fragility paradigm, with its trap/context terminology (Mcloughlin 2010; Collier 2008) seems to be replacing the older paradigm. Recent efforts to distinguish between typologies on the basis of core functions performed by states (Ghani/Lockhart 2008) should be followed closely. This article, however, goes beyond a strictly institutional approach focusing on state institutions and advocates an operational, more inclusive way forward, given the predominantly cross-sectoral, highly contextualised, no-blueprint, functional axiom of today’s thinking in the development and security communities.²

1 9/11 as the global ‘fragility crisis’ can be perceived as the initial point and catalyst for subsequent debates in different disciplines and the elaboration of multiple strategies for fragile situations.

2 This new way of thinking should be seen against the background of recent efforts in the field of aid effectiveness, incorporated in the Accra Agenda for Action, High Level Forum 3, Accra, 2-4 September 2008: <http://siteresources.worldbank.org/ACCRAEXT/Resources/4700790-1217425866038/AAA-4-SEPTEMBER-FINAL-16h00.pdf>

Different ways of handling fragile situations have emerged during the last two decades following the ‘failed states’ doctrine³ that reflected collapses in Somalia, the Democratic Republic of the Congo (DRC), Sierra Leone, Colombia or East Timor, for instance, and in recent years has centred on Afghanistan, Iraq, the status of Palestinian Territories, Kosovo’s independence and Islamic extremism. So far, emphasis has been placed either on stabilisation, security sector reform (SSR) and socio-economic recovery programmes or on issues of legitimacy, human rights, rule of law, demobilisation, disarmament and reintegration (DDR) and transitional justice. Thüerer (1995) represents an early and rare spillover of looking at consequences in the normative sphere. Linked to the erosion of the primary responsibility of states in a globalised world and – so far – a narrow regime of self-determination, international law often leaves out grey areas relevant for the realisation of individual rights and duties.

In contrast, and not surprisingly, discourse in the political sciences has moved forward dramatically with the broadening of understanding of security threats. What can be learned from this perspective are the perception of transversal threats as multidimensional challenges and the importance of applying human rights/human security-oriented methodologies where state structures are weak (Werther-Pietsch 2010). In pursuing these different avenues, disciplines and conceptual understandings began to merge, with improved results in fragile situations.

Thus, one innovative component of the international response is the building of bridges between different communities active on the ground. This has allowed the apparent stand-alone approaches – nourished by widespread distrust between the policy communities involved and resulting fragmentation – to come under scrutiny. When one looks more closely at the gaps created by different cultures of intervention, patterns and conditions, several lessons learned can be worked out and recommendations made.

As a point of departure, we state that cooperation between external actors as perceived today comprises the diplomatic, development, defence, financial, economic, humanitarian and justice and police communities, both national and international, as well as non-governmental (civil society) organisations in the fields of development cooperation, humanitarian aid, protection and promotion of human rights, and peacebuilding. All of these dispose of different access to people affected by conflict and fragility and pursue their own goals

3 The term ‘failed state’ was first mentioned and conceptualised by Helman and Ratner (1992/1993).

and procedures (Roithner 2010). As NATO puts it in its 2010 defence strategy, experience in Afghanistan and Kosovo demonstrates that today's challenges require a comprehensive approach by the international community, involving a wide spectrum of civil and military instruments, which also fully respects mandates and autonomy of decisions.⁴ It is indeed across the whole range of civil and military engagement in international, governmental and non-governmental configurations that discrepancies become manifest within interventions: dimensions of culture and logic at times amount to a 'clash of interests' and thereby document the complexity of action.

This clash is reflected not least in the related but differing viewpoints of peacekeeping, peacebuilding and statebuilding, each concentrating on separate priorities and measures by working towards either short-term stabilisation and absence of physical threat, or medium-term mediation between politically active groups and marginalised people to build resilient societies, or long-term establishment of state institutions and conflict prevention. It seems that there is ground for common visions in conceptualisation and daily business that is at present not yet systematically explored.

We illustrate the peacekeeping, peacebuilding and statebuilding nexus through a thematic lens:

Peacekeeping is a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers. Over the years, peacekeeping has evolved from a primarily military model of observing cease-fires and the separation of forces after inter-state wars, to incorporate a complex model of many elements – military, police and civilian – working together to help lay the foundations for sustainable peace (UN Capstone Doctrine 2008: 17ff).

Peacebuilding involves a range of measures targeted to reduce the risk of lapsing or relapsing into conflict by strengthening national capacities at all levels for conflict management, and to lay the foundation for sustainable peace and development (OECD 2010b⁵).

4 We may refer to provincial reconstruction teams (PRTs) in Afghanistan increasingly recognising the need for civilians to take the lead.

5 See the evolution since 1992 'An Agenda for Peace. Preventive Diplomacy, Peacemaking and Peace-Keeping', Boutros Boutros Ghali, <http://www.un.org/Docs/SG/agpeace.html> building upon research work of the peace researchers Johan Galtung and John Paul Lederach.

Statebuilding is an endogenous process to enhance capacity, institutions and legitimacy of the state driven by state-society relations. Positive statebuilding processes involve reciprocal relations between a state that delivers services for its people and social and political groups who constructively engage with their state (Wyeth/Sisk 2009).

Many interferences between those areas – positive and negative – occur on an ad-hoc basis, created by local circumstances, through initiatives by individual actors such as UN Special Representatives of the Secretary-General (SRSGs), at times triggered off by conceptual uncertainties. Overlapping of concepts without explicit cooperation between relevant actors in the field may lead to unintended duplication of competencies or, even worse, an engagement vacuum. Against the background of the multidimensional and interdependent challenges in fragile situations, Weiss, Spanger and van Meurs (2009:7) formulate three basic questions:

Whom should diplomacy address if there is no government present with which the international community could negotiate? What can development policy achieve if its projects within a precarious state fall victim to a hostile security environment repeatedly? And what purpose is served by military intervention if it succeeds in winning a war but fails to establish peace?

This growing awareness of the complex but intertwined problems of human security, socio-economic underdevelopment and governance deficits as root causes of precarious statehood has prompted autonomous communities – defence, diplomacy and development and others – to act together.

The enabling methodology: coordinated, coherent and complementary action

From 3D to 3C

Approaches emphasising collaboration and concerted action emerged in the late 1990s in several fora. The early 3C⁶ approach driven by EU development cooperation in 1998 may be cited as the initial concept promoted to overcome EU internal pillar divisions between more integrated EU policies such as development cooperation and common foreign and security policy (CFSP), the latter still reluctantly dealing with human rights and democratisation as new common policy

6 3C: coherent, coordinated and complementary action in fragile situations

goals at that time. Overall scepticism expressed by EU partners overshadowed this model process. This early sign nevertheless served as messenger for the subsequent groundbreaking policy coherence for development debate (cf. Werther-Pietsch 2007) propelling the creation of the nexus between security and development and preparing the way for the 3D concept.

The specific needs for interaction in fragile situations link the spheres of diplomacy, defence and development (3D). Multilateral entities such as NATO and a number of bilateral players – Canada (apparently in the lead), the UK, Norway and Switzerland – backed by World Bank policy, followed the 3D concept which was gradually transformed and enlarged by other policy fields such as human rights, justice or police and the succinctly labelled ‘whole-of-government’ approach. Driving forces had also been the 2006 ‘system-wide’ and ‘deliver as one’ policy goals within the UN administration (‘whole-of-system’ approach).

It is now widely recognized – including in the highest-level policy statements of the United Nations, European Union, African Union and NATO – that managing conflict requires a multidimensional, comprehensive, whole-of-government or integrated approach. All these approaches have a similar aim: to achieve greater harmonization and synchronization among the international and local actors, as well as across the analysis, planning, implementation and evaluation phases of the program cycle. One-dimensional or single-facet conflict-management responses are now viewed as superficial and counterproductive, in that they address only some aspects of a wider system. They thus tend to distort, shift or redirect tensions in the system, rather than dealing with the root causes of the conflict in a coherent or comprehensive manner (de Coning 2010a).

More recently, in order to overcome the initial restriction of distinct policy communities the 3D concept was slightly bypassed by the 3C approach relying on procedural criteria valuable for all actors, potentially including the NGO sphere (Kurtenbach 2009: 6). During the innovative Geneva and Vienna conferences in 2009 and 2010 emphasis was given to coordinated, complementary and coherent action (3C).

Whole of government approaches may involve a wide range of agencies. Notwithstanding the convenient shorthand of the ‘3Ds’ (development, defense, and diplomacy), efforts to achieve policy coherence in fragile states often involve an array of other donor

government departments, including ministries of finance, interior, justice, intelligence, trade, health, and others. Accordingly, donor governments must create coordination structures at headquarters and in the field, as well as training methods, which are flexible enough to accommodate this variable geometry. (Patrick and Brown 2007: 129)

Conferences on the 3C approach in The Hague, Oslo and Paris in the run-up to Geneva 2009 reflected increased engagement on the part of OECD in the subject documented by the foundation of the International Network on Conflict and Fragility (INCAF) in December 2008 and the International Dialogue on Peacebuilding and Statebuilding on the basis of the DAC Principles for Good International Engagement in Fragile States issued in 2007 (OECD/DAC 2007). The window of opportunity for this endeavour and the think tank potential of the OECD Network are clearly connected with the ongoing UN reform processes on peacekeeping and the re-shaping of the Peacebuilding Commission that is in our view best suited to operationalise the new conceptual framework as well as the upcoming revision of the UN Human Rights Council to be explored and negotiated in 2011.

From Geneva 2009 to Vienna 2010

A concrete line of action in this sense can be traced from Geneva 2009 to Vienna 2010. The 3C Conference on 19-20 March 2009 in Geneva brought together recent concepts dealing with ways of improving results in conflict and fragile situations and moving towards a 'coherent, coordinated, complementary approach' across security, diplomacy, development and finance. The 3C Roadmap adopted at the Conference reinforces existing international policy commitments with the ownership and endorsement of other policy communities, thus creating comprehensive 'whole-of-system/whole-of-government' commitments and generating new impetus for their implementation. The Roadmap also contains a series of specific operational recommendations as well as joint and individual commitments in the follow-up to the Conference.⁷

The impetus of consolidating the 3C approach was further complemented by the international 3C Conference on 5-7 May 2010 in Vienna focusing on the role of non-governmental actors in fragile situations and their cooperation with government actors in a given

⁷ 3C Roadmap Genf 2009: Improving results in conflict and fragile situations, 19-20 March 2009, http://www.3c-conference2009.ch/en/Home/Conference_Outcomes

country/region. Specific problems arise that are worth looking at more closely with a view to the difference in accessing local society compared to government actors, different levels of information, lack of strategic geopolitical interests and the non-profit maxim of NGOs. The ‘Vienna 3C Appeal’ lays down a set of criteria for government and non-governmental actors (‘principles and aims’) that were deemed to be of importance when acting simultaneously in a fragile environment. Grounded in common goals such as human security and local ownership, feasibility of joint analysis and rolling programming, the necessity of civilian underpinning of international intervention including respective capacity building as well as impartiality and neutrality of humanitarian actors affected by the framework of the emerging ‘civilian protection regime’ were all identified as crucial points of discussion when translating the intrinsic nexus of security and development into real partnership.

The Vienna 3C Appeal (see the full document in the separate box) was agreed in June 2010 by the negotiating parties and signed officially by several Austrian governmental and non-governmental organisations. The 3C dialogue regarding the Vienna Conference will be continued in order to implement lessons learnt from the field (Werther-Pietsch and Roithner 2010a: 63–69).

Vienna 3C Appeal

Coordinated, Complementary and Coherent
measures in fragile situations

Principles and Aims of Interaction between Government and
Non-governmental Actors – Recommendations

Principles and aims of acting together

Vienna 3C principles

1. Peace processes are only sustainable when they are also supported and shaped by civil society.
2. We, the undersigned, acknowledge local ownership as a central principle. That means the need for broad local participation and co-determination for sustainable conflict resolution and peace-keeping in decision-making processes. Support of local personal, material and institutional capacities should facilitate the phasing-out of international engagement in fragile situations.

3. We recognise the opportunity for shared visions for engagement in fragile situations, provided that these are based on the needs of those affected, as well as mutual confidence in the capabilities of the international actors and their determination to put these to beneficial use. We can therefore develop coordinated procedures or joint strategies where the respective objectives call for and allow this. In specific situations, however, different approaches can be more appropriate for the target population.
4. We accord priority to conflict prevention to avoid the outbreak or relapse of armed conflicts.
5. We consider joint analysis and assessment and coordinated planning as the decisive starting point for our activities.
6. We support regular briefings and information exchange when required to gain a better grasp of the specific tasks and modes of operation of the various actors.
7. We are committed to avoiding any adverse effects of our measures on the population concerned and natural resources (do-no-harm). To achieve this, it is also important to conduct impact assessments and communicate the findings to other actors.
8. We advocate systematic training and capacity building beforehand.
9. Our actions are conceived for the long term and are responsive to the cultural setting, i.e. we aim for the sustainable, long-term de-escalation and settlement of conflicts.
10. We attach priority to protecting vulnerable groups, as cited in UN Security Council Resolution 1894 (2009).
11. Women play a central role in peace processes and in conflict prevention. We support in particular the aims of UN Security Council Resolution 1325 (2000) and the follow-up resolutions.
12. The unhindered humanitarian access to people in need is of importance to us. We acknowledge humanity, independence, impartiality and neutrality as foremost principles of humanitarian aid. At the same time, we respect the missions and engagement of states and international organisations with other mandates. For peace enforcement and armed peacekeeping missions, however, either a mandate of the United Nations or one of its regional organisations, or a joint request by all parties to the conflict under an international treaty is required.

13. Where multilateral mandates of complex international peace operations necessitate military support for civilian tasks, we attach importance to applying the same principles of developmental sensitivity as well as the respectful treatment of the population and the civilian actors concerned. The performance of civilian tasks by the armed forces shall only take place in those cases in which it is not possible for civilian experts to do so.
14. We advocate improving cooperation between international peace operations and NGOs – including those that explicitly represent women, minorities and other socially discriminated groups – and exploring synergies. In particular, international peace operations that clearly make an important contribution to stabilisation after conflicts should be designed to be more responsive to development goals and care more for local socio-economic needs and conditions. This includes the following:
 - Carrying out the security component in concert with other aims (‘no security without development and no development without security’)
 - Providing situational support for the aims of other actors where the own mode of operation and tasks permit
 - Effecting visible and sustainable economic improvements at an early stage, especially
 - Promoting local procurement by the international mission
 - Remunerating local staff in keeping with local pay scales
 - Stimulating relevant local private sector activities, with a special focus on women-led enterprises⁸.
15. As NGOs add specific value in fragile situations, we also advocate channelling their expertise and relevant experience into multilateral processes modelled on the OECD’s⁹ International Dialogue on Peacebuilding and Statebuilding.
16. The scope of cooperation (e.g. coordination, information exchange) between government and non-governmental actors in fragile situations depends on the setting and must be defined in each individual case.

⁸ The last part of bullet 3 was added on the occasion of the 10th anniversary of SC resolution 1325 (to be confirmed by negotiation partners).

⁹ Interpeace Background Paper (2010); World Development Report on Conflict and Development 2011 (2010).

In conclusion, the persistently scattered picture of engagement of external actors and the need for alignment with local needs and expectations in fragile situations remain highly challenging. Fragmentation of international action runs counter to lasting success in terms of measurable progress in security and development on the ground (Malcorra 2010; Loj 2010). Therefore, inspired by the 3C methodology, we advocate that bridging peacebuilding and statebuilding (PBSB) is needed for efficiency reasons and requires sound conceptual foundations.

PBSB pioneering

Multi-component or scenario-based future of peacekeeping operations

Whereas in UN fora overall debate on the operational role of the different branches still dominates the status quo, the OECD has embarked on developing a common vision of an integrated approach to peacebuilding and statebuilding as envisaged in the Kinshasa Statement of 1/2 July 2008 (United Nations 2009; Kinshasa Statement 2008). In late 2008, the inaugural session of the International Dialogue opened a three-year process aiming at bringing together members from the North and the South in order to build on experiences, knowledge and leadership in formulating an international consensus on PBSB (OECD concept note 2009). Currently, 40 development partners, a group of governments experiencing conflict and/or fragility ('G7+'), members of INCAF and international organisations are participating in this endeavour. Inspired by the Accra spirit of enhanced partnership, the dialogue constructively addresses the gaps that were first identified by the UN Peacebuilding Commission (Takasu 2008).

Statebuilding and peacebuilding [...] emerge as distinct but linked fields. Statebuilding and peacebuilding both aim to assist societies move in directions that are conducive to sustained development and address over-lapping problems. What may vary is the emphasis: as Wyeth and Sisk put it, 'Peacebuilding emphasises helping states and societies move from situations of great peril to relatively greater safety. The emphasis within statebuilding is on helping in the transition from lawlessness or arbitrary authoritarian rule to government based on law to which there is general consent. But described in this way, the potential for synergy between the two enterprises is clear' (OECD 2010a).

Even if we can distinguish several main stages in the conflict transformation cycle, such as peaceful social change, latent conflict,

nonviolent confrontation, conflict mitigation, conflict settlement, peace process, (negative) peace implementation, and (positive) peace consolidation or peace/democracy consolidation, there is no linear, wave-like or cyclical model of political transition and no single unified process coordinated and synchronised by government or led by civil society that would suit each situation on the ground. Against this background, integrating the cross-sectoral insights and acknowledging the complexity of social change processes turns out to be of utmost importance (Dudouet 2007).

Therefore, any engagement has to dispose of a range of tools ('components') applicable in a flexible and sequential manner to be regularly adapted to varying circumstances. A comparative look at UN standards of action vis-à-vis the upcoming vision of the OECD Dialogue will demonstrate possible implications of this postulate.

The UN approach to building sustainable peace is based on the 1992 'Agenda for Action', embarked on in a new 'era of application' at the beginning of the new millennium (Annan 2003) to effectively reach the MDG (Millennium Development Goals) consensus. It can be traced back to the concept of human security brought to life in 1994 by the UN Human Development Report (UNDP) and further developed through humanitarian interventions in the late 1990s. At the 2005 World Summit, a consensus to create 'a dedicated institutional mechanism to address the special needs of countries emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development' (World Summit Outcome Document 2005: para 97) finally marked the beginning of a deepened adaptation of the UN system to new security challenges. A series of reports of the UN Secretaries General, mostly in preparation for a so-called 'culture of non-indifference', based on Kofi Annan's important reform paper 'In Larger Freedom', document this departure (selection):

1. Report on enhancing mediation and its support activities, S/2009/189 as of 8 April 2009
2. Report on the protection of civilians in armed conflict, S/2009/277 as of 29 May 2009
3. Implementing the Responsibility to Protect, A/63/677 as of 12 January 2009
4. Report on peacebuilding in the aftermath of conflict, A/63/881-S/2009/304 as of 11 June 2009
5. Report on women, peace and security, S/2010/173 as of 6 April 2010
6. Report on children and armed conflict, S/2010/181 as of 13 April 2010

Out of this conceptual move from 2005 to 2010 there can be found a revised understanding within the UN administration of what is needed in the first two years after peace has been formally installed:

[S]eizing the window of opportunity in the immediate aftermath of conflict requires that international actors are, at a minimum, capable of responding coherently, rapidly and effectively in these areas, which relate directly to the core objectives [...]:

- Support to basic safety and security, including mine action, protection of civilians, disarmament, demobilisation and reintegration, strengthening the rule of law and initiation of security sector reform
- Support to political processes, including electoral processes, promoting inclusive dialogue and reconciliation, and developing conflict-management capacity at national and subnational levels
- Support to the provision of basic services, such as water and sanitation, health and primary education, and support to the safe and sustainable return and reintegration of internally displaced persons and refugees
- Support to restoring core government functions, in particular basic public administration and public finance, at the national and subnational levels
- Support to economic revitalisation, including employment generation and livelihoods (in agriculture and public works) particularly for youth and demobilised former combatants, as well as rehabilitation of basic infrastructure (UN-SG 2009, *Peacebuilding in the Immediate Aftermath of Conflict*).

This representative, though not exhaustive, list of tasks to be performed by the organisation reflects the overlapping definitions quoted above in chapter Ia. It does not, however, address interaction with other players or strategic levels of probable incoherence. Maybe the answer to the problem of ‘double’ fragility after conflict will also have to be elaborated further. Does the proposed conceptual approach balance countries and societies that have all the underlying vulnerabilities associated with the likelihood of initial conflict, compounded by the recent, collectively traumatising experience of war and display fragility across many dimensions? These include a failure of governance, high levels of uncertainty and insecurity, disjuncture between national and local authority, and a fundamental lack of trust both within society and between state and society (Wyeth and Sisk 2009).

With the growing quest for more civilian capacities in the framework of peace missions it became clear that peacekeeping is already early peacebuilding (Le Roy and Nakamitsu, 2010). Thus, units concerned with such issues as security sector reform (SSR), disarmament, demobilisation and reintegration (DDR) and the rule of law have been established within the UN Peacekeeping Department (DPKO). However, surely we should address dilemmas and trade-offs in peacebuilding and statebuilding alongside equivalent tools, to strengthen the capability for achieving progress.

Indeed, what matters in statebuilding? Is it institutions or ‘regimes’, rules or ‘regulation’, responsibility or ‘compliance’, government or ‘governance’? This fourfold shift as detected by Martti Koskenniemi, pioneer of the critical approach to international law, takes on board much better the proposed integrated PBSB methodology, which includes the question of legitimacy in performance and process with regard to political settlements and identity-building beyond electoral democracy (Koskenniemi 2009).¹⁰ However, by remedying fragile situations through international administration do we downgrade and discredit the important function of national government? The more we use the functional and more open though not anti-state approach, the more we have to ensure local ownership by the affected population (OECD 2010; Nuscheler 2009, 7). Facing such difficult transitions a new conceptualisation of international action in fragile situations as advocated here might be key for the future.

The new menu of policy options that the international community possesses is vast and comprises the following (cf. Krause and Jütersonke 2007: 11):

- Disarmament, demobilisation and reintegration programmes (DDR)
- Security sector reforms (SSR)
- Truth and reconciliation commissions (TRCs) and transitional justice arrangements
- Democracy promotion efforts
- Direct budget support to government and departments
- NGO service delivery arrangements
- Economic and structural adjustment reforms
- Trade and investment liberalisation agreements
- Punitive and sanctions regimes.

¹⁰ Different sources of legitimacy, i.e. traditional, process-orientated or clientelist forms are listed in Menocal (2010: 10).

It is clear from this list that PBSB intervenes in formerly internal domains and that its ultimate goal is good (enough) governance, accentuating and adjusting it of course to aspects of security and development. Thus, a profoundly political notion of governance, at the end of a long-standing virulent discussion on a shared vision (Pospisil and Werther-Pietsch 2009), focuses on security, welfare and representation – whether they are basic functions of the state or other formal and informal entities. External intervention in fragile situations involves measures that reach deep into the internal sovereignty and governance capacities of states, and, as Krause and Jütersonke (2007) maintain, attempt to reshape the relationship between states and their citizens. The perspective of transforming this relationship is a substantive challenge of any intervention of the international community and other actors since it touches upon core principles of engagement. The PBSB Dialogue is set up to further develop this notion.

Changing concepts: The Dili Declaration 2010 – Political foundations of PBSB

What at first looks like a new translation of the tasks of the UN Secretary General (UNSG), cited above, amounts after all to the promise of being capable of achieving the ambitious interrelated goal of peacebuilding and statebuilding based on the political will of legitimate leaders in fragile situations, despite the existence of various spoilers of the process¹¹ pursuing particular interests and not least benefiting from perpetuating fragility, taking into account the unmet expectations of citizens concerning their basic needs that are not always self-evident, and within a tight timeframe to deliver the peace dividend to all. Given the debate – going on for one and a half decades – on external intervention in fragile contexts the Dili Declaration and the upcoming final outcome document of the International Dialogue on Peacebuilding and Statebuilding, formulated by both partners affected by fragile situations and external actors, present the beginning of a clarified picture of a component approach, putting the emphasis on the social, political and cultural realities of state- and peacebuilding processes.

The First Global Meeting in Dili, April 2010, in the framework of the International Dialogue on Peacebuilding and Statebuilding, can already be judged as standard-setting in this context:

11 The political scientist Stephen Stedman (1997) distinguishes spoilers, reform actors and status-quo orientated local actors in peace processes.

A new vision for peacebuilding and statebuilding: In order to translate this vision into reality and to guide our collective engagement, we identify the following peacebuilding and statebuilding goals, as stepping stones to achieve progress and development:

- Foster inclusive political settlement and processes, and inclusive political dialogue
- Establish and strengthen basic safety and security
- Achieve peaceful resolution of conflicts and access to justice
- Develop effective and accountable government institutions to facilitate service delivery
- Create the foundations for inclusive economic development, including sustainable livelihoods, employment and effective management of natural resources
- Develop social capacities for reconciliation and peaceful coexistence
- Foster regional stability and co-operation' (Dili Declaration, as of 10 April 2010).

Of the 49 civil society organisations that contributed, about two thirds were from the Global South. They collectively published the following statement:

Central Observations:

1. PB&SB are processes. Processes matter. There is a need to focus on the 'how' and not on the 'what'.
2. PB&SB should be complementary and mutually reinforcing processes, but tensions are arising. These tensions, based on contradicting visions and strategies, should not be denied or avoided, but acknowledged and overcome/transcended in a dialectical/dialogical way. We still need more research about lessons learned, on the basis of empirical case studies, connecting complexity thinking, understanding of inter-subjective narratives and political pragmatism.
3. PB&SB need to be internally-led and externally-supported
4. Strong interest in continuing the International Dialogue was expressed in Dili (Interpeace Background Paper 2010).

In fact it was one of the Dialogue Co-Chairs who stated that 'we are finally moving from monologue to dialogue'. This political awareness is, the Austrian representative at the Dili Meeting and former High Representative of Bosnia and Herzegovina Wolfgang Petritsch says, the precondition for a successful 3C approach. Thus, political components of the international engagement are deemed to become more and more important.

Indeed, in fragile countries development cannot be separated from politics and security (DFID 2009: para 4.12). It seems crucial that political processes are reconsidered in development cooperation, in statebuilding activities and the like. Ending the ‘sectoral policies’ approach, including from ‘outside’, helps in the making of difficult policy choices about prioritising and fixing temporary trade-offs (OECD 2010a). Therefore, supporting legitimacy in performance and processes providing the necessary conditions for development responsive to people’s needs as the core mechanism of ultimately channeling competition for power in a peaceful setting can no longer be understood as a matter of technical cooperation. Core functions of polity need foundations that are legitimate. Through this political understanding of PBSB a ‘strong state’ has to be seen as a state that operates sustainably through good governance.

In sum, once linkages are detected, the argumentation results in a new integrated PBSB concept. The stipulated synergies between peacebuilding and statebuilding, interrelated through the overarching effect of ‘politisation’, call for spreading this way of thinking in other bi- and multilateral fora.

A vision for the UN reform process on PBSB

The current architecture of UN reform

Starting with the statement that peacekeeping operations (PKOs) should strictly observe the purposes and principles of the UN Charter, the Special Committee on Peacekeeping Operations, in its 2009 substantive report on reform, opens – in a remarkably backward- looking way – a field of debate that has insufficient reach and is rather diffuse.

[The Committee] emphasises that respect for the principles of the sovereignty, territorial integrity and political independence of States and non-intervention in matters that are essentially within the domestic jurisdiction of any State is crucial to common efforts, including peacekeeping operations, to promote international peace and security’ (GAOR 63rd Session Supplement No. 19, para 22).

At the juncture of modern PBSB engagement this formula seems highly outdated even if still firmly enshrined in the classical reading of the Charter.

When trying to give a picture of the contemporary understanding of peacebuilding and statebuilding, one has to look at the circumstances and conditions under which the founding principles of international

relations were drafted in 1945 and critically confront today's security challenges and international response to those perceived at the time. Clearly, there have been changes and shifts since then, when one compares these with today's consensus and practice as well as changes of vision as to what is meant by responsible sovereignty, limits of non-intervention and how human rights law, responsibility to protect and the concept of human security will accelerate systemic adjustment of the political landscape post-2005. If 'intervention' today serves to mobilise external action for good governance, then former categories become fluid.

This transition is framed by formal reform processes within the UN as well as development on the part of regional and sub-regional bodies such as the African Union or the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS) as part of the African security architecture. A short overview is given in the following:

Firstly, peacekeeping reform, the 'peace operations Horizon 2010' package, was enriched by a British/French initiative in 2009. Up until over the end of February 2011 the deliberations of the C-34 Special Committee on Peacekeeping will include further topics such as restructuring, safety and security of personnel, conduct and discipline, strengthening operational capacity, strategies for complex peacekeeping operations, cooperation with troops contributing countries, cooperation with regional arrangements, enhancement of African peacekeeping capacities and training requirements including at senior level. In this context it is worth mentioning that Security Council Presidential Statements of 29 December 1998 (S/PRST/1998/38) and 20 February 2001 (S/PRST/2001/5) point to 'the inclusion, as appropriate, of peacebuilding elements in the mandates of peacekeeping operations, with a view to ensuring a smooth transition to a successful post-conflict phase'. In that sense, the Security Council (SC) resolution 1894/2009 as of 11 November 2009 already absorbs the demonstrated 3C wording:

[The SC] emphasizes the need for a comprehensive approach to facilitate the implementation of protection mandates through promoting economic growth, good governance, democracy, the rule of law, and respect for, and protection of human rights, and in this regard, urges the cooperation of Member States and underlines the importance of a coherent, comprehensive and coordinated approach by the principal organs of the United Nations, cooperating

with one another and within their respective mandates. (UN SC 1894/2009, at para 28)

Furthermore, questions of decentralisation, risk analysis and conflict assessments as well as interlinkages between security and development will certainly play their role. Equally, in its 2006 study on the economic impact of peacekeeping, the Stimson Center initiated a cross-disciplinary method of measuring the success of a peace operation by its ability to stimulate sustainable local development (Carnahan et al. 2006).¹²

Secondly, UN peacebuilding, renewed in 2005, has gone into its second phase. Operational as of 2006, the Peacebuilding Commission (PBC), together with the Peacebuilding Support Office and the Peacebuilding Fund, is one of the main instruments that have been created following the analysis of the High Level Panel on Threats, Challenges and Change commissioned by the former UN-SG Kofi Annan in the framework of the largest reform project of the United Nations since the Millennium. As part of the continuum between peacekeeping and statebuilding in post-conflict scenarios, mandate and tasks, political performance and implementation of the founding SC resolution 1645/2005 are crucial for progress on the ground. This was proved in the cases of Burundi and Sierra Leone where peace processes at least did not disappear from the international screen, although the lack of a regional dimension to the operations may have contributed to their limited success and the continuing fragility. For the sake of clarity about future peacebuilding architecture, they continue, coherence and context will be decisive, which means that '[...]' in order to improve the sustainability of peace operations the UN PBC will need to focus on three critical areas, namely local ownership, local context and local capabilities' (Aning and Lartey 2010: 16ff), bearing in mind that the Commission is the central platform of the debate. In its statement that investment in the immediate aftermath of conflict should be primarily focused on developing capacity so that societies are empowered to manage their own development, there is a strategic choice that demands a concrete institutional and policy follow-up.¹³

12 See also: International Peace Operations and Local Society, An Initiative of the Austrian Development Cooperation, http://www.entwicklung.at/uploads/media/Int_peace_operations_and_local_society_Sept2009_06.pdf

13 Senior Advisory Group to Guide Review of International Civilian Capacities, launched on 16 March 2010, PBC 65

Thirdly, and finally, reform of the UN Human Rights Council will shape UN performance and credibility in future years in this respect. General Assembly (GA) resolution 60/251, the founding mandate of 3 April 2006, foresees a reform process starting in late 2010. In relation to paragraph 138 (genocide, war crimes, ethnic cleansing and crimes against humanity) and the nascent regime of ‘responsibility to protect’ (R2P) in international law the reach and impact of the human rights system on PBSB will have to be explored thoroughly. Remarkably, SC resolutions did add to the now accepted interpretation of Article 39 of the UN Charter that gross and egregious human rights violations threaten (global) peace. Ten years on from the formative crisis in 1999 in the Western Balkans, they are now established reason for intervention. The ‘narrow but deep’ formula chosen by the UN-SG in early 2009¹⁴ opened up a new role for the UN in determining common standards for handling the elements of paragraph 138 by fixing objective criteria for R2P after having exhausted all other avenues.

The Human Rights Council (HRC) is ideally suited to be the forum for progress and to promote the normative approach of universal values. Enhancing the influence of human rights present in the framework of the Charter from the beginning will, nevertheless, partly depend on an adapted institutional architecture allowing for binding recommendations to the central operating body, the Security Council. The same is true for the Peacebuilding Commission. If consensus can be reached, around a strong and informed centre, on the UN’s acting under at least on the basis of a medium-term perspective, the Charter – still without amendment – would show ultimate flexibility and paramount guiding power. Given the paramount potential of human rights as the substantive promoter of human security it is the HRC where room for new conceptualisations in international law should be sought. At the same time, having witnessed the watering-down of ideas from the High-Level-Panel on Security, Challenges and Change, via the Pink report prepared for the 2005 World Summit to the 2005 outcome document itself as well as *vis-à-vis* the performance since 2006 (‘culture of resolutions’, special sessions, etc.), room for manoeuvre seems limited.

Looking at the Charter of the African Union and the respective optional protocols on gender or democracy, one has the impression that, normatively speaking, UN reform should in turn rather build on this new emerging peace and security architecture relying on massive capacity building in the area of civilian personnel (Birikorang 2010).

¹⁴ Implementing the Responsibility to Protect, A/63/677 as of 12 January 2009, at para 10 c).

Since increasing regionalisation of the organisation is at stake, the African Standby Force (ASF) seems to be a possible model for engagement which could be tested in the foreseeable future.

In the last half-decade the regional African organisations ECOWAS and SADC have also put emphasis on issues related to peace and security. ECOWAS runs a programme under the leadership of a special Commissioner for Peace and Security. SADC is guided by a Peace and Security protocol signed in 2001 in Malawi. A working group is installed as a comparatively small cell of action in this area.

Finally, we would like to point to the revision process of the Millennium Development Goals (MDGs) as set out in the reform summit in September 2010, the outcome document of which reflects international action in fragile situations. The security/development nexus as a truly innovative state-of-the-art element offered the opportunity to introduce the 3C approach and the interlinkages between peacebuilding and statebuilding (INCAF 2010) at the global level.

Possible entry points for PBSB

If we intend to improve mechanisms and interaction between partners and actors in favour of people affected by fragile situations, we should keep in mind the very purpose of any kind of reform process in a multi-stakeholder space, summarised by the Centre for International Policy Studies (CIPS) and the Norwegian Institute of International Affairs (NUPI) in three guiding priorities for sustainable peacebuilding: the need for a conceptual and operational model, the need for enhanced coherence as a critical factor for sustainability and the importance of local context and local ownership in ensuring sustainable peacebuilding and statebuilding. They are also very clear on consequences if the system fails to follow such guidelines:

Conceptual confusion leads to policy vagueness, duplication, omission and competition. It complicates resource mobilisation and causes budgetary confusion, and at the operational level it contributes to inefficiency and ineffectiveness, and thus ultimately to loss of impact and sustainability (de Coning 2010b, 12).

One major achievement of the ongoing reform processes will be to build upon and better incorporate the principles and aims of civil-military cooperation in PBSB strategies. That is why the primary leadership function of the Special Representative of the Secretary-General in the context of UN integrated missions should be to comprehensively facilitate a process that generates and maintains strategic

direction and operational coherence across the political, governance, development, economic and security dimensions of a PBSB process.

We argue that this 3C approach will foster interlinked statebuilding measures as well. The power and influence of the SRSG does not reside in the resources that he or she can directly bring to bear on a specific situation, but in the ability to muster and align the resources of a large number of agencies, donors and countries to support the peacebuilding effort in a given context. This type of leadership role implies that a person with skills, experience and a personality suited to multi-stakeholder mediation and negotiations are more likely to be a successful SRSG than someone who is used to top-down, auto-cratric, military, private sector or direct-control leadership styles. This perspective on the role of the SRSG has important implications for the way in which people are chosen and prepared for these positions, as well as for the ways in which support can be provided for this role, both at the United Nations and in the field (de Coning 2010a).

Apart from organisational questions, the Netherlands Institute of International Relations (Clingendael Institute 2009) recommends that PBSB policies should be planned and implemented so as to

- maximally involve leaders and citizens of the country concerned in assessment, decision-making and implementation of any activity that directly concerns them;
- work maximally through existing local and national, state and non-state, structures;
- prepare for long-term processes in which the nature of the activities to be undertaken changes as the process evolves.

The approach taken by the Danish Institute for International Studies, equally constructive in focusing on main challenges, is illustrative at this point (Engberg-Pedersen et al. 2008: 35):

From a perspective of external engagement in fragile situations, three significant distinctions can be made:

1. Intensification or reduction of social tensions and violent conflict
2. Low or high levels of policy formulation and implementation capacity
3. Existence or absence of a government in policy agreement with the international community.

Both research institutes stress the fact that in a PBSB scenario we have to acknowledge that inherent contradictions, with competing

imperatives facing the internal and external actors, constitute ‘vexing policy dilemmas’ that require trade-offs between multiple mandates, needs and priorities (Paris and Sisk 2008). A clear analysis of the dilemma reads as follows (Kurtenbach 2009, 9):

The high level of complexity and the volatility of developments on the ground confront donors and international development cooperation with some difficult decisions between:

- Short-term needs of stabilisation and long-term peacebuilding goals
- Local ownership and external agendas
- Peacebuilding agendas and other donor policies,

whereas Anten (2009) points to the underlying principal compatibility of PBSB strategies when correct sequencing and a rolling programming exercise is in place, a pragmatism we strongly support. The World Development Report 2011 will also address this decisive ‘sequencing and trade-offs’ approach in a separate chapter (WDR concept note 2010b).

Major policy goals following the Clingendael Institute’s report illustrate basically what choices have to be made and what effects have to be considered and consequently be dealt with during the peacebuilding review.

Entry points for the new integrated PBSB concept in UN reform processes require a thorough understanding of the basic ‘traps’ of PBSB. Six, arguably the main challenging trade-offs/traps, are described in the following.

1. The trap of ‘false inclusion’

When maximally involving leaders and citizens of the country concerned in the process, then at every stage this principle requires a choice. Elites may immediately be important for analysis and reconstruction of the political settlement; inclusive processes tend to enhance legitimacy in the long run. The challenge to negotiate a constitution so as to avoid becoming a catalyst for unconstitutional actors (spoilers) is considerable; there may be hegemonic controversy over regions and groupings and lack of visionary mediation and political leadership. Furthermore, newly constituted power-sharing arrangements may contribute towards perpetuating fragility. In this sense, it is for instance advisable that those who take part in transitional governments pursuing important and effective peacebuilding measures in criminal justice and efforts to end the

culture of impunity do not take part in democratic elections (Tolbert 2010). On the donors' side, therefore, the implementation of the 3C methodology by all actors involved seems crucial.

Swiss Development Cooperation's engagement in South Asia confirms that local ownership, community participation and a context-sensitive content analysis of the specific circumstances are key to successful programming (2006 Geneva Declaration on Armed Violence and Development / Basic Operational Guidelines (BOG) of the international working group on the peace process in Nepal since 2003). The World Development Report 2011 will also provide examples of fragile countries' and regions' programming assessments, namely Afghanistan, Bosnia and Herzegovina, Colombia, DRC, Haiti, Liberia, Nepal, Northern Ireland, Pakistan, Sri Lanka, West Bank and Gaza (WDR concept note 2010b: para 45).

2. The unintended impact of PKOs

Working through local and national structures is one aspect the current peacekeeping reform process is increasingly taking on board. In particular, international peace operations that clearly make an important contribution to stabilisation after conflicts should be designed to be more responsive to development goals and care more for local socio-economic needs and conditions (Vienna 3C Appeal 2010, principle 14). Peace operations bring significant resources into the local economy, which ideally may support socio-economic development (WDR concept note 2010b: para 52; Holt 2010). This certainly requires effective decentralisation, also from part of the UN administration.

By and large, these missions are significant contributors to the economies in which they deploy. How they and their personnel choose to acquire goods and services can make a real and early difference in the economic trajectory of a post-conflict state, during the so-called Golden 'hour' (first year) after major conflict ends, supplementing humanitarian aid and putting cash into the economy before a longer term development assistance or investment are engaged (Durch 2010).

The new UN Global Field Support Strategy 2010 already basically reflects this security/development juncture; it remains uncertain whether the Special Committee on Peacekeeping Operations (C34) will deal with this issue from 2011 onwards. Socio-economic potential is of course also a matter of allocation of financial means within the country's/region's envelope. If, as Aning and Lartey

(2010: 19) from the Kofi Annan International Peace Keeping Training Centre show, two thirds of the funds continue to go into Security Sector/System Reform (SSR) and not to youth employment or social services, for instance – with the serious political concern that ECOSOC becomes more important in the matter than the Security Council – then sustainability of PBSB will remain questionable.

3. The crucial role of NGOs in fragile contexts

The Danish Institute for International Studies (DIIS) further holds that it is of great importance for modes of external engagement whether a national government is in place at all and whether such a government is in overall policy agreement with the international community. In the latter case government-to-government cooperation will be appropriate; otherwise, for example in situations where clan leaders provide a certain degree of security, more subtle forms of support and sometimes compromise on human rights policies are recommended. In the scenario of a weak state, institutions working mainly through the government are no longer adequate, necessitating the adoption of a more bottom-up, people-centred approach to development (Paffenholz and Jütersonke 2008). This again leads to a human rights inspired model of human security close to the population concerned, providing certain criteria for policy trade-offs and allowing for more flexibility.

When authority is exercised in a manner that people accept and support, donors should build on this rather than go for new institutions in a situation of already high level of institutional instability. Donors must take the burden of adjusting to unfamiliar territory and not transfer this burden to people who are struggling to cope with fragility (Buur 2008).

A contextualised procedure may also be appropriate when working through non-governmental structures where state consolidation and statebuilding take place in a hostile environment. In such cases, where there are often social tensions between intra-societal groups and international actors, NGOs as well as traditional authorities definitely can play an important bridging role (Buur 2008). Kurtenbach (2009a) gives examples of how development cooperation interacts with peacebuilding agendas through a facilitating and enabling role in the empowerment of local capacities and preparation for implementation of peace accords in a series of countries, namely Liberia, Sierra Leone, Aceh, Nepal, El Salvador and Guatemala. It also seems advisable in the newly

born state of Southern Sudan (International Dialogue on PBSB 2010). NGO cooperation is crucial in those cases; otherwise, from an African perspective,

[...] peacebuilding becomes an event in post-conflict state-building rather than serving as process of building sustainable peace and development, thus perpetuating the state-centric tradition of peacebuilding which was always pervasive in the Cold War era (Aning and Lartey 2010: 9).

4. The time limit trap

The preparation of a shift to long-term processes poses another possible dilemma. All actors have to be aware of the non-linear evolution of the accompanying process and respect the ownership of the local population so as to model their way to sustainable political life (Vienna 3C Appeal, principle 1). A flexible approach of progressive joint analysis and programming aiming at decision-making focused on human security, to form a collective equipped with peaceful conflict management tools (resilient society), would contribute over a period of time to the overcoming of coherence limits in a transparent manner. By applying human security schemes, one would dispose of a regulative mechanism similar to human rights based approaches favouring weak parts of the post-war society vis-à-vis powerful groups.

A human rights framework thus puts issues such as politics and power relations, state accountability, state-society relations, and genuine participation at the centre of state-building efforts. A focus on vulnerable and excluded groups and the principles of universality, equality and non-discrimination, as well as participation and inclusion, are particularly relevant here (Menocal 2009a: 5)

This, of course, calls at least for holistic exit strategies to be prepared through a common coordination effort throughout all civilian components of a mission (Heary 2010).

5. The trap of doing it oneself

Finally, the tasks of restoring legitimacy and effectiveness of governance carry a seemingly predominant inconsistency. Viable co-habitation, speed and flexibility especially characterise peacebuilding as compared to statebuilding. Effectiveness sometimes runs counter to participation and accountability processes.

There is [...] recognition that although peacebuilding requires a long-term commitment, there is also a need for immediate and short term gains to solidify the peace, build confidence in the peace process and stimulate a vision of a better future (de Coning 2010b).

This leads Anten (2009) to conclude that ‘all peace-building tasks have to be carried out in such a way that they prepare state-building, and all state-building tasks have to be implemented in such a way that they structurally prevent a relapse into armed conflict’. Resolving conflicts between state and society by reforming the social contract represents a crucial objective of statebuilding and has been able to bridge differences with the concept of peacebuilding, Anten argues, since peacebuilding would basically also strive for structural resilient conflict-resolution mechanisms.

6. The regional add-on

None of these questions, especially the short-term/long-term contradiction, can be solved in isolation. Here, additionally, the regional dimension comes into play. Major successful efforts to build peace and settle conflicts in order to enable sound development processes in relation to natural resources were recently undertaken by African mediation teams, for instance in the case of Sudan. Underestimated in the first mandate of the Peacebuilding Commission, the regional dimension will have to be recognised and taken into account. So, for instance both ECOWAS and the PBC, sharing interests as key peacebuilding actors in the Manu River Region, will have to align their strategies.

To summarise, revision of UN reform processes might incorporate lessons learned through the following recommendations for missions’ leaders, anchored as focal points for enlarged peacebuilding:

- Focus on societal context with special attention to political settlements and genuine processes
- Focus on local market and capacity building as early driver of development by implementing a socio-economically sensitive approach, especially by PKOs
- An inclusive 3C approach open to NGOs and international actors as an enabling methodology in headquarters (planning phase and training) and on the ground
- Awareness of short/long-term trade-offs requiring rolling programming with all actors at stake

- Strengthening weak state institutions is a goal in itself and must be harmonised with the needs of the affected population (no parallel units)
- Think regionally when externally supporting internally-led PBSB.

Results of the synthesis lead back to the meta-purposes for a sustainable PBSB concept: regional integration, coherent action, local ownership, transformative impact and support of proper leadership as the new standard for UN action in fragile situations.¹⁵ Results of the current reform processes in the global framework of the United Nations will show if the time is ripe for innovation.

¹⁵ University of Innsbruck (Hilpold Peter, organiser), Die Unabhängigkeitserklärung des Kosovo – Das Gutachten des IGH vom 22. Juli 2010 und seine Auswirkungen auf das geltende Völkerrecht, 16 December 2010; International Dialogue on Peacebuilding and Statebuilding, Busan/Korea, 30 November /2 December 2011.

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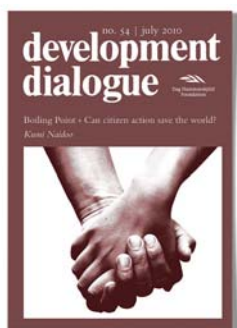
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Recent publications from the Dag Hammarskjöld Foundation

Development Dialogue no.54

Boiling point – Can citizen action save the world?



This volume offers the insights and reflections – both critical and self-critical – of a prominent civil society activist who has been engaged in local and global struggles for emancipation for over 30 years. On the basis of his own experiences in many different contexts Kumi Naidoo pleads for the involvement of ordinary people in the work for greater justice in this world. His point of departure is that civil society cannot be strengthened in a vacuum. Its achievements must be the result of actions by real people dealing with real problems.

The volume deals with several of today's most burning issues and also touches on sensitive matters within the global movements engaged in struggles for justice and equality. It does not avoid unpopular views on several issues, and advocates engagement with representatives of various agencies, including controversial ones such as faith-based organisations and the business community.

While being guided by a notion of non-violent forms of resistance, the author nonetheless promotes radical alternatives to the existing reproduction of societies as a necessity to meet the challenges in securing the survival of the human species and a decent life for all. His reflections add to the search for sustainable alternatives and the potential contributions that concerned citizen action can offer. This volume thereby also contributes to a better understanding of the potential that a so-called 'third United Nations' can offer to global governance issues currently at stake.

The Ethics of Dag Hammarskjöld



In 2009 the commemoration of Hammarskjöld's untimely death took for the first time complementary forms in Uppsala and at Voksenåsen. Hans Corell delivered a lecture on Hammarskjöld's pioneering understanding of his role as international civil servant on 18 September at the Dag Hammarskjöld Foundation in Uppsala. Inge Lønning presented the first Dag Hammarskjöld Lecture in Voksenåsen on 2 October, focusing on the late Secretary-General's ability to combine politics, morality and religion in his reflections on and approaches

to challenging matters. To underline the common agenda, Henning Melber was invited to add his comments to this presentation.

Since these three complementary speeches all shared an obvious engagement with dimensions of Hammarskjöld's political, ethical and moral philosophy, it was almost self-evident that we should decide upon their collective publication in a booklet. This not only reinforces respect for and recognition of the relevance of Hammarskjöld's thoughts in the context of our 21st century; it is also in a sense an early contribution to the special commemoration that will take place in 2011, when it will be 50 years since Hammarskjöld's death. A commemoration that is forward-looking in the sense that it invites us to tackle issues that are as crucial now as they were half a century ago.

We trust that the texts in this compilation will find a wide readership appreciating the importance of keeping alive the values and norms that Dag Hammarskjöld lived and died for.

Critical Currents no.8

Can we save true dialogue in an Age of Mistrust?

The encounter of Dag Hammarskjöld and Martin Buber

Dag Hammarskjöld and Martin Buber met three times between 1958 and 1961. They conferred about the possibilities of true dialogue in the political and cultural setting of a United Nations confronted by the Cold War and an atmosphere of general mistrust. Hammarskjöld observed 'Walls of Distrust' between the superpowers' representatives at the United Nations and in their propaganda-filled speeches. Buber described the social atmosphere created by nuclear threat, the Palestinian question and the Cold War as an 'Age of Mistrust'. Both were in search of a common understanding of the political blockages of the time, while their perspectives on re-structuring society differed.

What significance does their exchange have for today's problems? The Cold War has ended, but the atmosphere of mistrust prevails. The crucial questions of the Middle East remain unsolved. Only the concept of what constitutes the enemy has changed: fundamentalist terrorism has replaced the Soviet Union as a challenge for the West, while the West's answer to all challenges remains war – the opposite of dialogue, as both Buber and Hammarskjöld affirmed. True dialogue seems to be as lacking today as it was in Buber's and Hammarskjöld's times. However, remembering their discussions about the chances of true dialogue is simultaneously an inspiration in the quest for solutions in our own times.

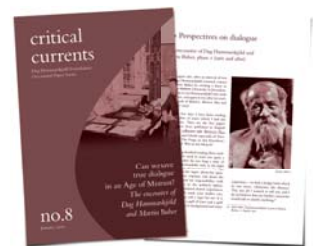


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'The United Nations was not created in order to bring us to heaven, but in order to save us from hell.' These words of the second Secretary-General of the United Nations, Dag Hammarskjöld, remain as valid today as they were half a century ago, shortly before his death in a plane crash in then Northern Rhodesia.

This issue of Development Dialogue is concerned with the continuing efforts to create normative global frameworks and implement them even-handedly. Following earlier volumes (nos. 50 and 53) it is the third in a series dealing with the challenges of how to take appropriate action in the face of genocide, mass violence and crimes against humanity.

It seeks at the same time to explore the relevance of such norms established by the United Nations and their impact on the global order.

Notions of responsibility, conscience and solidarity are among the values that guide the authors contributing to the volume. From various backgrounds they approach related matters of how to deal with the violation of fundamental rights and how best to protect people from forms of organised violence. They are all thereby seeking to contribute to the noble task of promoting and protecting human rights for all.

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