

Binello, Daniela (ed.). *Il diritto non cade in prescrizione: I 'desaparecidos' italoargentini. I diritti umani tra negazione e internazionalizzazione*. Rome: Ediesse S.R.L. 2002. Pp. 271.

Thousands of people disappeared in the so-called 'dirty war' during the reign of the military in Argentina. With the arrival of a democratically-elected government in 1983, high-ranking military officials (including three former *de facto* presidents) were brought to justice and convicted. In 1986 and 1987, the Argentinian Parliament adopted the so-called laws of '*Punto Final*' (statute of limitations) and '*Obediencia Debida*' (superior orders) under the threat of military insurrections; consequently, numerous serious crimes remained unpunished. For this reason, some third states initiated investigations in their respective jurisdictions in order to facilitate the prosecution of those responsible for crimes committed in Argentina against their respective citizens. One such trial took place in Italy against seven Argentinian military officials for their responsibility in the perpetration of political crimes; they were sentenced to penalties ranging from 24 years to life imprisonment. It is this particular trial that prompted the writing of the book *Il diritto non cade in*

*prescrizione* (Time does not bar prosecution) by the Italian journalist Daniela Binello.

The book consists of a series of accounts and interviews. Although it is not an international law book, it brings an interesting light to bear on the ever-growing debate on transitional justice. Most of the contributors are Italian, but some are Argentines. They include the editor, a mother of two victims, the prosecutor of the Italian trial, a surviving victim, two journalists, a diplomat, an Argentinian emigrant, an academic, a human rights activist, two lawyers and a trade unionist. In addition to the contributions, the book contains an annex with some trial documents, such as the closing arguments of the prosecutor and the *parties civiles*, and the judgment pronounced by the Court on 6 December 2000.

Some of the contributions deal more specifically with the general issue of Argentina's own transition. Horacio Verbitsky challenges the traditional realist argument in favour of amnesties, which claims that they lead to reconciliation. According to this Argentinian journalist, granting pardons and amnesties, far from leading automatically to reconciliation, simply delay a confrontation with the past. In his view, no law or political decision can suppress or impose feelings and the reality of these feelings needs to be respected. Indeed, it is difficult to disagree with the idea that reconciliation cannot be 'imposed' by formal means (amnesty laws). Unfortunately, Verbitsky does not go into the details of why this is so, but this reviewer would argue that in the case of Argentina, three important elements seem to conspire against reconciliation: the absence of a full explanation of what happened with the '*desaparecidos*' and the consequent impossibility of 'closure' for the relatives of the victims; lack of criminal investigations of the other grave crimes committed; and, finally, lack of remorse on the part of those responsible for such crimes. The point about the counter-productive character of amnesties, at any rate, is well taken at a time when the debate on the legality of amnesties seems about to be reopened in the context of the ICC and the principle of complementarity.

Julio Velasco, who emigrated from Argen-

tina to Italy during the 'dirty war', observes that in order to emphasize the human rights violations carried out by the military in Argentina during those years, it is also necessary to examine the violent actions perpetrated by certain armed opposition groups. The point is an important one because looking into the question of responsibility of those who belonged to armed opposition groups and participated in criminal acts may be seen as 'politically incorrect' in Argentina, given the comparatively larger scale of the atrocities committed by the military government. In Velasco's opinion, however, only if all parts of reality are acknowledged can a fruitful reconciliation be brought about. This argument seems valid since respect for victims of grave crimes and for their relatives needs to be paid in all circumstances, regardless of the scale of the atrocities committed by any party to the conflict.

The most interesting arguments put forward in the book, however, concern the growing debate about the desirability of holding criminal trials outside the country where the grave crimes were committed. This is a debate that has become all the more interesting in an era in which many people perceive this type of trial, particularly those conducted under universal jurisdiction, as a kind of all-round panacea. There is little to debate on the view that prosecution of serious crimes is crucial. Still, it seems that the starting point should be that prosecution in the territorial state should prevail over third state prosecution if possible. This is, among other grounds, out of respect for some fundamental principles of international law (not least of which is that of sovereignty). Moreover, criminal investigations and prosecutions as well as the enforcement of sentences are greatly facilitated if the trial occurs in the country in which the crimes were committed (evidence is more accessible and the accused may be easier to arrest).

It is also true, however, that criminal jurisdiction over widespread and systematic violations of human rights based on the principle of territoriality is (as practice shows) very frequently ineffective: with the notable

exception of the *Juntas Trial*, Argentina is living proof of this. Therefore, some other forum must be sought if justice is to be rendered at all. At one point, Daniela Binello, by insisting that human rights must be internationally protected and guaranteed *by the establishment of international judicial organs* that are able to work efficiently, seems to express dissatisfaction that one of the only significant trials outside Argentina had to be a national trial. However, given that the international community's resources and goodwill are not unlimited, it goes without saying that in many cases (and for the foreseeable future) there will be many case-loads that will never be dealt with by an international criminal tribunal.

This is why the existence of national judicial systems empowered to exercise their criminal jurisdiction in cases of crimes committed outside their general competence *ratione loci* remains important. There are of course significant problems associated with such trials. One is that at least some of the trials (like the one held in Italy) will be conducted *in absentia* of the accused so that enforcement of sentences is illusory. Perhaps a more important problem from the point of view of international law is that defendants may occasionally be charged with domestic rather than international crimes (it is a pity that none of the contributors dealt with this issue), which form the usual subject of adjudication by international judicial organs. This was the case in the Italian trial. Although the prosecutor did use the terms 'genocide' and 'crimes against humanity' in the closing arguments, the actual indictment was for kidnapping, murder and causing serious bodily harm (notably, the Italian Penal Code does not incriminate the crime of torture). The risk here is not only that international law will not be applied as such (although that is definitely a problem if one considers that the international public order has a vested interest in being enforced *per se*), but that victims may feel that the gravity of the crimes is somehow minimized as a result.

Another potential problem area is that the principle of criminal jurisdiction upon which

the Italian Court relied was the principle of passive nationality (the nationality of the victim). The idea that the accused were condemned merely because of the chance circumstance that some of the victims happened to have an Italian passport seems to gloss over the fact that they — and many others who did not have a second nationality — were killed in Argentina, as Argentines and by Argentines. Inevitably, trials like the Italian one will bring closure for only a small fraction of the relatives of victims.

Notwithstanding these shortfalls, what is perhaps most important is that a given court judges a criminal conduct no matter how the national law labels it, without the purpose of shielding the person concerned from criminal responsibility, and in accordance with the standards of due process provided for by international law. There are no strong reasons to believe that the same criminal conduct is 'more criminal' if qualified as an 'international crime' than as an 'ordinary' one, and certainly the net result in terms of sentencing is likely to be the same, given that the ordinary crimes for which the accused were condemned were in no way minor.

Indeed, a trial like the one that took place in Italy may contribute in its own modest way to reaffirming the fight of civil society against impunity (as most of the contributors contend); it may 'testify' to what happened in Argentina in its dark years; it may address (even if late) the sufferance of victims and

their relatives; and it may encourage the territorial state to bring persons responsible for grave crimes to justice.

Nowadays, renewed Argentinian efforts to look into its past seem to have been undertaken. The Argentinian Parliament derogated from the laws '*Punto Final*' and '*Obediencia Debida*' and, at present, their constitutionality is under consideration by the national Supreme Court. If such laws are declared unconstitutional, investigation and prosecution of persons responsible for serious crimes committed in Argentina during the military regime could be undertaken in the country once again. It may turn out that the accumulated effect of trials like the one that took place in Italy will have been to nudge the Argentinian government to action.

The book edited by Daniela Binello gives an excellent insight into the trial held in Rome, which led to the condemnation of some perpetrators of serious crimes committed in Argentina during the 1970s. Her account, together with the stirring collection of memories, analyses and notes issued by persons closely concerned with the events that took place there, makes this work a valuable tool for understanding the complex interplay of the international order and domestic issues of transition.

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