

## CONCLUSION

In sum, the field of transitional justice has made great strides in promoting the end of impunity and a focus on victims. This is at its strongest when supported by the norms and language of international justice. But the field loses its clarity when it tries to frame broader issues of peacebuilding and development, which may require different approaches to addressing underlying sources of injustice, tension, and conflict. Those efforts may well correspond with the vernacular meaning of transitional justice, but muddy the waters of the transitional justice field as it has developed.

**REMARKS BY PAYAM AKHAVAN\***

## COMPLEMENTARITY

I have come to question what can realistically be achieved by international criminal justice. In particular, the ICC's complementarity scheme is a very, very complex equation in practice. The drafters of the ICC Statute decided to give primacy to national jurisdictions. Under what circumstances, then, does the Court exercise jurisdiction? There are two criteria for when, despite national proceedings, the ICC should exercise jurisdiction: unwillingness and inability.

Unwillingness is relatively straightforward, as was the case in the former Yugoslavia where the prospect of national courts exercising jurisdiction over Slobodan Milošević was zero. In those scenarios international courts are most relevant but least effective. This is true unless there is some sort of regime change or some sort of external pressure that will force the surrender of the accused, or we are satisfied that the mere stigma of an international arrest warrant can have effect. Inability is the litmus test for the ICC, and, in the extreme case, a failed state with a collapsed judicial system.

Is the complementarity scheme a rush to judgment, or do we have to interpret it in light of a transition, which, by necessity, involves a long-term process of institution-building? In Libya, the Security Council referred the case to the ICC when the Gaddafi regime was in power; by the time the arrest warrants were executed, the regime had collapsed. In that sort of situation, the ICC has to strike a balance between avoiding the rush to judgment and the much more important process of capacity-building. On the other hand, balancing must be done in a way which recognizes the complementarity scheme. The only way to allow for some sort of balance as opposed to rushing to judgment is to prolong that process of determining whether a case is admissible or inadmissible; if you give no time, then in effect no cases in transitional situations can be declared inadmissible because there will be every opportunity to find some fault with the judicial system.

The ICC has understandably shown a reluctance to make determinations on unwillingness or inability; invariably you are putting an entire judicial system on trial. The "same conduct" test is the easier way out; it is part of the two-step process of determining admissibility. First, there must be national proceedings in relation to the "same person" and the "same conduct," after which the Court will determine whether there is willingness or ability. So far, the Court has found a way out through a very particularistic determination that the "same conduct" test is not satisfied.

Does this mean that national authorities must mirror exactly the same case as the ICC prosecutor? Must the victims be identical, the incidents exactly the same?

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In the Ali Kushayb case, the ICC avoided a finding of unwillingness by instead finding that the proceedings, which were sham proceedings to undermine ICC jurisdiction, did not relate to the exact specific incidents contained in the ICC arrest warrant. This precedent is problematic because it will force national jurisdictions to mirror the case exactly, and it will make the standard so unrealistic that we will continue to pay lip service to complementarity but make it nearly impossible for national jurisdictions.

The ICC has more to lose through jurisdictional overreach than it does through empowering national jurisdictions, and ultimately the success story of the ICC will be if it never has to exercise jurisdiction.

### CUSTOMARY INFORMAL MECHANISMS

I am increasingly interested in the process of healing, which is not about a dispute. A dispute can be resolved in a very finite way, whereas healing is an organic process which is open-ended. We tend to frame these issues in a way which gives us manageable technocratic solutions, but the most fundamental challenges are the ones for which there is no manageable solution. This goes to the experience that I recently had as an Iranian in exile who has gone to Yugoslavia and Rwanda and Libya but who perhaps experiences this process of healing in a very personal way based on my own family history and experience: even if you go halfway across the world, your own intimate experiences will always have an impact on you in a very different way.

It has been very humbling for me to be involved in the Iran People's Tribunal. A group of grieving mothers who lost their children came to me and said, "Well, you are the big professor of law and the UN prosecutor. I lost four of my children. What can you do for me?" "Well, not much, madam, because there is no court with jurisdiction."

This is truly grassroots justice in the sense that it was driven entirely by the victims and survivors. An international tribunal was created with the likes of Justice Krieglger, who was the head of the South African Constitutional Court, appointed by Nelson Mandela after the end of apartheid, and my co-prosecutor Sir Geoffrey Nice, an illustrious colleague from the ICTY. We had 100 witnesses who spoke about the mass executions and tortures in the first decade of the Islamic revolution from 1979 to 1989. They told harrowing, harrowing stories. We invited the Islamic Republic of Iran to defend itself; it failed to show up; the process mimicked an international trial based on state responsibility; and it was broadcast by satellite television. It reached an estimated audience of 20 to 25 million people in Iran.

It was extraordinary to see the power of a grieving mother who has lost her child and had nothing left to lose. After 30 years of denial, not through professorial lectures and legal pleadings but through broadcasting the voices of the victims to millions of people in Iran, the regime finally had to admit that, yes, these things did happen and they were unfortunate. They even tried to suggest that Ayatollah Khamenei, the current leader, had tried to save as many people as he could.

There really was no dispute at issue; it was a process of healing for an entire nation. We talk about statistics—10,000 here, 40,000 there—but for every victim, there is a name. There is a mother, a father, a brother, a sister, a schoolmate . . . and the consequences of that violence go far beyond the individual victim and create a culture of violence. What happens when an 8-year-old sees a public hanging, sees a man hanging from a crane? What effect does that leave on that child's psyche? Violence ends up permeating society.

I would say that the question of ownership, the question of justice from below, and all of the kinds of politically correct ideas that we have is really an existential necessity. Ultimately

it is about the way in which these initiatives, the telling of truth, open a space for conversation among work colleagues, conversations at the dinner table, and the intimate way in which people come to terms with their past.

In *Anthropology of Law*, Leopold Pospisil studied tribal societies and concluded that they have legal systems based on internalized norms. This is intriguing because although norms are not spelled out in some code, everyone in the village knows what the norms are; shame is the enforcement mechanism. We need to explore and understand, in a society where it is impossible to prosecute everyone, how to go beyond a rationalistic occidental way of looking at things. Sometimes there is no solution, no remedy. There is just a very humble attempt at giving people some measure of comfort and healing.

### TRANSITIONAL JUSTICE

I would like to address a kind of spiritual approach towards psychological restitution—through reclaiming one’s humanity, one’s identity—and the notion of development. The two are actually intriguingly related to each other. Is the purpose of healing and creating a culture of human rights unbridled consumer capitalism? Sadly, very often that tends to be the case. People heal and move on by creating a very materialistic and superficial culture which becomes the neo-liberal idea of how you solve problems: get people to make money; that way they won’t kill each other. Isn’t progress wonderful?

It is much more complex in terms of what is conducive to human dignity and how we replace one form of violence with another type of violence. The violence of the gross accumulation of wealth is more subtle; not just the material questions but also the psychological well-being of communities, where materialistic ideas create all sorts of social disintegration, dislocation, and alienation. I do think that we need to examine much more closely this more organic, slightly less technocratic idea of social transformation, and what it means for people to have, if you like, a spiritual dimension in their self-definition.

We should not exaggerate the scope of transitional justice because it is very tempting, whether as a psychological defense mechanism in dealing with overwhelming challenges or in a very cynical political way, to say, ‘‘We’ve had a few trials, we’ve had a truth commission, what are you complaining about?’’ or even to delude ourselves that we have sanitized this unpleasant reality, and we can move on. We have to ask ourselves what role transitional justice plays in social transformation. When is it actually advancing the creation of a shared humanity and shared values?

Perhaps the reason why transitional justice is so appealing is because it has finite goals, and it can be reduced to some sort of technocratic equation: here is the cost, here is what they will achieve. However, the real questions are the ones that lack manageable answers, they are the ones that do not have a start and finish date. We should contribute to social transformation through transitional justice but remember how inadequate it is and remember that it is by necessity a long-term, difficult, and painful process.

### STRUCTURAL INEQUALITIES

There is clearly an inextricable relationship between structural inequities and more imminent physical violence, but I would say that there is still a difference. Culture has a lot to do with it. Different societies have the same levels of socioeconomic injustice, but not all of them end up in the situation where crimes against humanity are committed. So this is something that we need to understand in much greater depth. When it comes down once

again to the very finite question of the ICC prosecutor with limited resources, it's a bottom line issue of how do we select our targets.

This opens the way for a much bigger question of how prosecutorial discretion is exercised in the ICC and similar institutions. When it comes to shoplifting, there may be prosecutorial discretion, but certainly when it comes to murder, it is taken for granted that all cases must be investigated and prosecuted. What do you do in a situation of mass atrocities where it is impossible to prosecute anyone but a small handful of the perpetrators? How do you develop an objective basis for prioritizing certain investigations over others? In that framework, do we look at the economic interests that are behind mass atrocities? One could say that Slobodan Milošević was a recycled communist who wanted to instrumentalize ethnicity as a means of acquiring power and wealth. It is true, but hatred is a very powerful form of self-identity, and can very often be the motivation for why someone will pick up a machete and kill his or her next-door neighbor.

Prosecutorial discretion invariably falls back on the very narrow question of physical violence and not the structural patterns which give rise to that violence. A criminal trial, far more so than transitional justice more broadly, is extremely limited. At the end of the day, the criminal trial is about the guilt or innocence of the accused, and we are not really interested in why things happened.

That might be what is so appealing and attractive about reducing the enormity of genocide to a question of the guilt or innocence of the accused, and why it is tempting to privilege criminal trials: to create the illusion of closure. We have convicted the genocide there; here is the jurisprudence; here is the final judgment of the appeals chamber; we can now move forward. What did we leave unaddressed? All of the other profound challenges which remain.