

Translated from French

<p style="text-align: center;">55th NGO/DPI Conference — Monday, 9 September Re-establishing the rule of law and encouraging good governance</p>

Françoise Bouchet-Saulnier

Legal director, Doctors without Borders (MSF).

Research Director, MSF Foundation

Author of *The Practical Guide to Humanitarian Law* (489 p.), Oxford: Rowman and Littlefield, 2002.

From the law of war (in time of conflict) to the rule of law (in peace time)

Thank you for giving me today the opportunity to speak on such an important topic as the return to the rule of law in countries emerging from conflicts.

The subject is of great intellectual and human interest. It is also of crucial practical importance because many countries are currently involved in this difficult transition from the rule of violence to the rule of law.

My comments today will be based on:

My own concrete experience as a lawyer with Doctors without Borders (MSF), an NGO active in most crisis and conflict areas; and

Our discussions at the MSF Foundation on the changing context of humanitarian action.

These comments are structured around four broad lessons learned from practice and some examples of concrete action.

1. Marginalization and instrumentalization of war victims in the reconstruction process

When a society emerges from a war or an armed conflict, it returns to peace only step by step. The process is slow and gradual and involves more than the signing of a peace agreement.

Post-conflict societies are extremely vulnerable. The balance of power that has been expressed through violence and armed confrontation has changed. Despite the end of violence, the population and civil society, traumatized, weakened and impoverished by the conflict, are often marginalized by the new authorities.

In most cases, the tribulations of the population and the crimes committed by the adversary seem to be fundamental issues in the discourse that legitimizes the new authorities. But as a rule, beyond the rhetoric, the action that would permit the concrete and symbolic rehabilitation of these victims is inadequate. Such rehabilitation would in fact presuppose a legal phase involving acknowledgement of the specific crimes committed during the conflict, including of course those committed by the new authorities. It would also presuppose raising funds to compensate victims. However, it must be admitted that the new authorities rarely

accord priority to the restoration of the judicial system and the compensation of victims.

In such transitional periods, any assistance and intervention from outside can be decisive in strengthening or, on the contrary, weakening the emerging civil society. But such assistance must be provided very quickly if it is to play a role in reshaping power in a way that ensures greater respect for victims.

This challenge is not limited to a technical debate on the choice of the most appropriate traditional or customary judicial systems. The main issue is to identify the balance of power in a given context and find the best way to tip the balance in the interest of civilians and victims.

This cannot be achieved merely by paying lip service to the rule of law and justice. It is important first to understand what is impeding the return of the rule of law and justice to societies that have known war and its attendant acts of violence, destruction and atrocity.

2. The dynamics of impunity and obstacles to a return of the rule of law

To understand the difficulties impeding the restoration of justice after a conflict, it must first be remembered that impunity and oblivion concerning crimes committed during conflicts are the rule in the history of societies. Such impunity has long been, and continues to be, the condition governing agreements on peace and the surrender of the armed groups concerned. As a lawyer, I know this from experience. The first time that I opened a national criminal code at the chapter on war crimes, I found only amnesty laws.

Today's discourse is tending towards a change in this rule, but what is the reality behind words or fashion? The military tribunals at Nuremberg and Tokyo after the Second World War were merely a parenthetical episode in international justice, which came immediately to an end: all the crimes committed in the conflicts of the past fifty years have remained unpunished, with the recent exception of the cases brought before the ad hoc tribunals set up by the United Nations in 1993 for the former Yugoslavia and in 1994 for Rwanda.

Since the late 1980s (when the Cold War ended), international justice has therefore resurfaced as a complementary ad hoc system of peace management, but there are still difficulties at the national level.

In this connection, it is to be hoped that the establishment of the International Criminal Court, by bringing additional competence to bear, will serve to stimulate prosecution at the national level.

The example of Congo/Brazzaville, with which we have been confronted, illustrates some of these practical difficulties.

MSF has had an extensive medical programme for civil war victims in that country. In 1999, more than one thousand women raped during the conflict by soldiers and militiamen came to the Brazzaville hospital for medical consultation. With the approval of the national authorities, MSF participated in providing medical, psychological, legal and social support to these rape victims. Many of them overcame their shame and initiated legal proceedings. The amnesty law enacted in that country explicitly excluded from amnesty any act aimed at furthering the personal interests of its perpetrator and thereby unrelated to the conduct of the war.

Despite that law, judicial action has been paralysed to this day by a whole series of obstacles, including the reluctance of judges to interpret the amnesty law with regard not only to rape but also looting and the appropriation of other people's property. That law is linked to the balance of political power and the political rationale of national reconciliation, and judges remain silent and cautious in that regard. It should also be borne in mind that, in the Congo, hearing criminal charges of rape requires the organization of Criminal Court sessions with civilian juries, but there have been no such sessions in the Congo for more than four years: the financial cost of such hearings is constantly used as an argument to justify this delay.

This phenomenon perpetuates a vicious circle, because judges do not expedite investigations into criminal cases for which no procedural deadlines have been set. It also keeps victims in a situation of utter vulnerability vis-à-vis their aggressors and encourages them to accept out-of-court pseudo-settlements with them.

The difficulty encountered in punishing the rapes committed mostly by soldiers and militiamen during the civil war has led to a disturbing development: one year after the end of the war, sexual aggression has not disappeared. The tolerance it has enjoyed has resulted in the extension of this violence to the entire community. Rape is now a widespread form of violence in Brazzaville, but the aggressors are mainly civilians, while the victims' age is constantly falling (in April-May 2002, half of the victims were under twelve).

Thus, in practice, it is not easy to reconcile impunity and the reaffirmation of certain fundamental social prohibitions.

It is certainly important to expose the consequences of impunity in terms of post-conflict destructuring and social violence, in order to encourage more courageous and far-sighted policies in this area.

3. Necessary distinction between justice and judicial administration

Financial arguments are always used to explain the difficulties encountered in meting out justice in a country. I remember the state of judicial administration in Rwanda in July 1994. It was clear at that time that nothing could be done unless considerable financial assistance were provided to the Ministry of Justice. That was a necessary, though not sufficient, condition.

At the time, a number of NGOs, taken aback by the sluggishness of international cooperation in this field, came together to support the Rwandan judicial system through direct grants to the Ministry of Justice and training programmes and donations of material for the judicial police, court clerks and prison directors. I participated in that endeavour from July 1994 to December 1995. But we soon realized that protecting the independence of judges and lawyers was an absolute prerequisite if justice were to function properly, just as much as ensuring respect and physical protection for witnesses and victims. Justice can have no authority without independence. It must be admitted that the creation of a strong and independent judiciary is never the top priority of the new authorities. The appointment of a Special Rapporteur on the independence of judges and lawyers is a recent development (1994), but the Rapporteur has very limited resources. It is meaningless to speak out strongly against impunity without developing practical means of action. Unfortunately in this area there are serious gaps in the

comprehension and action of the various national and international, governmental and non-governmental entities involved, and too few initiatives commensurate with the challenge.

4. Transition from wartime law to peacetime justice

To facilitate the return to the rule of law after periods of violence, action of various types must be taken during the period of conflict.

It is important to identify the nature of the acts of violence committed against the population during the period of conflict. In many cases, those acts of violence are not an unfortunate consequence of the conflict but a war objective.

To understand the real nature of conflicts, it is no longer enough to say that 90 per cent of their victims are civilians. It must also be acknowledged and asserted that war and armed violence are increasingly being used for the purpose of seizing political power rather than for defence against an external enemy or for conquest.

There is a general tendency to group all types of violence together under such headings as “atrocities”, “crimes” or even “human rights violations” or “humanitarian crises” (this, it should be recalled, was the term that the United Nations Security Council used during the Rwanda genocide). Paradoxically, this practice is likely to make the gravity of the various forms of violence appear relative and to render punishment difficult. At the end of a conflict, the advocates of amnesty and oblivion often contend that it is not possible to judge all crimes and that it is therefore preferable to judge none.

Still, international humanitarian law can be used to establish a hierarchy of categories of crime, each with its own degree of gravity and provisions for punishment; namely, the three major categories established by the International Criminal Court: genocide, crimes against humanity, and war crimes.

To understand the nature of a conflict, it is essential to make these distinctions in each situation.

Genocide and crimes against humanity are crimes that form part of a general policy towards population groups. These crimes therefore engage the political responsibility of leaders in addition to the liability of their immediate perpetrators. Responsibility for war crimes is limited to the perpetrators and to any military hierarchical superiors who may have ordered the crimes or failed to initiate punishment.

In practice, however, refusal to investigate war crimes impedes the punishment of crimes against humanity and genocide. This is currently illustrated by the difficulties encountered by the ad hoc International Criminal Tribunal for Rwanda, particularly the lack of cooperation on the part of the Rwandan authorities, who contest the investigations into possible war crimes by the armed forces that put an end to the 1994 genocide (ICG Report) and take a stance which could be summarized by the expression “silence for silence”. But this logic is also apparent in most of the other conflict situations. For example, it is evident in the refusal of certain countries to recognize the jurisdiction of the International Criminal Court because of its competence with regard to war crimes.

Thus, to facilitate the return to peace and to the rule of law, the place of law and justice must be defended during the period of conflict. This helps to avoid

bargaining on the recognition or negation of crimes during peace negotiations. It also permits better protection of endangered population groups during the period of conflict. This is the role of humanitarian law and it is important that all actors in a given conflict situation understand the stakes involved in the application of this law.

To facilitate the return to peace and to the rule of law, action in specific fields can and must be taken while the war is being waged.

5. Concrete actions to strengthen law

Every organization must think about its own place in the ongoing battle for dignity and justice.

In a humanitarian organization like MSF, whose mission is in particular to provide medical assistance to victims of conflicts, the relevant concrete action may take various forms:

More than ten years ago, MSF established a legal directorate whose role is to make all members of the organization aware of the rights that victims of conflicts enjoy under international conventions, the obligations that these conventions impose on armed actors and the responsibilities that the conventions assign to relief organizations.

While the ethical and political issues raised by humanitarian action in peacetimes are resolved as each organization sees fit, the traditional dilemmas encountered in humanitarian action during periods of conflict must be settled within a binding legal framework designed to defend the interests of the victims.

On the basis of the aforementioned knowledge, which in particular permits differentiation between human rights violations and acts of genocide, crimes against humanity and war crimes, MSF draws up reports on a case-by-case basis concerning the situations and crimes that its teams encounter and witness in the field.

This work contributes to the characterization and recognition of crimes at the time when they are perpetrated and reduces the risk of subsequent revisionism or denial. For example, in April, May and June 1994, MSF prepared a compilation of evidence from its field workers on the Rwandan genocide. This document was subsequently transmitted to the International Criminal Tribunal for Rwanda. One chief of mission went to Arusha to testify at the opening of the trials. In 1992, before the establishment of the ad hoc International Criminal Tribunal for the former Yugoslavia, MSF drafted and published a report describing the acts of ethnic cleansing that we had witnessed. Other compilations were prepared to attest to the deportation policy followed in Kosovo in 1999 and, more recently, the crimes committed against the Angolan population in the last phase of the war or by the Russian forces in Chechnya.

Such work concerning the recognition of crimes during conflict helps to break the taboo of silence regarding such crimes once peace has returned.

Lastly, MSF, in its medical practice, is called upon to issue medical certificates attesting to certain forms of maltreatment or violence. These documents have made it possible both to show the extent of the phenomenon of rape in Congo/Brazzaville and to provide practical support to rape victims. They also enable victims to try to have their rights recognized in the national courts and

to contribute to the restoration of the rule of law by bringing to light instances in which it fails.¹

Conclusion

The struggle for law and justice cannot await the return to peace. As long as the crimes committed during the conflict are not characterized, it will be impossible to end the reign of terror, the silence, the lies and the violence, which will continue long after the conflict has ended.

Recognizing acts of violence during the conflict and supporting the victims are therefore prerequisites for the return to peace and the rule of law.

Promoting a return to the rule of law also presupposes an assessment of the social and human cost of impunity in societies emerging from conflict. In such societies, impunity helps to perpetuate violence and the monopolization of civil power (political, economic and financial) by the perpetrators of crimes who retain exclusive control of the use of force.

The role of NGOs is not to say what is good and what is bad but to bring to light facts obscured through negligence or connivance so that they may be taken into account when the lucid and courageous political decisions, required of the Governments concerned are taken.

¹ Françoise Bouchet-Saulnier, "Du crime de guerre à l'impunité ordinaire: les viols au Congo Brazzaville", *Diplomatie judiciaire*, Paris, June 2002. Marc LePape and Pierre Salignon, *Une guerre contre les civils*, Paris, Karthala, 2001.