

Juan Méndez

August 13, 2008

Presentation: Beyond the Inter-American System

Justice is preventative, at least that is our intent; we punish because the value of justice has to be confirmed, but we also punish because one must at least have hope that if we punish serious offenses we dissuade other possible perpetrators of those offenses from committing them in the future.

Prevention is the express foundation of the framework, of the architecture, of international legal norms, of norms of human rights. Practically all international treaties impose on states the duty to guarantee and respect, and also the duty to prevent. Prevention is the basis of the 1948 Convention on Genocide, chronologically the first international instrument, prior even to the Universal Declaration of Human Rights.

Currently in the International Criminal Court, there is a controversy, an additional complication, over what are the most effective means of preventing conflict and violence, and we have entered into a rather sterile discussion about whether peace should prevail over justice, or justice has to cede before the imperatives of peace.

For Latin Americans this is a little reminiscent of when 25 years ago they told us during the transition to democracy that we had to choose between democracy and justice; they said we should not insist too much on investigation, prosecution and punishment of systematic violations by the dictatorial regimes because democracy was in danger. This has not happened in Latin America and, on the contrary, facing the past with authority is what has enabled many of our countries – despite the big deficit of democracy across out continent – to assure us of a period of democratic stability much greater than we enjoyed throughout the entire past century.

On the issue of peace and justice it is important is to acknowledge that this dilemma is real, but also real is the fact that we should reject the confusing notion that peace must hold sway over justice; because, in other words itis a product of blackmail by the players in the conflict --what they are saying is that either you give me amnesty or the ministry or the house next door, otherwise I will continue committing massive and systematic violations.

The persistence of burdens makes the peace that is obtained in that manner both feeble and not enduring. While there are many examples, it is basically unfair to deny innocent victims of the armed conflicts access to justice. They have had to live with the conflict and now they have to live with an unjust peace.

It is important that we recognize that justice is not merely an instrument of peace, but that both justice and peace be recognized as values to be realized in harmony throughout the pursuit of the conflict.

Impunity as associated with the justice system is a factor of instability and recurrence of conflict that can be proved empirically. Impunity is an incentive for perpetrators not only to again commit offenses but to commit more serious crimes.

The American Convention on Human Rights is the international instrument that best protects freedom of expression. It is not only the prohibition of prior censorship, but, unlike the European Commission, the Commission Against Racial Discrimination and the International Covenant on Civil and Political Rights, the American Convention establishes the obligation to punish expressions of racial and religious hatred only when

they constitute an incitement to violence, not when they constitute instigation to discrimination, for example, or hatred.

This distinction is important because racial and hate expressions are hideous and must be regarded as revolting, but to combat them through criminal law is counter-productive because it permits the victimization of those who enter the debate with lies, hatred and distortion instead of allowing it to be discussed in another tone.

Incitement is punishable even though the crime is merely attempted or plotted. But we must bear in mind that if the crime is carried out it must be imminent.

The Court for the former Yugoslavia had occasion to deal with the relationship between the press and the international criminal justice system in a very interesting case called Janic, the name of a man who had given an interview to *The Washington Post*, in which he was said to have declared that he was prepared to carry out ethnic cleansing in Bosnia. However, when he went on trial he denied that he had said such a thing. The prosecutor wanted to question the reporter who, defending his independence and his right not to reveal his sources, refused to reveal. He was ordered to testify and he appealed, which produced an incident in the case because the Appeals Court for the former Yugoslavia confirmed that he was not obliged to testify and did so with an interesting argument about the independence that must exist between the free practice of journalism and the judiciary; that the judiciary must respect the separate role of the press and that the possibility that someone who is making a statement to a journalist might later see himself declaring before a court makes the work of the journalist less independent.

The international criminal justice system recognizes the independence of the press but it also requires the help of the press because the International Criminal Court, especially, is currently doubted and accused of impeding other important functions of the international community.

I end with a reflection that is not intended to be controversial but is put up for discussion. I believe, because the subsequent sanctions when what are involved are acts against the rights to reputation and privacy should never be criminal sanctions, and I am sure that the Inter-American Human Rights Court is going to agree, but I do think that there should be an exception. The sanctions should be criminal when what is involved are expressions of racial and religious hatred that have as a real and concrete effect the possibility of massive loss of life. So I believe specifically in this very narrow number of cases and within the context of cases where that can be real, yes, we do have to consider the possibility of a subsequent criminal sanction.

A second reflection: When one thinks about Rwanda and the case of its radio station – and this shame we all in the international community must feel because of its inability to prevent the murder of some 800,000 people in five or six weeks, we have to think if in this case we do not have the obligation to consider the possibility of preventing the propagation of racial and religious hatred by physical means, such as interruption of communications, destruction of broadcast antennas or taking over radio stations. I repeat that it is for extreme cases such as this, which have had no equal. That is where freedom of expression and the other values that the international community should defend could come into collision, which must be resolved without entering into violence between one value and another.