

Critical Reflection

following KOFF Dealing with the Past Roundtable

Bringing Justice to Victims of International Crimes, with Philip Grant from TRIAL

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'Bringing justice to victims of international crimes' re-launched the KOFF Dealing with the Past Roundtables, a series which will explore different aspects and components of addressing the legacy of gross human rights violations in a comprehensive and inclusive manner. A focus on victims and the role of international justice in the fight against impunity is a particularly apposite way in which to re-launch this series of roundtables for it highlights a series of critical debates and tensions in transitional justice and peacebuilding: the responsibility and agency of different actors; the importance of power, knowledge and politics; the balance between broad participation and the dominance of particular norms; the universal (in terms of norm development, universal jurisdiction and 'tool kits') and the particular (in terms of cases, contexts and contingency); and the balance between different processes and mechanisms for dealing with the past.

The roundtable focused on a presentation by Philip Grant, the Director of TRIAL (Swiss Association against Impunity) and was attended by representatives of Swiss NGOs, and the Swiss Federal authorities. Philip Grant's presentation highlighted how TRIAL aims to use different legal mechanisms to bring justice to the victims of genocide, crimes against humanity, war crimes, torture and enforced disappearances. This includes bringing cases before Human Rights bodies of the United Nations and regional mechanisms. Active in Bosnia-Herzegovina, Algeria, Libya, Nepal, Burundi and Kenya, TRIAL's work exemplifies an anti-impunity, victim-centred and legal approach to questions of transitional justice. The roundtable discussion moved between the specific experiences of TRIAL and how such experiences can be understood in terms of broader questions and debates regarding anti-impunity.

An anti-impunity stance is based not only in a belief that failure to punish is itself an injustice¹, but also that prosecution is an instrument for ensuring deterrence against future crimes². Not only is it

¹ Pensky, M. (2008). Amnesty on Trial: Impunity, Accountability, and the Norms of International Law. *Ethics and Global Politics* 1(1-2): 1-40, p.9.

² Rothe, D.L. (2010). Shedding the Blanket of Immunity: A Commentary on the Global Principle of Ending Impunity, Realpolitik, and Legal Precedent. *Criminal Law and Social Change* 53:397-412.

a legal norm, but it is also a political norm, “asserting the rights of a more confident international normative consensus regarding the minimum standards of criminal justice that members in good standing of the international community are expected to adhere to”³. TRIAL’s work supports the development of such a norm, established as it was to use the Swiss legal system to help victims of international crimes bring complaints against perpetrators present in Switzerland. However, the experiences of TRIAL reflect the complexity and contestation which pervades the development and practice of an anti-impunity consensus, and which is addressed in scholarship from transitional justice, legal studies and peace studies.

The literature on impunity has no clear answer on its effectiveness as either an instrument of justice or as a deterrent. In theory, the successful prosecution of perpetrators of gross human rights violations forms part of a transitional justice ‘toolbox’ and ensures a just outcome for victims who, as a result, may also be able to secure their right to know (for example, what happened to loved ones), the right to reparations, and their right to justice through holding those who have harmed them accountable. These are complex and contested processes however, complicated by debates over the practice and reality of transitional justice. Orentlicher⁴, for example, suggests that international legal norms against impunity have grown increasingly strong which has itself proved a powerful antidote to impunity, whilst Rothe is less optimistic, citing two key issues: the realpolitik of seeking to end head of state immunity whereby international diplomatic relations, and resistance by heads of state lead to lack of political will to address this issue fully; and the weakness of the Pinochet ‘effect’ (i.e. the fallout from the UK arrest of the former Chilean dictator in 1998)⁵. Falks is even more damning, suggesting that “The promise of ‘universal jurisdiction’ has titillated the imagination of liberal legalists, but it currently lacks the capacity to overcome the insulation of international crimes of state from procedures of legal accountability except in some rare special instances”⁶. At the roundtable this issue was discussed at length, with the relative importance of high profile cases such as that against Pinochet, and the implications of chasing ‘big fish’ for the strengthening or weakening of universal jurisdiction. It became clear as the debate developed that the intersection between law and politics was an important dynamic.

Politics plays an important role in influencing the application of law, particularly in the case of international law and the fight against impunity. According to Rothe, when questions are raised regarding the issue of certainty of international criminal law, its general deterrence effect could be-

³ Pensky 2008 p. 15.

⁴ Orentlicher, D. F. (2007). ‘Settling Accounts’ Revisited> Reconciling Global Norms with Local Agency. *The International Journal of Transitional Justice* 1:10-22.

⁵ Rothe 2010.

⁶ Falks, R. (2008). The Power of Rights and the Rights of Power: What Future for Human Rights? *Ethics and Global Politics* 1(1-2): 81-96, p.88.

come less effective⁷. The certainty of the universal applicability of international law can be challenged by lack of political will, selective enforcement, a doctrine of immunity that has only in part been revised at the international level⁸, the presence of domestic amnesties⁹, and the creation of 'zones of impunity' by a (lack of) state will to sign and ratify international law agreements¹⁰. Here we see a 'tug of war' between universal norms and state-sovereignty, or as Pensky states: "Domestic amnesties for crimes, and the effort to prohibit or discourage them, are at heart part of a political debate about the status and extent of traditional nation-state sovereignty in a rapidly globalizing political order"¹¹. Dominic Zaum has written more broadly of this 'sovereignty paradox' whereby the ability of a state to rightfully claim its sovereignty is tested against its ability to fulfil the requirements of emerging international norms such as those which relate to human rights¹². However, Falk contests the weakening of the power of state sovereignty in the face of international law and international norms by observing that "rights of power prevail over the power of rights almost always when strategic interests of major state actors are at stake, and this is true whether the orientation toward world politics reflects a realist or a liberal internationalist persuasion"¹³.

These debates were reflected in the roundtable discussion with reference to high profile figures such as George W. Bush, and of the careful balancing act between political negotiations for peace and the demands of justice. As some participants reflected, there may be a moral case for pursuing the prosecution of a particular suspected perpetrator, while on the political level certain big player may need to be at the table and taking part in peace negotiations and diplomatic efforts. At this point in the discussion we reflected on how universal jurisdiction is in any case not just about several big cases, but large numbers of open cases in different country contexts which have not yet been pursued. The important questions to ask are: what should states do when foreign dignitaries suspected of crimes against humanity visit in an official capacity? Should individuals who are central to peace processes receive *de facto* immunity while negotiations continue? Can the prosecution of some 'big fish' actually hinder the concept and practice of universal jurisdiction?

It is worth reflecting on the application and practice of universal norms (putting aside the question of how strongly universalisable they are at this current moment) and their relationship to context

⁷ Rothe 2010 p.399.

⁸ Rothe 2010 p.400; Arrest Warrant Case of the International Criminal Court <http://www.icj-cij.org/docket/files/121/8126.pdf>

⁹ Pensky 2008 p.6.

¹⁰ Sriram, C. L. and Ross, A. (2007). Geographies of Crime and Justice: Contemporary Transitional Justice and the Creation of 'Zones of Impunity'. *The International Journal of Transitional Justice* 1: 45-65.

¹¹ Pensky 2008 p.1.

¹² Zaum, D. (2007). *The Sovereignty Paradox: The Norms and Politics of International Statebuilding*. Oxford: Oxford University Press.

¹³ Falks, R 2008 pp.81-82.

specific, particular experiences of gross human rights violations. Sriram and Ross reflect that “The violence of human rights abuse always happens locally. Yet these acts and experiences of violence reverberate in national, regional and international politics and jurisdictions”¹⁴. Crettol and La Rosa¹⁵ take the example of missing persons and illuminate the ways in which victims’ right to know what has happened to their loved ones may not always coincide with the measures taken through criminal proceedings in the fight against impunity. Perpetrators may be reluctant to provide information if they are not given immunity, whilst even a full account of the criminal proceedings may not be enough to satisfy the needs of the victims in this regard. Proponents of amnesties push the inadequacy of the law argument further by claiming that amnesties may help to reduce violence and create a climate favourable to reconciliation¹⁶. Indeed, Mallinder argues that conditional amnesties (by which she means individualised amnesties which have democratic approval and can promote peace and reconciliation) in conjunction with other transitional justice mechanisms can contribute to the guaranteeing of victims’ rights¹⁷. Orentlicher, however, cautions against the use of ‘reconciliation’ as a watchword for impunity¹⁸, reminding us of the need to remain engaged in an ongoing dialogue about what counts as justice, and to remain aware of the need for case specific responses. Recent work by Olsen, Payne and Reiter proposes a ‘justice balance’ approach whereby transitional justice mechanisms such as truth commissions, prosecutions and amnesties can work together to improve human rights. In reference to amnesties in particular, their review of twenty-seven cases of truth commissions finds that amnesties will only lead to positive results on human rights when accompanying trials. This would support a partial amnesty, rather than a blanket amnesty approach¹⁹. Reflections on the Lomé Amnesty Decision of the Special Court for Sierra Leone by Meisenberg seems to concur with this kind of approach, arguing that a balance between impunity and facilitating a peaceful transition needs to be struck, meaning that limited and qualified amnesties must be seriously considered²⁰.

If we think of anti-impunity actions in the broader framework of dealing with the past, we can of course suggest ways in which anti-impunity can contribute to the right to know, the right to reparations, the right to justice and the guarantee of non-recurrence. Despite the debates briefly outlined above it is clear to see how anti-impunity, were it to be universalisable, responsive to victims’ needs and supported by strong political will, could be said to contribute to dealing with the past.

¹⁴ Sriram and Ross 2007 p.47.

¹⁵ Crettol, M. and La Rosa A.M. (2006). The Missing and Transitional Justice: the Right to Know and the Fight Against Impunity. *International Review of the Red Cross* 88(862): 355-362.

¹⁶ Mallinder, L. (2007). Can Amnesties and International Justice be Reconciled? *The International Journal of Transitional Justice* 1:208-230, p.208.

¹⁷ Mallinder 2007 p.210.

¹⁸ Orentlicher 2007 p.13.

¹⁹ Olsen, T.D., Payne, L.A. and Reiter, A.G. (2010). When Truth Commissions Improve Human Rights. *The International Journal of Transitional Justice* 4:457-476; p.470.

²⁰ Meisenberg, S.M. (2004). Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone. *International Review of the Cross* 86(856):837-851.

Beyond these links we can also see what Pensky refers to as the expressivist and communicative function of the law²¹. The law, when applied in particular ways, can signal to citizens that there is a legitimate set of norms that govern behaviour and that all are equal before them. This general preventative effect of the criminal law also relates to a consensus over the mode of social life²² and can be strengthened in ways which link to a transition towards democratic life²³, a "kind of public catechism of democratic virtues"²⁴. Such a claim also needs to consider the possibility that the needs of individuals for justice do not always complement the needs of whole societies for peace²⁵. How we might define justice, what different definitions might be considered legitimate, and which actors should be engaged in its advancement are complicated questions which still require sustained attention from both academic and practitioner communities. We might also wish to reflect on the moment of amnesty or prosecution, and how it does not stand separate from longer-term societal processes. The work of Backer on the decline in popular support for amnesties awarded by the South African Truth and Reconciliation Commission²⁶ illustrates that whether amnesties or prosecutions are pursued, the continued actions of states, processes of truth-telling and material situations of socio-economic inequality may re-shape the landscape on which justice decisions are made, understood and contested.

Further information:

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²¹ Pensky 2008 p.20.

²² Pensky 2008 p.21.

²³ Orentlicher 2007 p.14.

²⁴ Pensky 2008 p.24.

²⁵ Mallinder 2007 p.219.

²⁶ Backer, D. (2010). Watching a Bargain Unravel? A Panel Study of Victims' Attitudes about Transitional Justice in Cape Town, South Africa. *The International Journal of Transitional Justice* 4:443-456.

swisspeace

swisspeace is a practice-oriented peace research institute. It carries out research on violent conflicts and their peaceful transformation. The Foundation aims to build up Swiss and international organizations' civilian peacebuilding capacities by providing trainings, space for networking and exchange of experiences. It also shapes political and academic discourses on peace policy issues at the national and international level through publications, workshops and conferences. swisspeace therefore promotes knowledge transfer between researchers and practitioners. swisspeace was founded in 1988 as the Swiss Peace Foundation in order to promote independent peace research in Switzerland. Today the Foundation employs more than 40 staff members. Its most important donors are the Swiss Federal Department of Foreign Affairs, the Swiss National Science Foundation and the United Nations.

Center for Peacebuilding (KOFF)

The Center of Peacebuilding (KOFF) of the Swiss Peace Foundation swisspeace was founded in 2001 and is funded by the Swiss Federal Department of Foreign Affairs (FDFA) and 45 Swiss non-governmental organizations. The center's objective is to strengthen Swiss actors' capacities in civilian peacebuilding by providing information, training and consultancy services. KOFF acts as a networking platform fostering policy dialogue and processes of common learning through roundtables and workshops.

Critical reflections

In its *critical reflection* publications, swisspeace and its guest speakers critically reflect on topics addressed at roundtables. They both make a note of the arguments put forward during the roundtables and carry on the discussion in order to encourage further debates.