



## Session 5: Regional Courts and Commissions

### Background Paper for Panel on Regional Organs of Protection

Discussion Paper By  
Juan Méndez, Scholar-in-Residence at the Ford Foundation

Prepared for the Consultative Conference on International Criminal Justice  
September 9 – 11, 2009, United Nations Headquarters, New York

I.

Public opinion identifies the notion of “international justice” with the International Criminal Court and with the organs of individual criminal responsibility set up by the international community since the 1990s. This is understandable because in the last two decades there has been a marked shift from total impunity for mass atrocities to an attempt to prosecute at least the worst offenders. Between the Nuremberg and Tokyo tribunals in the mid-1940s and the creation of the International Criminal Tribunal for the Former Yugoslavia in 1992, *genocidaires*, mass murderers and war criminals could reasonably expect to be rewarded with impunity for their crimes. We are presently far from achieving consistency and universality in bringing them to justice but we are well on our way, and the world is justified in having great expectations for the ICC and other instruments of international criminal justice.

But the international architecture of redress for wrongs predates the ICTY and the ICC by several decades and consists of organs of very diverse composition, scope of functions and authority, and jurisprudential output. For purposes of our discussion we restrict the analysis to regional courts and commissions, but we are certainly conscious that a variety of universal treaty bodies and special procedures at the UN and subregional judicial organs in some parts of the world also perform important functions in the promotion and protection of human rights. The reason to restrict our discussion to regional courts and commissions is that they protect rights primarily through a judicial or quasi-judicial approach through their case complaint procedures; in that context they can truly be considered *organs of justice*.

Regional and treaty bodies are organs of *State responsibility* in the sense that their jurisdiction is limited to analyzing whether a State has breached its obligations under a specific human rights treaty and if so, to provide redress to the victim of the violation.<sup>1</sup> They are

---

<sup>1</sup> The International Court of Justice and several other judicial bodies also deal with State responsibility, but generally on issues of legality in inter-State relations, not on matters dealing with the rights of human persons.

emphatically not empowered to adjudicate claims against individuals for actions that in addition to being a human rights violation may constitute crimes as well. This feature – and also that organs of State responsibility are not empowered to consider abuses committed by non-State actors unless the State is complicit in some fashion -- is a major distinguishing factor between them and international criminal tribunals; but the scope of their respective action overlaps significantly, at least when it comes to human rights abuses that are widespread or systematic and particularly serious. For that reason it is appropriate to include them in an examination of the current and future state of a system of international justice.

II.

A preliminary question is the extent to which organs of individual criminal responsibility and of State responsibility constitute *a system*. The word suggests a purposeful design scheme or a level of coordination, neither of which are immediately visible in this picture. In fact, regional treaty bodies and international criminal tribunals were created at different times and for different historical reasons. Nevertheless, the body of jurisprudence that these organs produce has been remarkably free of contradiction or confrontation, even in areas of international law that are quite dynamic and constitute, to a large degree, a territory for experimentation and innovation. In any event, whether or not a system of international justice exists that includes all of these organs, it is worth exploring: a) whether a system of this sort should exist; b) how much coordination and exchange is either possible or desirable between both sets of institutions.

Relevant to this discussion are the limitations of State responsibility organs in their present stage of development. In the first place, huge geographic areas have no regional organs of human rights protection, and they are inhabited by more than half of the world's population. Efforts to fill that gap in Asia and the Pacific have proved to be very slow-moving, and those in the Arab world actually counterproductive because they tend to lower standards of human rights protection. Regional courts and commissions have been created with a sense that geographical proximity, common languages and historical heritage make for common values and understandings – and in fact it may be said that they have enjoyed more effectiveness and success when applied among States that are so bonded. But that fact can also constitute a hindrance to the effort to establish universal, widely recognized and accepted standards. International criminal justice mechanisms are also less than universal in coverage at the present stage, but that fact only highlights the infancy of the development of international law: lack of universality is a problem for both genres of organs, and it compounds the problem for both as well.

There is little evidence that treaty organs and international criminal courts coordinate their work in any form. Nevertheless, it is clear that courts of State responsibility do follow the jurisprudential developments of the international criminal courts in terms of definitions of genocide, war crimes and crimes against humanity, at least insofar as reading such precedents may be necessary to adopt decisions under their own jurisdiction. There is much more evidence that the regional courts and commissions and the universal treaty bodies do share

their respective experiences amongst themselves. In addition to citations in their decisions, the evidence for this horizontal level of coordination lies with the frequent meetings between these organs that have taken place over many years (in December 2009, the European Court will host a meeting of regional courts and commissions, co-organized by the International Center for Transitional Justice, to deal with remedies for mass violations of human rights, a topic that is closely aligned with the discussions in this conference).

A *system* of international justice can only be conceived of as including the tasks performed by domestic courts, and especially the highest courts in each State and/or those entrusted with constitutional adjudication. This is because, with respect to State responsibility, domestic courts are called upon to be the primary source by which treaty obligations are given effect, especially when those treaty obligations create rights for individuals and collectivities that are ultimately enforced in the domestic jurisdiction. But that integration between domestic and international courts is also at the core of the concept of *complementarity* – both in the negative and positive sense – that undergirds the structure created by the Rome Statute. Even in the case of *ad hoc* international courts (where complementarity is not an operating principle), the interaction of the ICTY and ICTR with domestic courts in the Former Yugoslavia and Rwanda respectively constitutes effective coordination on devolution of jurisdiction for pending cases, on sharing of evidence for new cases, and more generally with respect to larger legacy issues.

Coordination between domestic courts and organs of State responsibility is far from ideal at this stage, but it is nevertheless evident in the many ways in which high courts increasingly cite the jurisprudence of the European and Inter-American Court when deciding cases that involve rights under the European or American Conventions on human rights. It is encouraging that this trend (which has been noticeable in Europe for a long time) is now very much a part of the picture in countries like Colombia, Peru, Chile and Argentina. Courts that are open to being guided by the rationale espoused by regional courts in well-reasoned cases, are also likely to follow the guidance of the international criminal courts when it comes to overcoming factors of impunity, as well as to affording the most exacting guarantees of due process and fair trial to the accused.

III.

Regional treaty organs have case complaint jurisdiction over a broad range of human rights, certainly not limited to those the violation of which form the jurisdiction of the ICC and other international criminal courts. Human rights treaties do not distinguish between violations committed singly or massively, nor do they establish a hierarchy of gravity between the violations of one right or the other. Nevertheless, a certain scale of seriousness is implicit in the distinction that treaties make between rights that are derogable under states of emergency and those that are non-derogable even under those circumstances. International human rights law, however, has developed the notion of *gross and consistent patterns of human rights violations*, originally in Resolution 1503 of the old Commission on Human Rights of the United

Nations for the purpose of creating a high threshold for consideration of a State's human rights performance by that Commission.

The notion of gross and consistent violations is undoubtedly present in the jurisprudence of regional courts and commissions when those bodies need to determine the appropriate remedy for the abuse for which a State has been found responsible. From *Velásquez Rodríguez v Honduras*,<sup>2</sup> the question of whether the disappearance of a victim was part and parcel of a systematic or widespread pattern of similar violations was held crucial to the determination of the remedies imposed on the State. In *X and Y v The Netherlands* the European Court established that the rape of a mentally handicapped person required criminal prosecution of the culprit and could not be settled with monetary reparations.<sup>3</sup> The obligation to investigate disappearances is present in *Kurt v Turkey*<sup>4</sup> and the insufficiency of monetary reparations appears also in *Akdivar v Turkey*<sup>5</sup> when it comes to systematic destruction of homes in counter-insurgency campaigns. The European Court has established the State's obligation to investigate and prosecute as the counterpart of the victim's right to a remedy in several cases against Turkey.<sup>6</sup> For its part, the Inter-American Court found the State responsible for the death of a teenager in police custody in the aftermath of disturbances during a rock concert and established an obligation to investigate and prosecute it, but – contrary to its findings in other cases -- the Court did not categorize the case as a crime against humanity nor did it determine that the event was part of a pattern of violations.<sup>7</sup>

An important item to discuss is whether the notion of gross and consistent violations is equivalent to the definition of crimes against humanity contained in the Rome Statute, especially since the latter requires that the abuses are committed in a *widespread or systematic* manner.<sup>8</sup>

#### IV.

The regional courts and universal treaty bodies have built an impressive body of precedents regarding the obligation to investigate, prosecute and punish serious violations of the rights to life, to liberty and to physical integrity, especially when those violations are part of a widespread or systematic pattern. These decisions have been arrived at in the context of different factors of impunity, whether *de facto* or *de jure*. Amnesty for these kinds of crimes has been regularly declared to be in violation of treaty obligations, especially if it is granted unconditionally and by its terms it precludes any inquiry into the events – the so-called *blanket amnesty*. Amnesties that require some action from the beneficiary, such as the South African immunity from prosecution in exchange for truthful confession, have not been considered yet

---

<sup>2</sup> Inter-American Court of Human Rights, 1988.

<sup>3</sup> 1985.

<sup>4</sup> 1998

<sup>5</sup> 1996

<sup>6</sup> *Aksoy* (1996), *Aydin* (1997), *Kaya* (1998) and *Orhan* (2002).

<sup>7</sup> *Bulacio v Argentina*, 2003

<sup>8</sup> Art. 7.1, Rome Statute of the International Criminal Court.

by an international treaty body in a case complaint procedure. The Inter-American Court has gone far beyond the mere declaration of a treaty-based responsibility: in *Barrios Altos* it demanded that Peru deprive the two amnesties passed by the Fujimori-dominated Congress of any legal effect in the domestic jurisdiction.<sup>9</sup> In *Almonacid Arellano v Chile*<sup>10</sup> and in several cases in recent years the Inter-American Court has insisted that States must remove any and all obstacles to effective investigations and eventual prosecutions, including statutes of limitations, presidential pardons, fraudulent *res judicata*, negligence of prosecutors, interference with investigations by military or police officers, threats to witnesses and victims, etc. In *La Cantuta v Peru*<sup>11</sup>, the Inter-American Court even stated that other countries were under an obligation to extradite former President Alberto Fujimori so that he could be tried in Peru, which the Supreme Court of Chile proceeded to do, resulting earlier this year in Fujimori's historic conviction by a panel of the Peruvian Supreme Court, for the massacres in La Cantuta and Barrios Altos among other crimes.

In Europe, the Court has repeatedly sustained legislative and prosecutorial efforts to lift restrictions standing in the way of investigations into the crimes of the Nazi or Stalinist past.<sup>12</sup>

The African Commission on Human and People's Rights has made findings on the obligation to investigate and prosecute cases of grave violations of the African Charter.<sup>13</sup> It has also determined what constitutes a fair trial and the obligations of a State when that standard is violated.<sup>14</sup>

The Inter-American Court has hinted at a disposition to consider not just the obligation to investigate and prosecute, but whether the punishment ultimately meted out to mass murderers is proportional to the severity of their crimes.<sup>15</sup> It is true that this statement has been made in *dicta* and not as part of the resolutions and orders to the government, but the same Court is on record stating that every part of its decisions is binding on the parties to the litigation.

All of these decisions contribute mightily to the emerging norms in international law that are also at the basis of the Rome Statute. In fact, in *La Rochela* the Court was analyzing a statutory scheme (the Justice and Peace Act) designed by the Colombian government to facilitate the demobilization of paramilitary forces, a scheme that was explicitly and consciously created in contemplation of the need to avoid the jurisdiction of the ICC under the Rome Statute. The Inter-American Court did not decide whether the Justice and Peace Act is on its face compatible with the American Convention (or, for that matter, with the Rome Statute – for

---

<sup>9</sup> 2001.

<sup>10</sup> 2006.

<sup>11</sup> 2006.

<sup>12</sup> *Papon v France*, 2002. The extinct European Commission had reached a similar conclusion in *Touvier v France*, 1997. More recently, the European Court has upheld the same principle in *Kononov v Latvia*, 2008 (referral to the Grand Chamber pending).

<sup>13</sup> See *Social and Economic Rights Center v Nigeria* (2001) and *African Association of Malawi v Mauritania* (2000)

<sup>14</sup> In *CLO v Nigeria* (1999) and in *Avocats sans Frontieres v Burundi* (2000).

<sup>15</sup> In *La Rochela v Colombia*, 2007, see especially para.# 196.

which the Inter-American Court would not have jurisdiction) but apparently reserved the matter to be analyzed on the statute *as applied*. If the Inter-American Court decides in the future that the Justice and Peace Law is applied in violation of the American Convention, would that have bearing on the issue of complementarity for purposes of attaching ICC jurisdiction to prosecute certain suspects?

To be sure, the regional courts and treaty bodies have dealt with other State obligations regarding legacies of massive human rights violations, namely the obligation to seek and disclose the truth, to offer reparations to victims, and to reform State institutions so that they are no longer the instrument of abuse. To a great extent, the protection organs have also made it clear that those obligations cannot be understood as alternatives to the obligation to investigate, prosecute and punish those responsible. But it is also quite clear that, in practice, it will never be possible to investigate each event and punish every culprit, not even with the joint efforts of domestic courts, of international tribunals or of courts exercising universal jurisdiction. Nevertheless, the degree to which a State complies with its obligations to justice, to truth, to reparations and to institutional reform could be, in a given case, an important set of considerations in establishing fundamental compliance with the complementarity principle.

Regional and universal treaty bodies have also developed experience with protection of victims and witnesses, especially through their ability to issue interim measures (provisional or precautionary measures, depending on the organ). The effectiveness and worth of such measures vary widely, because to a large extent they depend on the voluntary compliance of States; but they still represent a body of precedent that could be usefully examined for purposes of devising effective ways to protect investigators, victims and witnesses in international criminal cases, albeit bearing in mind that the stakes for persons vulnerable to threats or attack will always be greater in criminal cases than in cases where a State's responsibilities are under examination.

V.

Even if cooperation and coordination between treaty bodies and international criminal tribunals is deemed desirable, it should be understood that effective cooperation will depend on maintaining the essential difference between each type of organ of international justice. International criminal tribunals should never overstep their boundaries and condemn States for the abuses committed by individuals; likewise, organs whose jurisdiction is limited to State responsibility should not engage in determinations of liability of individuals. In this sense, the idea that has been floated in the African Union, of granting jurisdiction on individual criminal responsibility to the newly-created African Court on Human and People's Rights is a worrisome development, especially since the initiative would require a political decision to trigger such responsibility. It does not take much imagination to see how subjecting a Court to determinations by States regarding their jurisdiction will have a very negative effect over its real or perceived independence and impartiality as a court of law.

VI.

As the ICC develops and grows, it may well be that its specialization in criminal law and procedure will take it farther apart from the work of regional treaty bodies. The latter will grow in their own path and will probably become highly specialized in discerning the nature and scope of a State's obligations under human rights treaties. But in any event it is very unlikely that those paths will ever result in a collision course. For now at least, it is very clear that treaty bodies are reinforcing the emerging norms in international law that mass atrocities demand a certain kind of remedy or response from the State, and those remedies are wholly consistent with the principles of international criminal justice.

In any event, it is worth remembering that the international community's evolution toward international criminal justice owes a lot to the societal experiences of countries making transitions from dictatorship to democracy or from violent conflict to peace, especially as those transitions have reckoned with heavy legacies of mass atrocities. For their part, those societies received great support – legal, but also moral and political – from the reasoned judgments of treaty bodies analyzing and explaining the content of human rights obligations in international law. The creation of the *ad hoc* and mixed courts and the discussions leading to the Rome Statute for an ICC were clearly influenced by transitional experiences and, more precisely, by the rapid development in the international law of human rights that is reflected in the decisions and views of treaty organs that have taken place in the last quarter century. Those developments contributed to a resurgence of ideas dating back to the end of World War II, to the effect that genocide, war crimes and crimes against humanity are of such enormity that they cannot go unpunished. In that sense, both streams of developments in international law reinforced each other at the historical junctures of the last 25 years. It should be possible – and necessary – to continue providing impulse to both streams in order to put an end to impunity for mass atrocities in our lifetime.