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Report

Latin America – Africa network of human rights and criminal law practitioners

Wednesday 18 – Friday 20 May 2022 | WP2013

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Background

For the last decades, Latin America has been the region leading the investigation and prosecution, at a national level, of international crimes and mass human rights violations by autocratic and military regimes that were, not long ago, widespread among these countries. Guernica 37 Group (Guernica Centre for International Justice and Guernica Chambers) wants to leverage the current socio-political context that has led to a momentum of ground-breaking apartheid-related judicial proceedings in South Africa and connect these regions similarly immersed in accountability and justice seeking national processes.

The proposal under discussion at the conference is to create a network of practitioners and experts on the field of international criminal law and human rights that have been actively practicing law in Latin America and in Africa and that are taking part in said national proceedings. The intended project builds on the assumption that the experience that Latin American human rights practitioners have gathered among the years and gained after every case litigated and every investigation carried out is not only useful, but also key for the pioneering national accountability proceedings that are prospering in South Africa; and beginning in other African nations.

Grounded in South-South collaboration perspective, the activities include experience and knowledge exchange between key African countries, and Latin American practitioners, sharing different approaches on legal strategies regarding the investigation of the mentioned crimes, and the development of a epistemic community rooted in the need of distributing national information and materials useful for practitioners in this field.

DAY ONE SESSION ONE - SUMMARY

Transitional justice processes in Africa

1. Substantive discussions began with an applied analysis of the South African transitional justice process, which has been widely heralded as a success.
2. It was noted that a key feature of the South African transition was that it was brought about by a settlement negotiated from 1990 to 1994, rather than through electoral defeat or the disposition of a repressive regime. This allowed the South African process to be governed and directed by legal standards which set out inter alia the conditions under which the new constitution could be adopted and the fundamental constitutional principles to be adopted.
3. This ‘bridging’ of legal standards and fundamental rights is laid out in the epilogue of the interim constitution, the last section of which refers to the constitution as a historic bridge from strife and injustice, and as a tool to achieve peace, reconciliation, and the reconstruction of society.

4. Reconciliation and reconstruction, however, required the granting of amnesty for acts and omissions associated with political objectives and during conflict. Predictably, this was a contagious issue, the resolution of which required the establishment of a Truth and Reconciliation Commission, the refusal of the apartheid Regime's request for blanket measures, and the establishment of equitable, non-discriminatory measures for those who confessed to acts associated with political objectives and conflict, including those involved in defending and challenging South African apartheid; those who did not confess were agreed to be capable of prosecution.

5. Of those 7,500 persons that applied for amnesty, 1500 were successful, with 300 individuals being recommended to Parliament by the TRC for prosecution. This gave rise to further controversy as to why so few individuals were prosecuted.

6. Discussions raised that it was possible that there was some reluctance to prosecute those that had been involved in the liberation struggle, complemented by the fact that those with influence in apartheid security establishments were reluctant to see more prosecutions, and that the then President felt that the country needed to move on and begin reconciliation.

7. To some extent, this reluctance started a chilling effect on further prosecutions; whilst there is some impetus to do so now, those efforts have been severely undermined by issues of state capture and corruption, which have begun to take an increasing amount of attention.

8. Rather than capacity, this now represents one of the largest barriers to revitalising South African prosecutorial efforts: how to ensure that prosecutorial authorities ensure real factual and legal independence and rebuild their credibility as a rule of law institution.

9. Practitioners from Sierra Leone noted that regardless of their perceived necessity, their experience has been that the adoption of amnesties does not allow the societal wounds caused by international crimes to heal, as the sense of bitterness and division continues. It was for this reason, for example, that prosecutorial efforts in Sierra Leone refused amnesty for offences categorised as war crimes or crimes against humanity, and also why the Special Tribunal for Sierra Leone ("SCSL") targeted all warring factions, responsible for international crimes in Sierra Leone.

10. Whilst the SCSL may have focussed on those with the greatest responsibility in order to bring them to account for their crimes, the result of this focus on equity is that Sierra Leone does not harbour that same bitterness that might otherwise be expected, as each and every group, regardless or affiliation, can point to the fact that justice had been done.

11. Nigerian practitioners willingly pointed to the Nigerian transitional justice process as a 'case study of a transitional justice process that had not fulfilled its potential. Mass trials for crimes committed by the Boko Haram Insurgency were taken on very speedily in 2018-2019 so as to prevent referral to ICC. In doing so, they faced significant limitations, including, inter alia:

    a) insufficient prosecutors or judges, with only two or three judges listening to hundreds of cases over the course of two weeks;

    b) issues of public access; and

    c) many suspects being charged only with the lowest crime in the Terrorism Act (belonging to terrorist organisation), which was seen by many as inappropriate and inequitable.

12. As a result, rather than contributing to societal reconciliation, the trials led to a cycle of stakeholders being dissatisfied with the justice system, which was seen as a hollow attempt to avoid adjudication in The Hague.

13. What is more, after the trials the government established a reformation and re-orientation programme for convicted persons, encouraging demonstrations of ‘repentance’ in order to permit their release. These programmes, however, were largely rejected by local communities, who will not allow convicted individuals to reintegrate. As a result, those engaging in reformation and re-orientation programmes find themselves in legal and actual ‘limbo’, which in turn is serving only to drive them back to the bush and Boko Haram.

Transitional justice processes in Latin America

14. Moving to transitional justice processes in Latin America, discussion highlighted that there had been several waves of prosecutions in the region in respect of past violations, and that recent periods have seen a significant change in its capacity to conduct prosecutions for international cries generally.

15. Three regional moments of change were highlighted in particular.

16. The first was largely characterised by the challenge of simply getting cases into court, as many States negotiated their transitional justice processes through the use of amnesty laws. With some exceptions (e.g., Guatemala, which had an exception for international crimes) these amnesty laws were overwhelmingly ‘blanket’ in nature, covering all persons and crimes, creating further challenges around the principles of legality.

17. Although effectively addressing these challenges took decades, in many (if not all) places in the region, amnesty laws were nullified and/or set aside, and proper prosecutorial efforts could begin.

18. Having addressed the issue of accessing the court per se, the second moment of change then consisted primarily of the issue(s) created by the massive capacity and organisational demand placed on the Courts through the fresh influx of potentially hundreds of thousands of cases.

19. Creative solutions had to be found to solve these issues, including by shifting from a ‘case by case’ to a more systemic way of thinking capable of creating a proper, evidentially supported crime base.

20. One of the primary ways in which this was achieved was the establishment of specific units capable of building factually and evidentially complex war crimes trials and organising them into more identifiable and manageable crime bases. In Argentina, for example, these units organised numerous otherwise disparate cases into genocide trial(s), which allowed prosecutorial authorities to show multiple fact patterns and modes of liability through one trial.

21. The use of victims has also been instrumental (as even the most diligent prosecutor cannot do everything and must make room for victims to participate), as has the effective instrumentalization of both universal and domestic jurisdiction where one faces too many challenges. Having that interplay between the two has been really important.

22. Having dealt with these initial two stages, we have now reached the third moment of change, which consists of the issue of how to punish perpetrators (particularly in the context of criminal prosecutions): conditional amnesty? Suspended, reduced, or non-custodial sentences? Restorative or retributive justice?

23. In this third stage, we might also consider the possibility of a fourth, in which it becomes necessary to conceptualise and address the need to tackle the issues of State/private sector capture and corruption that often serves to create or cement the environment in which these violations, and impunity for them, become possible.

24. Chile provided a useful example of the experiences relayed in relation to Latin America, Chilean practitioners added that the transitional justice situation in Chile differed from that in South Africa at the end of apartheid.

25. When Chile suddenly transformed from a democratic republic to a dictatorship, it was noted that the military regime usurped all available political power, but found that in many cases it needed to resort to military justice to defeat its opponents. Impunity for these crimes was all but guaranteed by that fact that the judiciary at the time largely believed what was said to them, whilst the government also operated on the presumption that any transitional justice process would have to involve extremely broad, blanket amnesties.

26. Progressively, however, these issues were resolved by the application of international principles, as military tribunals refused to apply amnesties, and Chilean authorities began to properly investigate and prosecute international crimes, including Pinochet and two other members of the military junta, alongside other members of various agencies. To be sure, judges retained scepticism regarding the propriety or possibility or possibility of prosecutions for international crimes, and trust in the judiciary remains low.

27. Moving on from Chile, discussion touched upon the role of the Inter American Court of Human Rights ("IACtHR") in Latin America, which was noted to have been fundamental in setting out the parameters of what amnesties can and cannot do. Particularly important in this regard has been the way in which the decisions of the IACtHR are incorporated into national legal systems in Latin America, many of which afford direct applicability to its jurisprudence.

DAY TWO SESSION 1 – SUMMARY

28. Day two began with a discussion on the role of international cooperation in tackling impunity; this focus was noted to be increasingly important when international cooperation on criminal matters is floundering at a time when international crime is flourishing and the rule of law is being stress tested in unprecedented ways, whilst international cooperation on criminal matters is disjointed and increasingly reactive.

29. Discussion highlighted that, for the most part, the reasons for this reactivity are political, not legal, meaning that the role of civil society will become increasingly vital in the coming years as political will continues to fluctuate.

30. Three scenarios were then highlighted as possibilities in the next few years.

31. First, it is possible that the global security network could become increasingly undermined and less legitimate, with the changing balance of global political power leading to a rise in bilateralism, coalitions of the willing, informal cooperation and, concerningly, more unilateral action.

32. Second, and less likely, is the possibility that the global community realises that new leadership and political dynamics are necessary.

33. The third is that States come around to the fact that the international system needs to be reinvented from the top to the bottom, using 'shock treatment' to respond properly.

34. Having given those possibilities, two examples were provided of situations in which cooperation was going well.

35. First, there is a burgeoning willingness to share evidence in military contexts, which, despite the concern that goes along with their role, can lead to the collection and sharing of evidence and data that would not otherwise be possible. That said, it is important to be clear on principles and roles, both for peacekeeping and offensive task forces, and to be transparent on how intelligence can be collected and shared, including by refraining from over classifying and declassifying quickly. To do this proactively, it will be necessary to increasingly embed investigative capacity within military units.

36. Second, there are encouraging signs in relation to the collection of digital evidence in the context of counter-terrorism. That being said, challenges remain as the world becomes increasingly digitised, which in turn makes data easier to obtain, manipulate, and destroy. In order to combat this, cooperation should permeate through states to the owners of relevant ISPs, which are presently showing a tendency to prefer questions of freedom of speech and privacy. Equally important will be the cultivation of specialised skills, which are needed to combat the sheer complexity and amount of digital evidence in investigations today.

37. Moving away from the general picture, discussion moved to an analysis of transitional justice processes in Argentina, which demonstrated an ability to harness political will and (intra-community) cooperation so as to realise effective prosecutions.

38. It was noted that one of the fundamental contributing factors to this success was the effective instrumentalization of the historic memory, which is not only important for victims and societal reconciliation generally, but in doing so also creating, almost unconsciously, the political will and momentum to establish proper criminal prosecutions.

39. Also important was the effective and pragmatic use of jurisdiction to overcome political obstacles that would otherwise block accountability action; this is the case, for example, with the effective utilisation of the IACtHR.

40. Drawing from the example of cooperation with the IACtHR, it was noted that another effective avenue is the strategic use of universal jurisdiction, which had been used in Guatemala to protect leaked documentary evidence by presenting it in Spain as evidence and only then taking it back to Guatemala for protection. The document in question was also shipped to Washington for protection and will be given back when it can be guaranteed that it will not be destroyed.

41. The Guatemalan experience was affirmed as a positive example of the importance of getting access to documents held by the military, and the value in getting documents declassified that will be useful in human rights investigations. It was also important in highlighting the need for appropriate information access and whistle-blower protection laws.

DAY TWO SESSION 2 – SUMMARY

42. Session 2, day two, began with a discussion on the experience of Chile during the military dictatorship from 1973 to about the year 2000, during which it was noted that Chileans faced a constant state of emergency that was used to curtail and, in many cases, abolish fundamental freedoms.

43. It was noted that there were two clear stages giving rise to crimes against humanity. The first, which spanned from 1973 to about 1989, was the bloodiest period, in which anyone who looked like a threat to the regime was eliminated. This period eventually ended with an amnesty law issued by the regime itself.

44. After 1989, there was a sporadic but dramatic set of events, the first involving the beheading of three civilians in March 1985, and the second involving arbitrary arrests and detentions following an attack on General Pinochet, which was used as a justificatory ‘act of war’ to further target enemies of the regime.

45. Tackling these issues was immensely difficult and required practitioners to address deeply embedded corruption and a culture of widespread impunity. However, it was noted that it is possible to succeed in the face of these challenges, and despite the idiosyncrasies of their domestic situations, African colleagues were encouraged to be brave and to arm themselves with valour and patience if justice is to be properly served.

46. Drawing of the experience of their Latin American colleagues, Gambian practitioners raised some of the issues presently being faced in the Gambia in respect of alleged international crimes committed by former President Yayha Jammeh.

47. It was noted that when Jammeh was finally defeated in the election of 2016, the current government had to navigate through a complex transitional justice process. One element of this was the establishment of a Truth Reconciliation and Reparations Commission (TRRC), which sat for approximately two years and was streamed live. Following the delivery of the TRRC’s final report, the Gambian President will now be expected to deliver a white paper regarding what is to be done about the recommendations of the TRRC.

48. It was noted that as a result of the TRRC, many Gambian have the information that they wanted. However, lawyers continue to grapple with the information that they need, as serious issues are on the horizon relating to immunities; pardons; amnesties; the (non-) inclusion of substantive international crimes within domestic criminal codes; the potential political turmoil associated with brining Yayha Jammeh back to the Gambia; and the major challenges faced by ensuring effective witness protection in a country as small and ‘tight knit’ as the Gambia.

49. The issue of capacity and resources was also firmly part of any Gambian needs assessment, as lawyers at the ministry of justice are already greatly burdened with their domestic case load even without the further complication of factually and legally complex international crimes investigations.

50. Thought was given to the possibility of a hybrid tribunal to overcome many of these challenges, with domestic prosecutions for ‘smaller’ cases, and hybrid efforts for those most responsible for the most heinous crimes.

51. The value of using external or hybrid prosecution strategies was endorsed with reference to the example of Uganda, which has a major back log of approximately 1000 prosecutions.

52. The issues created by the absence of proper elements of international crimes in domestic penal codes was also highlighted as an important one. Latin American colleagues noted that this does not have to be fatal to any prosecution, as it is possible to charge the crime under the elements of crime that you have (e.g., murder, rape) and then categorise and reflect the actual seriousness of that crime appropriately upon sentencing.

53. This was the approach taken, for example, in Argentina, which, so as to comply strictly with the principle of legality, found it appropriate only to apply to the criminal laws in force in 1976, which did not include international crimes. The result has been overwhelmingly positive, with the rise in prosecutions and the decision to strictly abide by the applicable law leading to increasing trust in the criminal justice system, and, in time, a willingness to engage with accountability processes in a manner that is now helping to contribute to societal reconciliation.

DAY THREE SESSION 1 – SUMMARY

54. The final session was dedicated to bringing together suggestions for concretising and instrumentalising the shared experiences of attendees going forward.

55. The basis of a shared idea was the establishment of an accessible network or grouping to allow the sharing of challenges, and to facilitate ongoing engagement and the sharing of comparative solutions between African and Latin American colleagues. Specific issues that might be addressed, for example, include focusing how amnesties work (which was one of the most popular topics during the conference).

56. Any sharing network could also be used as a training platform to allow practitioners at similar transnational levels (judges to judges, prosecutors to prosecutors) to find solutions in different cases. This could be through active engagement and/or through the drafting and sharing of protocols advising on prosecution/investigations. An important topic in this sense may be, for example, training of digital evidence as digital literacy becomes increasingly important in today's world.

57. Workshops could also be held on specific issues to lead to practical solutions amongst those actively involved in the challenge(s) addressed.

58. Stress was placed on the need to be programmatic in establishing this framework to ensure that it is created in the most efficient and widely beneficial way possible.

59. On written advocacy and document sharing, it was noted that it would be important to consider that any comparative platform will be translating decisions/written documents that are to be shared into English. It will be equally important to ensure that any translated document is culturally literate, in that it at least makes sense in the context of the domestic system to allow it to be understood and used properly elsewhere.

60. It was also noted that a potential way forward in sharing scholarly experience may be to establish a 'Guernica 37 Journal'. Training and development manuals could also be drafted to assist in domestic prosecution efforts.

61. Guernica 37 made it clear that they had very concrete commitment to translating these proposals into reality, and to creating something unique, comparative and collective to better understand and facilitate prosecution efforts around the world. It was noted that an agenda for action would be circulated in due course.

Gema Gutiérrez Hernández
Jack Sproson
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