

JUSTICE: NEW CHALLENGES
(The Right to an Effective Remedy before an Independent Jurisdiction)

FIDH Forum¹

EXPLANATORY NOTE

I. Objectives and Methodology

General Objective

The Forum will be the occasion for debates, exchanges of experience and analyses on various themes related to the right to an effective remedy before an independent jurisdiction, at national level as well as accessing regional and international justice systems. A special focus will be given to the new challenges to build on FIDH and its member organisations' expertise and impact on future strategies of action.

Specific Objectives

- To share experience and develop common strategies at national, regional and international level in order to contribute to the fight against impunity for serious human rights violations and for international crimes;
- To raise awareness among public opinion, stakeholders, and decision makers including: states and intergovernmental organisations on the crucial role of the effective remedy;
- To contribute to the knowledge and appropriation by the civil society and the political actors of key justice related issues in Armenia and in the region;
- To strengthen intra-regional and inter-regional ties among FIDH member and partner organisations and;
- To contribute to strengthening existing instruments, in particular the FIDH Legal Action Group (GAJ), and to the creation of alliances between the national, regional and trans-regional networks for supporting victims.

Official Ceremony

The Official Ceremony will be the occasion for the organisers and key guests to welcome the participants and say a few words on the importance of the Forum which is an occasion to have all

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FIDH member organisations gathered in Armenia to discuss justice related issues. This section will include the words of a representative of the state of Armenia as well as of the President of the organisations hosting the event and key invitees.

Opening of the Forum

The Opening of the Forum will be chaired by two *Masters of ceremonies*. The opening will be the opportunity for guest speakers to address key aspects of justice and the various fora representing an effective remedy for victims of grave human rights violations and international crimes in the light of two main testimonies.

The first testimony, on the key role of victims in the fight against impunity will be given by a representative of the Russian NGO *Memorial*. The important role that the regional human rights protection system have had in reinforcing the right to an effective remedy will be addressed by a judge of the European Court for Human Rights (ECHR) as an example of the role and impact of these mechanisms at the national level. Finally, a keynote speech on the role of the international criminal justice system will be delivered by the Chief Prosecutor of the International Criminal Court (ICC).

The second testimony, on the need to have an independent judicial system as a prerequisite to a real access to justice, including the effective division of powers, will be addressed by a Peace Nobel prize winner and representative of an FIDH member organisation in Iran. The national aspect will be addressed by an Armenian official (Minister of Justice) with an emphasis on the different reforms to strengthen the national judicial systems; to conclude with the remarks of a representative of the Organisation for Security and Cooperation in Europe (OSCE).

The Opening of the Forum will conclude with the intervention of Patrick Baudouin, Honorary President of FIDH, highlighting the objectives and methodology of the Forum, as well as the selection of issues to be discussed on the different panels and workshops.

The Panels: Debating Challenges

Two parallel Panels will take place each day of the Forum. Each panel will be guided by one *Moderator* who will facilitate the exchange of experiences among several *Debaters*. The Debaters will be in charge of introducing different issues of discussion. The Panels will provide the participants with the key elements of each core issue in the framework of the general debate on justice mechanisms with the aim to nourish the workshops' discussions by presenting different approaches to the general question of what could constitute an effective remedy.

Debaters and Moderators will come from our member organisations or will be external international experts. The Debaters' intervention shall be short and focused; the Moderator's responsibility will be to help panellists confronting their views.

After the Panels sessions, participants will be asked to divide into Workshops. This modality will allow participants of the Forum to attend general discussions on more than one subject, while at the same time engaging in a more detailed discussion over those issues of his/her interest in the framework of the Workshops.

Participants will be asked to select two Panels at the time of their registration. The Panels will be aired by video streaming, available on Internet.

The Workshops: A Time to Strategise

Eight workshops will take place during the Forum (two times four parallel workshops). Following the Panels, participants will be asked to divide into the different workshops where a deeper discussion will take place on the basis of a case study.

Discussion papers on the identified issues and around a case study will be drafted to facilitate the debates among the participants of each Workshop. The selected case study will illustrate positive strategies within FIDH's and her member organisations' work to address the issue and the related challenges and obstacles and enable participants to exchange experiences and lessons learned.

The case studies will be briefly presented by two *speakers*. The case studies will highlight encountered challenges, obstacles and solutions. When possible, the speakers will have direct experience of the cases or involvement in the discussed issue.

Each Workshop should be headed by a *Facilitator* to guide the discussions. Furthermore, the appointed *Rapporteur* of each Workshop shall briefly compile the shared information, the identified challenges and best strategies to address them as well as the recommendations gathered in order to be able to share them at the Plenary Session of the following day.

Participants will be asked to select two Workshops at the time of their registration.

The Plenary

The conclusions of the eight Workshops will be shared with all participants by the rapporteurs in the Plenary session. The conclusions, agreements and recommendations for further strategies will be presented by each rapporteur (max. 10 min per workshop).

The Plenary session will end by closing remarks.

Testimonies: Filling the Protection Gap for Human Rights Defenders Fighting Impunity

On the third day of the Forum, during the final plenary session, two *Key speakers* will address the issue of the need to protect human rights defenders in their fight against impunity. Where this is a current issue in the region, the need to protect human rights defenders is a common challenge in all the regions of the world. Defenders are most of the time in the front line of the fight against impunity. Therefore there is a need to make an assessment and a state of existing experiences to support the essential work of human rights defenders, aiming at filling the protection gap for defenders involved in the fight against impunity.

II. Content of the Forum

Panel I - International Justice: A Tool for Domination or for Progress?

This Panel will highlight the current debate around international justice. The claim of being used only in a selective way and not as a universal principle applicable to all will be addressed. Claims on its partiality will be confronted with experiences where international justice has become the only option for victims to obtain justice. Moreover, its positive effect will be addressed including where international justice has fostered national processes of justice or contributed to crime deterrence. The need to set up new jurisdictions - international, hybrid or *ad hoc* courts - as a tailored response will be also discussed by the speakers, this in the light of the Review Conference of the ICC Statute to take place in May 2010 in Kampala, Uganda, and the stocktaking exercise envisaged to take place. The discussions and the recommendations in this Panel and the related Workshop will serve as an important input to this exercise.

Panel II - The Challenges of National Judicial Systems: Their Willingness and Capacity to Investigate and Prosecute

Panel II will address the need to have access to an independent tribunal as a prerequisite to an

effective remedy. The problem of justice being manipulated by state power or *de facto* powers will be discussed in order to measure the willingness of justice systems to fight impunity. Participants will also address the possible misuse of justice systems as a tool to oppress human right defenders. Finally, the different possible reforms of the judicial system will be addressed to understand if they are effective means to increase the capacity of national justice systems to become an effective remedy for victims of grave human rights violations.

Panel III - Obtaining Truth, Justice and Reparation: Complementary Systems to Criminal justice

In order to obtain truth, justice and reparation, victims have approached different venues besides the one of criminal justice. The regional human rights protection systems are the clearest example of complementary justice systems. These systems allow victims to have a determination of the violations suffered and a declaration on the responsibility of the State involved in these violations. Moreover, the decisions of regional human rights protection bodies allow victims and NGOs to go back to their national justice system and demand the implementation of these decisions, which can encompass the obligation for national judicial systems to bring those who bear the responsibility for gross human rights violations to justice. However, these systems are not available in all regions of the world.

Other means of redress have been sought such as the setting up of Truth Commissions and other means of transitional justice. Another tool to foster accountability for those who committed international crimes and obtain justice can be found in the setting up of international missions of inquiry. These missions allow the establishment of facts and responsibilities and are an essential mean to hold perpetrators accountable.

Panel IV - Justice and the Responsibility of Non-state Actors

One of the important challenges in seeking justice for gross human rights violations is to hold non-state actors accountable. Non-state actors involved in human rights violations include companies and multinationals. While NGOs' search for justice for crimes involving companies has mainly been focusing on their civil responsibility, some attempts to expand it to criminal accountability have already taken place. In this regard the scope and applicability of Article 25 of the ICC Statute can be interesting, showing how instrumental such contemporary criminal law can be.

At the same time, the fight of governments against crimes allegedly committed by non-state actors has increasingly become an issue of attention, especially in the framework of governments' fight against terrorism. The need to fight the abuse of the legal framework and practice of these policies and make them respect international standards for human rights protection is still a current issue in different regions.

Workshop A) - Triggering National Justice

Case study: Cavallo (Mexico/Spain/Argentina) and Fujimori (Peru/Chile)

In both the Cavallo and Fujimori case, after a long process in which several FIDH member organizations of different countries were involved, tribunals of the State where the crimes were committed are finally judging Cavallo and Fujimori for the commission of gross human rights violations. Both cases illustrate the importance of coordinating efforts among NGOs and of states' international obligations in these cases in order to finally organise the trials in the country where the violations/crimes were committed and strengthen capacities of national jurisdictions.

This Workshop will try to present the objectives of triggering national justice mechanisms, the obstacles and proposed solutions to overcome them.

Workshop B) - Measuring the Capacity and the Willingness of National Justice Systems

Selected topics: The list of criteria used by the European system of human rights protection and the

criteria used by the ICC in the assessment of the national system's capacity and willingness to judge

Two of the main obstacles that victims face in the fight against impunity are the lack of capacity or the unwillingness of national justice systems to bring those responsible of human rights violations accountable. Therefore victims have been forced to search justice before international judicial bodies. However, due to the complementarity or subsidiary nature of these mechanisms, one of the first analysis victims and human rights NGOs have to do is to assess their national judicial system using internationally or regionally recognised criteria or standards.

The European Court of Human Rights and the ICC are two examples of institutions that have to make an assessment of the capacity and willingness of national justice systems in order to decide whether they can act or not. Understanding the list of criteria used by both institutions and the way they conduct their analysis, will allow participants to better apply these criteria in their assessment of the capacity and willingness of their national justice system.

Workshop C) - The Needed Involvement of Victims: Between Participation and Other Ways for Victims to Contribute to Justice

Case study: The Extraordinary Chambers in the Courts of Cambodia (ECCC), the International Criminal Court and the Colombian experience.

With the development of international criminal justice and the establishment of new international and hybrid criminal tribunals, like the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia (ECCC), the need for a bigger involvement of victims in these proceedings, above their traditional and limited role as witnesses, has been recognised and incorporated in the statutes of these tribunals. Victims can contribute to proceedings before these jurisdictions providing the Prosecutor with information on crimes and alleged perpetrators, feeding his analysis and investigation and influencing his prosecutorial strategy. Victims can also share their views and concerns before the judges. Participants before the ICC and civil parties before the ECCC, victims have the right to be represented by lawyers, including during trial proceedings, where their interest, as well as their views and concerns are presented, and victims can request reparations. However, these recognised rights come with challenges that these newly established tribunals have troubles to meet. The experience of Colombia on the involvement of victims in national criminal proceedings, and the concrete application of the Justice and Peace Act, will also help participants to understand how the participation of victims can be envisaged in national cases, taking into account the contribution of Colombian victims to the analysis of the ICC Prosecutor of the Colombian situation.

This workshop is about sharing experience and proposes concrete strategies to render the involvement of victims in international and internationalised criminal proceedings effective.

Workshop D) - Extraterritorial Jurisdiction

Case study: Gaza / Spain / Rwanda, and the European Union

When victims of international crimes are unable to find a response to their need for justice in their own country and when international criminal tribunals do not have jurisdiction over the crimes committed, the use of the principle of extraterritorial jurisdiction is an option that victims have explored over the last decade. Extraterritorial or universal jurisdiction allows the courts of any country anywhere in the world to try perpetrators of serious international crimes regardless of the location of the crimes and irrespective of the nationality of the perpetrator or the victim. It is based on the recognition that certain crimes are so horrific that they affect the international community as a whole. However, even if this principle is being more and more used, it meets some obstacles, often of political nature, that undermine its effect.

The Al-Daraj bombing in Gaza in July 2002 is an important example for different reasons. The NGO supporting victims of this bombing decided to look for other avenues to obtain justice by filing of a

complaint before Spanish courts. In January 2009 a criminal investigation was open against seven Israeli political and military officials for allegedly committing a war crime – and possibly a crime against humanity – in that operation. The opening of this investigation was followed by diplomatic pressures exercised by Israeli authorities on Spain to prevent this case to continue. As a result Congress approved modifications to the legislation limiting the scope of universal jurisdiction in Spain.

The case of Rwanda will also give an example of how victims have succeed in the opening of investigations, and even prosecutions, to cover the impunity gap left by the UN backed International Criminal Tribunal for Rwanda.

Finally, the study of the general status of the universal jurisdiction in European Union states will also show the negative effects that political pressure has have in the restriction of the use of this legislation by national courts or even in the modification of legislation which explain in part current debates on universal jurisdiction before the African Union and the UN General Assembly, aiming at strategizing on how to overcome these current obstacles.

Workshop E) - The Role of Regional Human Rights Protection Systems in the Reinforcement of National Justice

Case study: Chechnya (ECHR) and Peru (IACtHR)

The case law and jurisprudence of the regional human rights protection systems is very rich, in particular explaining the content of the rights to an effective remedy. Moreover, these decisions have had a good impact in improving the functioning of national justice systems through their recommendations, leading for example to the reform of national justice institutions, laws and practices.

Recently, the European Court of Human Rights (ECHR) has issued numerous important and progressive decisions on the situation in Chechnya. Russian NGOs referred the situation in Chechnya to the ECHR after trying, without success, to trigger domestic courts. Although they are facing difficulties in the implementation of these decisions, participants will use them to discuss the strategies for the implementation of decisions and the impact that these decisions can have in improving the access of victims to justice.

The case of Peru will serve as an example to show how the Inter-American System of Human Rights Protection has examined the issue of an effective remedy. It will highlight in particular the positive effect that it has had over the years in Latin-America to foster national proceedings after periods of military dictatorships and to overcome legal obstacles such as the adoption of amnesty laws for international crimes in transition periods.

Workshop F) – The Establishment of the Truth: A Strategic Issue

Case study: Burma and Kenya

The need to establish the truth is a key element in the search for justice and therefore implies big challenges, including the establishment of the facts (e.g. Algeria, Sri Lanka and Burma). Different countries have experienced the setting up of truth commissions as a way to establish the facts after a period of armed conflict or in a transition to democracy. Other means of establishing the truth were the setting up of international missions of inquiry (e.g. Sudan, Kenya, Chad, Gaza and others) with the participation of international experts. A common element of these commissions is that they have recommended the investigation and prosecution of those responsible for human rights violations. The establishment of the truth also plays a key role for certain human rights violations and international crimes and in particular enforced disappearances. In this context, the recent adoption of the *International Convention for the Protection of All Persons from Enforced Disappearance* and the need to have it enforced will be addressed.

An international mission of inquiry in Kenya led to the establishment of truth and facts and recommendations on best ways to effectively investigate and prosecute alleged perpetrators of the crimes committed. FIDH has been campaigning for the establishment of an international and independent mission of inquiry in Burma, which would pave the way for future criminal investigations and prosecutions of alleged perpetrators of crimes committed.

Workshop G) - Respect of Human Rights in the Fight against Terrorism

Case study: Afghanistan, Yemen, Uzbekistan and the case of China.

While respect for human rights in the framework of the fight against terrorism remains a major challenge for FIDH and its member organisations, the current context illustrates that there are other obstacles that have to be addressed and integrated into future strategies. After the clear disrespect of human rights and international law by the Bush Administration, the inauguration of Obama to the US presidency represents a fresh opportunity to change the approach and practices in the fight against terrorism. However, Obama has decided to send new troops to Afghanistan.

The case of Abu Ghraib and its proxy centres in Afghanistan will show the challenges in addressing the fight against terrorism, and will help to enrich the discussion on new elements that must be envisaged in future strategies. The case of Pakistan will also serve as an example of the current challenges in the fight against terrorism. First, which type of accountability do we want to reach. And secondly, how to reinforce our work to reach a more effective respect of human rights, including alliances with groups other than human rights. While the respect of human rights will be the main focus of the workshop, the need to address the accountability of actors who commit acts of terrorism will be also addressed.

The case of Uzbekistan is of particular concern due to the high level of repression and violence, but at the same time, is representative of the current situation in the region where the fight against terrorism is more and more often used as an excuse for harsh political repression. In Uzbekistan where the majority of population is Muslim, believers are accused of extremism and hundreds of people are persecuted every year and their basic human rights violated.

The case of China is relevant as in the framework of the Shanghai Convention on Combating Terrorism, Separatism and Extremism, China among the Republic of Kazakhstan, the Kyrgyz Republic, the Russian Federation, the Republic of Tajikistan, and the Republic of Uzbekistan, is engaged in conducting multilateral cooperation on these issues. China's invocation of a "war on terror" and separatist, extremist, or terrorist labels raise serious concerns regarding protections for ensuring an appropriate balance between national security and protection of human rights and fundamental freedoms under international norms and standards.

Workshop H) – Accountability of multinationals: the need for common strategies

FIDH and its member organisations have explored venues and shared lessons learned to increase multinationals' accountability. Two seminars have been held, one in Nairobi, Kenya in 2008, and other in Bogota, Colombia in 2009. Each of these seminars addressed the main challenges faced by victims, lawyers and NGOs. Both recalled the importance of adopting a victim oriented approach in the conduct of activities, reaffirmed the need for enhanced coordination at the national and international levels and the need to hold multinationals accountable (ie. by using Article 25 of the ICC Statute, the extra-territorial obligations of judges from countries of multinationals' headquarters, by updating the OECD guidelines to the attention of multinationals, or addressing the project of an economical and environmental international court). The conclusions of these seminars can serve as a basis to guide the discussions of this workshop with the idea to share experiences and lessons learned in leading advocacy activities with states and multinationals and in bringing cases in order to draw common legal and political strategies.