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Monitoring and Documenting Human Rights Violations in Africa

A Handbook

Amnesty International and CODESRIA

Amnesty International

Council for the Development of Social Science Research in Africa

Amnesty International Dutch Section, Keizersgracht 620, PO Box 1968,1000 BZ Amsterdam, The Netherlands

Council for the Development of Social Science Research in Africa
Avenue Cheikh Anta Diop Angle Canal IV, BP 3304 Dakar, Senegal

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Contributors

Sulaiman Adebowale

Sulaiman Adebowale is currently Assistant Editor (Publications) for the Council for the Development of Social Science Research in Africa (CODESRIA), Dakar, Senegal. His previous experience includes working as a journalist for the print media and consultant editor for several organisations in Nigeria and Senegal.

Agnès Callamard

Agnès Callamard has been working for Amnesty International since 1995, first as research policy co-ordinator, focusing on methodology and standards of research, and currently as the head of the Secretary-General's Office. Before joining Amnesty International, she worked at the Centre for Refugee Studies of York University in Toronto where she pursued research on international and African refugee movements, refugee women, gender and development, and taught at Atkinson College, York University. She holds a Ph.D. in Political Science from the New School for Social Research, New York.

David Anthony Chimhini

David Chimhini is the Executive Director of the Zimbabwe Human Rights Association (ZimRights), based in Harare. Before working in the fields of human rights promotion, protection and defence, he was a teacher and trade unionist.

Aminata Dieye

Aminata Dieye is currently the head of the Monitoring of Human Rights and Urgent Alert Unit at RADDHO (Rencontre Africaine pour la defense des droits de l'homme), a human rights NGO based in Senegal. She previously worked as the head of RADDHO's Women and Children's Rights Commission. She investigates human rights violations, works with lawyers to provide legal aid to victims of human rights violations, and conducts human rights awareness-raising activities with the relevant authorities and the public at large. She holds a Master of Science in Education (M.Sc. Ed.).

Casey Kelso

Casey Kelso has worked for the International Secretariat of Amnesty International since 1994, as a press officer, researcher and media director. Before joining Amnesty, he was a writing fellow of the Institute of Current World Affairs based in Zimbabwe, and a professional journalist.

Bruno Lokuta Lyengo

Bruno Lyengo is the founding member and deputy chairman of the Non-Governmental Organisation "La Voix des sans-voix pour les droits de l'homme" (VSV) of the Democratic Republic of Congo. VSV was founded in 1983 and worked underground for seven years. Its main activities focused on human rights education and awareness-raising, monitoring human rights violations, and assistance to victims of human rights violations. Bruno Lyengo is currently living in the Netherlands.

Kathurima M'Inoti

Kathurima M'Inoti is advocate of the High Court of Kenya and Chair of the International Commission of Jurists, Kenya section. He litigates and practises law in the High Court and Court of Appeal with particular emphasis on human rights issues. He has defended many human rights activists in court facing such charges as unlawful assembly, incitement, sedition, etc. He has represented victims of torture seeking compensation in court, as well as families of victims of death in custody in public inquests. Mr M'Inoti has also lectured in the Department of Public Law of the University of Nairobi. He holds a Bachelor of Law degree and a Master of Law degree from the University of Nairobi.

Carolyn Norris

Carolyn Norris worked for Amnesty International as a campaigner and researcher on West and Central Africa. She has also worked with human rights defenders across Africa and in Uganda with a national local human rights organisation. More recently, she has been working on a programme learning with the development agency, ActionAid. She is currently a consultant with Article 19, an NGO working on freedom of expression, and Save the Children.

Ebrima Sall

Ebrima Sall currently co-ordinates the Academic Freedom and Child and Youth Studies Programmes for the Council for the Development of Social Science Research in Africa (CODESRIA), Dakar, Senegal. Ebrima Sall holds a Ph.D. in sociology from the University of Paris I Sorbonne, France. Among his publications include *Women in Academia: Gender and Academic Freedom in Africa,* Dakar: CODESRIA, forthcoming.

Rojatu S. Turay-Kanneh

A nurse by profession, Rojatu Turay-Kanneh is currently working for the Women's Health and Development Program of the Mother Patern College of Health Sciences of Don Bosco Polytechnic in Liberia. The objective of the Women's Health and Development Program is to create awareness on the issues of violence against women with certified midwives and birth attendants in order to enable women to see a way around violence and do something about it. Ms Rojatu Turay-Kanneh has conducted research on war-time violations against Liberian women and has trained certified midwives to enable them to work with traditional birth attendants and create awareness on violence against women.

Peter van der Horst

Peter van der Horst is currently co-ordinator of the Special Programme on Africa of the Dutch Section of Amnesty International where he develops and implements projects to support the human rights movement in Africa. His previous positions have included: head of campaigns in the Dutch Section of AI, co-ordinating a programme for returned development workers in the Netherlands, the Associate Repartriating Officer in the UNHCR repatriation programme in South Africa, and development work in Zambia.

Part One
RESEARCH ON HUMAN RIGHTS VIOLATIONS

Definitions and Activities

Overview

Broadly speaking, research on human rights violations consists of finding and assessing information related to human rights violations, recording and processing them in a report, and identifying possible strategies and actions to address the violations.

This is how the Media Institute of Southern Africa, Zambia Chapter (ZIMA), describes its work on behalf of press freedom:

> *Typically, ZIMA's media monitoring role consists of watching the national press such as radio, television and newspapers daily for reports of attack against the press. In addition, we maintain close links with journalists working for both the state-owned media and the private media who give us additional tips which may not be public knowledge. When we get a report of a violation of press freedom from the press, we have as much as possible to verify the information ourselves to ascertain its truthfulness so that we do not mislead the world. This involves speaking to the journalists involved, their work mates, lawyers or families for a first hand account of the attack. If there is a need to contact the government or one of its agencies, we do so before finally compiling a report of the violation which we call an "Action Alert" for MISA headquarters. The Action Alert is a "news bulletin" focusing on violations of freedom of the press or freedom of expression. The "Action Alerts" are sent from the ZIMA office using electronic e-mail to MISA headquarters in Namibia where they are edited and in turn sent to subscribers of MISA's electronic mailing list.* [1]

ZIMA's approach is typical of virtually any research exercise:

- The ZIMA activist **watches** the media, in other words, he/she monitors it by reading it regularly and consistently.
- The activist also **builds contacts** with journalists to get more information or confirm what has been received from reading the press or other sources.
- He/she then identifies allegations that require further investigation on the scene: this is a **fact-finding** phase.
- Running all through these activities is **analysis**: is this or that incident a violation of press freedom or not?
- Once all information has been confirmed, it is compiled in a brief report called an "Action Alert" and circulated via e-mail: this is the **action** phase.

1 Sipo Kapumba, *Monitoring Violations of Press Freedom in Zambia*, Southern Africa Human Rights Defenders Workshop, Harare, Zimbabwe, 26–28 March 1998.

Research on human rights violations is likely to involve five main interrelated activities

Contact-building

Identification and development of a network of contacts or informants who report incidents or give you information related to human rights violations.

Monitoring

Long-term observation and analysis of the human rights situation in a country or region.

Fact-finding

Investigation and verification of information related to specific incidents or allegations of human rights violations.

Documenting

Systematic recording, analysing and storing of information, and report writing.

Acting

Identification of the best strategies and implementation of action to remedy the situation.

Contact-building

What is contact-building?

Contact-building means developing networks of contacts, friends, informants, throughout the region or country and possibly outside the country, who will report incidents to you, pass on information related to the political situation and inform you of particular risks.

Contact-building is, in itself, a large part of human rights investigation, and one that may take a lot of time, especially if you are starting work on a new issue or if your organisation is not well known.

Why is it important?

- **To get information:** The networks of **contacts** which human rights researchers develop are absolutely vital to human rights documentation. Your contacts will be the ones reporting incidents or allegations to you.
- **To assess information:** You also need a good contact network to verify your information. If one contact reports an incident to you, you will need to double-check this information. You may do it by conducting fact-finding yourself, or you may ask other contacts whether they can confirm the incident.
- **To build a safety network:** Finally, contacts may save your life. They may help you if you need to keep a low profile, leave the country, or they may warn you of imminent risks to your life or to the work of your organisation.

Sources of contact

A contact network may include the following (the list can be longer or shorter, depending on the country, your mandate, your resources, etc.)

1 **Local, national and international Non-Governmental Organisations (NGOs)**
   - Other national human rights NGOs
   - Development NGOs
   - Other NGOs and associations (e.g. women's; youth's; etc.)

2 **Religious institutions**

3 **Relevant professionals**
   - medical doctors
   - lawyers
   - journalists (including non-national journalists)
   - trade unionists; etc.

4 **Members of government**

5 **Members of Parliament**

6 **Members of *all* political parties;**

7 **Members of security forces, the army, police, etc.**

8 **Representatives and staff of international organisations**
   - UN agencies
   - ICRC

9 **Diplomats and staff of embassies**

Who are the contacts?

The nature of your contact-base depends very much on the type of work you're doing and especially on the violations you are researching.

Ideally, a contact-base should be **varied** and **representative** of various ethnic groups, regions, social classes, professions, political affiliations and parties, areas of work, women's and children's issues, etc. Contacts should also be balanced in terms of their gender. Contacts may be found in the country or the region, but also outside.

How to build and keep contacts?

Contact-building involves building trusting relationships with people

- It may take time and require regular contact with them, either through the phone, mail (provided there is no security risk involved), or meetings. Contacts must feel that they can rely on you and that appropriate action may be considered and taken upon the receipt of information.
- Trusting relationships also necessitate informing contacts about your work. Contacts will often be the first ones to bring cases to your attention. If they are not aware of your research standards, the information provided may not be useful. For example, your contacts must understand just how important it is to get precise information, such as time, date, and names particular to an incident.

Contact-building involves monitoring the accuracy of your contacts

- The allegations of human rights violations will often come from your contacts (organisations and individuals) who have conducted their own fact-finding, or who have been witnesses to or victims of human rights violations. Monitoring will allow you to establish the record of these contacts in terms of their political agenda and the consistency, accuracy, and veracity of information passed to you.
- When someone has been a long-standing contact, it is easier for you to evaluate the accuracy of the information provided. When the contact is new, this becomes more difficult and involves contacting other individuals, taking more time (sometimes at the expense of speed of action), etc. Another frequent situation is that contacts have a political agenda. When assessing the information, you should always keep in mind this agenda and assess how it may have affected the information provided.

Contact-building requires confidentiality

- Relationships with contacts require a number of precautions as their life is often at risk. *Confidentiality* is key here, along with a thorough assessment of the risks involved in communicating with them.
- Contacts must be able to rely on your discretion. They will only trust you if you don't land them in difficulties.
- The need to respect confidentiality should not stop you from putting different people with common interests in touch with each other.

❇ See Part Two "Principles of Research"

Monitoring

What is monitoring?

Monitoring is the **long-term observation and analysis** of the human rights situation in a country or region.

It generates an **important database** which allows you to build a picture of the human rights situation in the country or region and make judgements about reports of human rights violations, and permits an informed assessment of individual allegations.

It also, quite often, **alerts** you to possible human rights violations.

It consists of **collecting systematically and consistently** information that may be related to human rights violations, from a variety of sources. These might include:

- print media
- radio broadcasts
- official reports
- court records
- statements and interviews of witnesses and victims
- individual allegations of human rights violations
- reports from other NGOs or IGOs
- internet sites

Monitoring can be very labour intensive and possibly expensive. You will have to make hard choices on the basis of their financial and human resources.

In particular, you will have to decide:

- which newspapers should you systematically gather, read and file?
- which other published materials should you gather, read and file (including, if you have access to it, material on the Internet)?

What to monitor

This is how the Human Rights Committee of South Africa describes their monitoring work:

> *"We collect information from newspapers, the police and other NGOs working on similar issues. On receipt of newspaper and police information, we verify with NGOs and sources . . . We then input the information into a database. The database is categorised into: security force abuse, attacks against security forces, security force action, military and other abuses, prisons, political violence, industrial and education conflict. We give a narrative on the information collated in the database on a regular basis. This gives an indication of the human rights situation in the country."*[2]

The scope and nature of the monitoring exercise depends very much on the human rights situation in the country or region covered, your financial and human resources, and the specific violations you want to work on.

2 Nobuntu Mbelle, *Monitoring Human Rights Violations by the Human Rights Committee of South Africa,* Southern Africa Human Rights Defenders Workshop, Harare, Zimbabwe, 26–28 March 1998.

Sources of monitoring

In the examples above, ZIMA is collecting information from newspapers and radio, journalists and the government itself, while the Human Rights Committee of South Africa focuses on newspapers, police records and other NGOs.

Types of information being collected

It is beyond the capacity of any single organisation to collect information on everything. You have to make strategic choices determined by the type of violations you are working on.

ZIMA has decided to collect information related to freedom of expression. The Human Rights Committee of South Africa collects information on a larger number of issues, e.g. prisons, abuses by security forces, etc.

On page 10 is a list of issues you may want to cover while doing the monitoring. Notice that they are not all directly related to specific incidents. In fact, many may be more general, i.e. they relate to the *context* within which the violations are occurring, such as the political, economic or cultural context.

Example: To return to the Human Rights Committee for South Africa:

> ❝ *We monitor how many children are still being held in police cells or in prisons while awaiting trials. We collect statistics from the Department of Correctional Services on the number of children awaiting trial in police cells and prisons.* ❞

Example: If you or your organisation are conducting research on violations of women's human rights, you may need to collect specific reports or allegations of violations (e.g. rape by security officials, domestic violence, etc.), but you may also need to collect statistics on women's access to education, health, political representation, speeches by government officials or others on women, etc.

POSSIBLE INFORMATION TO LOOK FOR WHILE MONITORING

You do not need to monitor everything, just what is most important depending on what you are working on and what your objectives are. The following is a list which will need to be adjusted depending on your mandate, your objectives and your resources.

Contextual information, such as:

- **Historical context**
- **Economic indicators**, such as: unemployment rate, growth rate, labour force, nature of economic policies, military spending, etc.
- **Social indicators**, such as: access to health care and education, malnutrition rate, access to land, working conditions, labour unrest, etc.
- **Demographic data**, such as: size and age structure of the population, growth rate, ethnic and regional make-up, refugee and internally displaced populations, etc.

Possible sources: official reports; reports from local and international NGOs; IGOs reports; academic writings; media

Political information, such as:

- Nature of the political system, role of the military and security forces, political tensions or conflicts, ethnic cleavages, etc.
- Electoral patterns
- Political speeches

Possible sources: official speeches and reports; political party platforms, media

Legal and constitutional information, such as:

- International conventions, treaties ratified by the government;
- Important court cases, prosecution, etc.
- Relevant constitutional provisions
- Laws (including penal code)
- Organisation and working of the justice system

Possible sources: court documents; police records, lawyers; office of the prosecutor; victims, family, media, etc.

Reports of

- incidents
- individual allegations of human rights violations

Possible sources: contacts; victims; the media; missions.

Fact-finding

What is fact-finding?

Fact-finding consists of investigating a specific incident or allegation of human rights violations, collecting or finding a set of facts that proves or disproves that the incident occurred and how it occurred, and verifying allegations or rumours.

Forms of fact-finding

Fact-finding can take different forms, depending on the type of the violations being investigated, the location of the violations, and the objectives. The following is an incomplete list demonstrating the variety of methods of fact-findings:

Missions: Investigation in the field (i.e. not from the office) for a limited period of time. Missions can be low-profile (no publicity around it) or high-profile (seeking publicity) depending on the objectives. They may be conducted by:

- **staff members**
- a **national delegation** composed of staff members of the organisations and other experts, such as medical doctors, lawyers, locals, etc.
- an **international delegation** composed of foreign nationals and nationals.

Long-term missions: Placing trained field workers in an area for a longer period of time to collect information on violations.

Trial observation: Observing a trial in order to determine whether it follows proper (that is, fair) procedures.

Prison visits: Such visits may serve different purposes: interviewing specific prisoners or detainees; finding evidence of torture or ill-treatment; assessing the conditions within the prisons.

Observation of demonstrations: You may decide to observe demonstrations in order to monitor the behaviour of the police, security forces, specific groups involved in the demonstrations, etc.

Observation of elections: A number of NGOs monitor elections, including during the months preceding the elections, the election day and the follow-up to the elections. This task may include: press monitoring; legislation; events leading to election day; election day; etc.

Surveys: They consist in gathering a number of data, usually quantitative but possibly qualitative as well.

Preparations before going on fact-finding

Carry out a thorough risk-assessment

- List all possible security concerns (e.g. your own physical security and the security of your contacts) and develop contingency plans to deal with each one of them (e.g. evacuation: how?). If access to, and your presence on, the scene carries many dangers, identify alternative means of carrying out the research (e.g. rely on a confidential local contact to bring possible witnesses outside the area).
- Be ready: prepare responses regarding the reasons for your visit and what you are doing in case people ask you difficult questions or appear suspicious.
- If necessary, seek official written authorisation to go to the scene.

Empower yourselves

- Be knowledgeable about the law and standards related to the human rights violations you are going to investigate: find out exactly what is prohibited under domestic laws and international human rights standards.
- Be knowledgeable about the patterns related to the allegations under investigation.

❇ See the section on "Documenting" on page 15.

Get the facts

- List everything you already know about the case.
- List everything you know about the particular location or region, as well as about the violation itself.
- Ask yourselves the following question: What do you already know about the case? What information is missing? What kind of evidence is lacking?
- List all your objectives for this mission.

Seek expert advice

- Get all necessary information or expert advice before going to the scene, e.g. consult with forensic pathologists, lawyers, etc.

Prepare your interview format

- Write down a check-list of the data and facts necessary to assess the allegations.
- Show the check-list to local contacts who have worked on the issue or have dealt with similar cases to get their input: they will often be able to add questions, delete others that are not appropriate, etc.

❇ See Part Four, "Suggestions for Interviews".

Composition of the delegation

- **Be strategic:** The investigative team should not be constituted with individuals who may be perceived as

partial by the informants because of their ethnicity, religion, known political affiliation, etc. As far as it is possible, identify team members who are impartial but who will also be *perceived* as impartial by the informants.

- **Experienced delegation:** An organisation's credibility is at stake, hence the need to send trained and credible researchers who can establish trust with informants.
- **Experts:** Identify which expertise will be most needed during the investigation: you may need forensic pathologists, a ballistic expert, a lawyer, etc. If possible, you should include such an expert in your delegation. If it is not possible, you should meet with experts before going on a fact-finding mission.
- **Gender-balanced delegation:** The delegation should include a woman who will be able to interview other women.
- **Ethnicity, language, etc.:** As far as possible, you should also seek to get delegates representative of different ethnic groups, language groups, etc. If you have little resources and few delegates, identify one who will be best equipped to deal with the ethnic, language, or other important factor.

A generic list of contacts and material evidence (to be adjusted according to the nature of the violations being investigated and local circumstances)

Individuals and/or groups

- Victims
- Eye witnesses
- Other witnesses
- Relatives
- Community leaders
- Religious institutions
- Lawyers
- Journalists
- Medical personnel
- Local human rights activists
- Members of political parties, civil rights groups, trade unions, ethnic groups, etc.
- Members and officials of the police force
- Prosecutors
- Other police/judicial representatives
- Members and officials of the army
- Members and officials of armed opposition groups

Material evidence

- Hospital and/or autopsy records
- Court records
- Police reports
- Official acknowledgement or response to the alleged violations
- Report of independent investigative bodies
- Weapons and ammunition left behind, bullet shells
- Documents left behind by the deceased
- Photographs, videos, etc.
- Body scars and wounds

At the scene

Identify contacts and sources of information

- Before departure, list all possible contacts and sources of information you may need to interview and meet in order to investigate and corroborate the information.
- **Identify who it may be more appropriate to meet first:** Provided, of course, that you have the luxury to set up and organise meetings. In any case, you should decide whether and at which point in the investigation you will meet with security officials.

Be politically aware

- Rely on local knowledge; "read" the overall mood; be on your guard and do not hesitate to leave the scene whenever you "feel" that something is wrong.
- Be observant of your surroundings.
- Be prepared to respond to requests or questions regarding your presence and activities.
- Seek all necessary permissions.

❇ See Part Three, "Challenges and Possible Solutions", pages 58–60, on security.

Ensure confidentiality

❇ See Part Two, "Principles of Research on Human Rights Violations", pages 35–38, on confidentiality, and Part Four, "Suggestions for Interviews".

Be accurate

❇ See Part Two, "Principles of Research on Human Rights Violations", pages 32–34, on accuracy.

Assess individual allegations and testimonies

❇ See page 15–26, on documenting.

Seek evidence and establish responsibilities for the human rights violations

❇ See the separate booklets on specific human rights violations.

Documenting

What is documenting?

Documenting involves: assessing individual allegations; analysing the overall evolution of the human rights situation; identifying trends; processing information in a report; recording and storing information.

Assessing individual allegations

The first question guiding your analysis is the following:

- **Does this alleged (you are not sure yet whether this is indeed a human rights violation) human rights violation fall within the scope of work my organisation is doing?**

In other words, the incident reported to you may well be a human rights violation but you may not be in a position to conduct the research because, as a matter of policy and practice, you do not work on this type of violation.

For instance, the Zambian organisation we referred to at the beginning of this chapter works exclusively on violations of freedom of the press. If they come across other types of violations, such as an alleged case of police violence against street children, they will most probably refer the case to other organisations who work on such issues.

If the allegation falls within the type of work you do, then you will embark on fact-finding. If it does not, you will report the case to other human rights organisations who are working on such cases.

The other main question guiding your analysis is the following:

- **Does the allegation or the incident reported to me constitute a human rights violation?**

In other words, does the incident violate international standards and domestic laws?

In order for you to answer this crucial question, you need to know the specific definition of the alleged human rights violation and the evidence required to determine whether it constitutes a human rights violation.

❇ See the separate booklets on specific human rights violations.

In other words, the next questions guiding your analysis are the following:

- **Do you have all the evidence needed to demonstrate that a human rights violation took place? What is missing?**

In the case of M.X., presented in the box below, you may want to go to the police station in person and ask to see the alleged

An example of alleged torture by state officials

Example: Some of your contacts have reported to you that a certain M. X. has been arrested for stealing a car and brought to a police station. According to family members and other individuals present in the police station, the police officers responsible for the arrest went on to torture him to extract a confession.

The first question is whether the alleged incident constitutes a human rights violation, in this case, torture. What is the definition of torture under international law?

> By definition, an **act of torture** is: the intentional infliction of severe pain or suffering, whether physical or mental, on a detainee by or with the acquiescence of state officials, for the purpose of intimidation, humiliation, degradation, coercion, punishment, or the extraction of a confession or information.

According to what you know already about the case, it is quite possible that the case will constitute a human rights violation. There are allegations of:

- severe pain inflicted on a detainee;
- it is being inflicted by police officers;
- they are seeking to obtain confessions.

What you need to do is to find all the evidence required, including:

- proof that M. X. was tortured;
- proof that he was tortured by prison officials;
- information regarding why they tortured M. X.

victim. If he has been transported to the hospital, you may need to go there and talk with him (if he can talk) or with hospital workers. You may ask for medical records which will demonstrate that M.X. has been the victim of torture.

- **How do you know if the data are valid?**

  ⇛ If you have already gathered some evidence or information (from eye-witnesses, for instance), you then need to ask yourselves whether the data provided to you are likely to be valid.

  ⇛ If you have interviewed eye-witnesses, you need to assess the interviews and cross-check all the facts: are the testimonies similar? Do they contradict each other?

⇛ If you have gathered material evidence, such as medical reports, you also need to check their validity. Unfortunately, in many countries, some medical professionals assist the security officials or cover up their activities. If you are not satisfied with the official medical report, you may need to seek a second opinion, etc.

⇛ If you have little material evidence or testimonies, then you may compare an allegation with the existing information in your hands and your knowledge, i.e. whether an allegation "fits" with what you know about the specific aspects of human rights violations.

Assessing the overall situation

The following is one of the ways the Human Rights Commission of South Africa analyses its information:

❝ *Through our data collection on children awaiting trials, we are able to note the trends. The numbers have escalated despite statements made by the authorities that secure care facilities for children awaiting trials will be ready this year [1998] in May.* ❞

The HRC analyses its information to assess whether the evolution of the human rights situation is a positive or a negative one, i.e. whether the allegations or cases of violations have increased or decreased, whether the government has responded positively or negatively, etc.

Assessing the government record
For instance, you may assess the government's willingness to:
- ratify international conventions;
- comply with its international obligations;
- take allegations of human rights violations seriously;
- take all allegations of human rights violations seriously (or only some);
- investigate all allegations of human rights violations and prosecute perpetrators;

Assessing the independence of the judicial system

Assessing the evolution of the human rights situation
Analysing your information may allow you to measure the evolution of the situation, that is:
- whether human rights violations have increased or decreased
- which specific violations have increased (or decreased).

Identifying patterns

A pattern constitutes one (or several) typical, possibly systematic, feature of human rights violations. It is identified through the analysis of a number of cases over a given period of time and by isolating one or several variables, such as: the location of the violations, manner, circumstances, etc.

Example: In a certain country, all known cases of arbitrary arrests over the last 2 years have taken place in the capital, demonstrating a **pattern** in terms of the **location** of the killing. By definition, location constitutes a variable.

You identify patterns all the time
Human rights activists identify patterns all the time and rely on them to improve and pursue further their investigation and develop strategies. In many cases, the identification of these patterns is based on political judgement or "intuition" and excellent knowledge of the country, region, political developments, etc. For instance, you may know that the majority of the killings have occurred in city A and that these killings have increased a great deal in the last two years. You may also know that such killings are likely to be committed by a special branch within the security services because of the methods followed.

But . . .
Such an approach may present limits when you are dealing with a large number of cases or when you are trying to establish with

EXAMPLES OF PATTERNS

Patterns in the identity of the victims

The victims themselves may present a number of common characteristics, such as:

- type of political activities
- professional activities or occupations
- ethnicity
- age-group
- gender
- sexual orientation
- residents of clearly defined areas

Patterns in the location of the violations

Quite often, the violations may take place overwhelmingly in specific places, such as:

- regions
- cities or localities
- neighbourhood
- specific detention centres

Patterns in the methods used to commit the violations

Quite often, the methods used by the perpetrators are consistent, i.e. the same or similar methods may be used to commit killings, torture, arbitrary arrests, etc. For instance, all killings may result from gunshot wounds, or may have been preceded by similar forms of torture.

Patterns in the circumstances of the violations

The circumstances immediately preceding or following the violations may also be quite similar and as such present a pattern. For instance, specific human rights violations may take place particularly before, during or after:

- new legislation
- declaration of a state of emergency
- elections
- announcement of meetings or request for authorisation
- demonstrations
- riots
- curfew
- military or reprisal operations

Patterns in the identity of alleged perpetrators

Through monitoring, you may also be able to identify a pattern in terms of the identity of the alleged perpetrators, including:

- specific security forces
- specific individuals
- ranks of alleged perpetrators
- commanders in charge

For instance, all cases of excessive use of force may be committed by one specific police force, or by specific individuals. Another example is when the perpetrators appear to enjoy freedom of movement at a time of curfew or roadblocks, which will tend to indicate that they are very well informed and that they may have allies within the security or military forces.

Patterns in official responses to alleged cases

A pattern may emerge over time in terms of the responses of the government and/or of armed opposition groups to the accusations, including:

- statements following the alleged violations
- official investigation or lack of investigation
- nature of the investigations
- nature of the procedures
- the absence or nature of prosecutions
- the identity of the courts responsible for the prosecution
- the absence or nature of the verdict

quasi-certainty the evolution over a number of years of cases of human rights violations, the incidence of certain variables, and the identity of the perpetrators.

A systematic approach is best

Keeping records of all alleged cases will allow you to establish patterns in a more systematic and accurate manner.

At regular intervals, you may add up and analyse:

- the total number of cases recorded over a period of time
- the total number of cases presenting one specific characteristic (e.g. allegations of torture in a particular prison; or killings resulting from gunshots)

Example: You may compare the overall number of rape cases with the number taking place in a particular city and notice that 90% of all recorded rape cases have occurred in this one place.

Example: You may compare the manner of death with the circumstances and notice that all killings resulting from gunshots have occurred less than 2 hours after a police operation in the area.

Common computer software programs such as Microsoft Word and Corel Word Perfect have commands such as "word search" which can help you process the information and establish trends.

Writing reports

Let's look at the experience of the researchers involved in researching and writing the report entitled *Breaking the Silence*. [3]

> "Breaking the Silence *was intended to move events of the 1980s from the murky realm of rumour, to a more solid historical footing. More than this, it was intended to highlight the continuing problems arising from the disturbances and thus to become a document that could be pointed to in support of the argument that compensation and rehabilitation is now needed by affected communities. . . . Transparency of the data sources and how they were interacting was clearly central to the report's overall validity . . .* ***Presenting data in a way that was both accessible and credible was one of the most crucial concerns in compiling this report.*** *It was clear the report's final acceptability and therefore usefulness hinged on this.* "[4]

Reports on human rights violations can take many forms and follow many different approaches. But there are a number of crucial questions which you ought to ask yourself before writing the report:

3 *Breaking the Silence: A Report on the Disturbances in Matabeleland and the Midlands, 1980 to 1988*, Harare: Catholic Commission for Justice and Peace in Zimbabwe and Legal Resources Foundation, 1997.

4 Shari Eppel, *Documenting Human Rights Violations*, Southern Africa Human Rights Defenders Workshop, 26–28 March 1998, Harare, Zimbabwe.

What must be proven and highlighted?

In all cases, you will want to demonstrate that human rights violations did occur. But what is your overall message? Is it to underline a pattern of impunity? Violence? Indifference? Lack of progress?

What is the main objective of this report?

The report published by the CCJP and LRF had one main objective: it had to be "*a document that could be pointed to in support of the argument that compensation and rehabilitation is now needed."*

Besides ensuring some forms of redress for the victims, you may also wish that your report fulfils other objectives, such as: proposing policy changes, the drafting and implementation of new laws; bringing to justice those responsible for human rights violations, alerting public opinion, putting pressure on the government or armed opposition groups, etc.

Who is the target audience?

Are you writing this report principally for: the government; the media; the public at large; the international community; other NGOs; etc.?

Has everyone being quoted agreed to it?

Before quoting anyone by name, you should make sure that this person has agreed to it and that there are no security risks involved.

How best to present the findings so that the report can be convincing and credible?

Once you've identified your main message, your objectives, and your target audience, you then need to turn to the presentation of your arguments and the facts. At this stage, the most important question you need to ask yourself is: how best can I present the facts?

There is no one single way to present the facts. The format to be followed depends very much on the answers you have provided to the first questions. But you cannot avoid including the following issues:

- the political, historical or economic context and circumstances;
- a description of the incidents;
- the nature of the human rights violations (Is it torture? Is it killing?);
- the identity of the victims, unless it is confidential;
- the alleged perpetrators and/or responsibility of the authorities;
- recommendations on actions to be taken

You may also wish to indicate the methodology you followed to gather the facts and evidence and come up with the recommendations.

In terms of the language being used, you should:
- be concise and clear;
- avoid insulting words,
- avoid politically loaded words that may demonstrate a lack of impartiality

Recording and storing information

"Sometimes, you may feel you'll remember. But you won't. You should write and file everything."

Recording and storing information occurs at each phase of the research process. In other words, you will have to develop a system to record and file information when you monitor, when you build contacts, when and after you go on a fact-finding mission, and when you develop actions.

How to create a filing system

Whether or not you have access to filing cabinets, all information collected should be **arranged** so that you can **easily and logically** find it when you need to go back to it.

The questions that must determine how to organise your filing system are:
- How can I get access to the data **quickly** and **easily**?
- How can I maintain the system in a way that is **not** (too) **time-consuming** or **complicated**?
- What measures should I take against **possible security risks**?

You may arrange the information according to **themes**, e.g. abuses by police; economic data; elections; etc.

You may also divide each theme into smaller categories, such as: **sources of information** (newspapers, government, contacts); **geographical location** (city, region, neighbourhood); **years** (1989–1990, 1991–1992).

Some organisations prefer using a **numbering system**. For instance, the Women's Health and Development Program of the Mother Patern College in Monrovia, Liberia, filed each interview they conducted in the course of several surveys on violence against women according to: the number of the survey, the number of the area where the survey was conducted, the number of the house where the woman was interviewed.

It is advisable *not* to file public and confidential information together in order to ensure a better protection of sensitive

information. By so doing, you may also be in a position to offer access to public information to other NGOs or individuals.

❇ See Part Two, "Principles of Research on Human Rights Violations", pages 35–38, on confidentiality, for further advice.

Some organisations can assist you in developing a comprehensive filing and recording system.[5]

How to record and file individual allegations

Example: RADDHO, Senegal, has two recording systems. The first one is a general record or **visitor book** where the names of all visitors and the reasons for the visit are systematically recorded. The second system is the individual **case sheet** where all information regarding the person or the case is recorded, including the progression of the investigation.

To facilitate monitoring and fact-finding, it is recommended that you develop a **standard format** to record allegations of violations, also called a **case sheet**. This format should be developed on the basis of:

- key information necessary for a case to be brought to national or international attention
- key political factors in your region, e.g. ethnicity, religion, region of origin, etc.

Take the necessary time to identify the information that should be recorded on the case-sheet. Such careful consideration will provide you with the opportunity to make a meaningful analysis and draw conclusions.

Generally speaking, the basic elements which should be recorded on the case sheet concern:

- the **identity of the victim(s)** (name, age, gender, occupation, address, religion, ethnicity, etc.);
- **location, date and time** of the incident;
- the **circumstances**;
- the **incident** (nature of the violation, method employed, possible reasons, etc.);
- **identity of the alleged perpetrator(s)** (police or military, individuals involved, description, etc.);
- **responses** of the government or of armed opposition group
- **evidence provided** (court records, police records, medical or forensic reports, etc.).

❇ See an example of a case sheet on pages 25–26.

How to record and file all other information

Please note that in many cases, the information provided in the case-sheet summarises a much more important file. For instance, all forensic evidence or court records (when available) cannot be filed on the case sheet. The objective of the case sheet is to

5 One such organisation is HURIDOCS, who can be contacted at: 48 ch. du Grand Montfleury, CH-1290 Versoix, Switzerland. *Tel.:* 41-22-755-5252; *Fax:* 41-22-755-5260; *E-mail:* huridocs@oln.comlink.apc.org

provide a quick summary of the information available at the time.

All case sheets **must be updated** whenever new information is made available. A case sheet is very similar to a medical record: every time you go to see your doctor, she/he should record all new information regarding the treatment, the illness, etc.

All case sheets **must be consistently and systematically filed** according to the system developed.

In addition to individual complaints, you will have to record and file all other information coming your way through monitoring and fact-finding, such as your daily activities, newspaper articles, government reports, letters, interviews in person or by telephone, etc. For instance:

- Newspapers articles have to be **cut and filed** in their proper files. Remember to add the name and date of the publication on the clippings.

- You may want to **develop a database** where you record all important information received every day, week or month. For example, the Human Rights Committee of South Africa summarises all information received from all sources in a database divided into themes (security force abuses, industrial conflict, etc.).

- The use of a **field book**. You may also want to follow the approach of the Women's Health and Development Program of Monrovia, Liberia: "each of us has two books. One is a journal where we express personal feelings. The second is a field book where we write day-to-day activities, how we selected our interviewees, how the persons reacted, etc."

How to use the computer

If you have access to a computer, you may want to file all your information and individual cases in a secure database.

There are a number of advantages with using a computer database system: it does not use as much space as filing-cabinets; it facilitates the search of information, the analysis of the evolution and trends. It is easier to update and to write reports because all information has already been typed, etc., and data can be protected to some extent if a password is required in order to access files.

But there are also a number of inconveniences: it requires inputting all the information into the computer, which is more time-consuming than putting it in a file.

You need to take into account the possible erratic electrical services: how often does the electricity shut down? For how long? You need to have access to up to date anti-virus software. Finally, you should remember that many thieves find it easier to steal

Sample case sheet for recording information, e.g. political killings

Date: ..... Registration number: ..... Information compiled by: .....

Visit to the scene: No ☐ Yes ☐ by ..... on .....

Interviews of witnesses No ☐ Yes ☐ by ..... on .....

1. Victim identification information

Name (last and first name, nickname): .....

Date of birth or age: ..... Gender: .....

Profession/Occupation: ..... Family status: .....

Address: .....

Nationality: ..... Religion: ..... Ethnicity: .....

Other identity-related status: .....

Physical description or picture: .....

2. Location of killing

Date, time and year of the alleged killing (or date of the disapperance):

Province: ..... District: ..... City/village (or nearest): .....

Street address (if applicable): .....

3. Nature of killing(s)

Number of victim(s) .....

killing(s) during or following:

police/ security operations	☐	military operations	☐
riots/demonstations	☐	inter-communal fighting	☐
arrest	☐	imprisonment	☐
abduction	☐	other	

Disappearance .....

Was any property:

☐ damaged .....

☐ destroyed .....

☐ stolen .....

☐ confiscated .....

☐ other .....

4. Causes of death

Causes of death (e.g. gunshot): .....

Brief description of the killing: .....

.....

5. Circumstances

Briefly describe the events immediately preceeding the killings (e.g. new legislation; military attacks, etc.): .....

.....

.....

6. alleged perpetrators (e.g. police forces, armed forces, armed groups, paramilitary groups etc.): .....

.....

.....

7. Evidence

Witnesses: .....

Forensic evidence: .....

Court record: .....

Other: .....

8. Governmental responses

Complaint lodged: when? ..... where? .....

Public statements: .....

Investigation: .....

Court cases: .....

9. Responses of the armed group, if any:

Did you contact representatives of the armed group? .....

How did they react to the allegation? .....

.....

Were any measures taken by their leadership; if so, what? .....

.....

Taking action

> *We adopt various strategies. We may write articles highlighting issues. This was done in the cases of child offenders being brought to trial. We are also in a position to alert other NGOs involved on issues that they lobby on, e.g. a child welfare group. On other issues like the use of excessive force, i.e. police and military personnel assisting the police in crime-fighting, we write submissions and present them in Parliament. Our data on security force abuse enabled us to make a submission on legislation in Parliament providing for the use of force by police in affecting arrest. We also write letters to government officials such as the Minister of Welfare on the issue of children awaiting trial. We also hold workshops on issue that demand greater publicity, i.e. the status of prisons in South Africa.* [6]

As the above extract illustrates, there are various forms of action available to human rights researchers or their organisations. Whichever action you decide to take, it will require that all information regarding the individual case or cases of violations be **accurate, organised and compiled**.

The information may be compiled in a public report or publication, but not necessarily: the report may remain internal or may form the basis for oral testimonies before a parliamentary committee, short articles for the media, etc.

Immediate action on behalf of the victims

Such action is meant to address the immediate or medium-term consequences of the violations as far as the victim or his/her family are concerned. It may include:

- **Issuing urgent appeals, writing letters to officials,** etc. – for instance, to ensure the release of an individual who is the victim of an illegal detention.
- **Seeking medical remedies** – for instance, medical treatment, forensic expertise, etc.
- **Seeking legal remedies –** for instance, organising legal assistance, filing law suits, etc.
- **Seeking redress** – including compensation, punishment of perpetrators.
- **Seeking remedies and assistance** – from international NGOs.

The identification and implementation of such action may be preceded by **discussions with the victims and their families**.

- **Explain your own limitations and objectives**, in particular that you cannot provide financial compensation. Instead, your objective is to make sure that this violation does not go unpunished and is not repeated.
- **Identify the possible options** for the victim or the family in terms of actions and the problems that may arise.
- **Don't be discouraged** if the victim and/or the family decide to drop the case.

> *We have a number of human rights violations involving the*

6 Human Rights Commission, South Africa.

police where the case is solved out of court. The victims who originally came to us seeking assistance then turn around and say they are no longer interested in pursuing the matter. As a human rights NGO, there is nothing we can do about it. Some victims are not interested in the human rights angle any more as soon as they have been financially compensated. [7]

- Be aware that such situations are likely to arise.
- Stay calm and don't get angry.
- Keep on recording information. Possibly issue a report on such cases if the situation keeps on occurring.
- Identify the best possible ways of persuading victims to pursue the cases.

Other possible action

Other possible action may include:

- Issuing public reports, publicising the results of findings, etc.
- Alerting the media and building a media strategy
- Building coalitions with other NGOs
- Holding workshops for the population or policy-makers
- Organising and mobilising the population
- Conducting campaigns around a particular theme or victim
- Lobbying the government for reforms
- Alerting the international community
- Alerting and working with relevant UN bodies and treaty mechanisms.

7 David Chimini, ZimRights, Editorial Group Meeting, Dakar, Senegal, November 1998

Suggestions for identifying effective action

1. Identify your objectives

What are you aiming to achieve and why? What are the expectations of the victims?

2. Identify your audience

Is your audience the general public, the media, other NGOs, the government, international organisations, etc.?

3. Time the release of the report or of the action

- What are the national and international events that may assist (or hinder) your cause?
- Is the national context open to changes?
  For instance, if a law reform has been tabled by government or parliament, this may be a good moment to do some lobbying.

4. Identify detailed and precise recommendations to accompany the action

The nature of the recommendations depends very much on the type of violation and the political circumstances or context. Generally speaking, however, the more detailed and precise the recommendations, the more likely they are to attract the attention of policy-makers, journalists, etc. For instance, recommending and lobbying for "a reform of the judicial system" without giving further details may not look very serious or knowledgeable. Explaining in detail what such a reform should entail and how it should be implemented will carry more weight in the eyes of the public, government, or media.

2

Les fondements philosophiques

Connaissance incomplète et fin des grands récits

Sans la revendication de l'ignorance et sa prétention à mettre fin au règne de la raison, la problématique postmoderniste serait inintelligible. Intervenant dans un contexte travaillé par les idéologies du New Age, et comme pour apporter à ces dernières une caution philosophique et scientifique, le postmodernisme a pris la tête de la contestation générale des valeurs fondatrices de la modernité, incarnée par Descartes, Bacon, Kant, Hegel et Marx. Partisans de la souveraineté de la Raison et promoteurs des philosophies de l'histoire fondées sur la liberté, la justice et le progrès, ces géants incarnent, aux yeux de la postmodernité et du New Age, la figure de l'Antéchrist ou de « malfaiteurs de l'humanité » (Lacroix 1996:99). L'hostilité que la postmodernité nourrit à l'égard des Lumières est grande. Aussi est-il compréhensible que *Contre la méthode* (Feyerabend 1996) soit l'antithèse du *Discours de la méthode* (Descartes); il en est de même de *L'Homme spéculaire*, qui professe explicitement une « science sans méthode » (Rorty 1990a:345). Comme *L'Espoir au lieu du savoir* (Rorty 1995), *L'Homme spéculaire* n'invalide pas seulement les acquis en matière de science et de connaissance, de certitude et de vérité; il cherche surtout à se frayer une voie susceptible de mener à l'herméneutique et à l'édification. Une telle démarche aurait été compliquée sans la ruine du principe de causalité, au cœur de la problématique scientifique moderne.

La physique contemporaine a en effet sonné le glas du positivisme, du déterminisme et de la causalité. Dans le contexte de la mécanique des fluides et de la physique quantique par exemple, ces notions semblent inopérantes. La causalité classique découlait d'une vision mécanique héritée de Newton. Le déterminisme en était le fondement. La conséquence logique découlant d'une telle vision des choses était l'affirmation de l'idée de dépendance universelle qui supposait que tout phénomène, même pris isolément, se trouve sous la dépendance d'autres phénomènes qui le déterminent étroitement (Bachelard 1975:149). Mais une telle hypothèse n'était valable que dans les strictes limites de la mécanique des solides. La causalité ici supposait les relations des solides entre eux, à l'instar de deux phénomènes doués de mouvements

différents, mais dont l'un déterminerait le mouvement de l'autre, d'après un déplacement linéaire suggérant un avant et un après.

Les choses changèrent avec le passage à la mécanique des fluides. Ici en effet, les éléments semblaient beaucoup plus indépendants du fait de leur grande mobilité. Car, « comme la chose liquide est déformée par le mouvement, il semble que le même et l'autre interfèrent et que le déterminisme se divise et devienne ambigu » (Bachelard 1975:110). La théorie des lois statistiques et la physique quantique ont davantage compliqué les choses. Les lois statistiques partent de l'hypothèse que les processus à grande échelle sont le résultat d'une multitude de processus isolés, irréguliers et se déroulant à l'échelle corpusculaire. Telle est la signification de l'idée de concours statistique (Heisenberg 1962:43). Ce concours concerne, rappelons-le, la multitude de petits processus isolés se déroulant au cœur des phénomènes. Contre le mécanisme, la physique atomique explique les phénomènes de la nature par le concours statistique d'innombrables petits processus isolés. D'où il appert que les lois de la nature elles-mêmes sont postulées comme des lois statistiques (*ibidem*). Ces lois ont introduit dans la science et l'épistémologie un concept nouveau, mais décisif: la connaissance incomplète. Incontestablement, les lois statistiques constituent un aveu d'ignorance; elles signifient que l'on ne connaît qu'incomplètement les systèmes physiques en cause. L'idée de température en fournit le modèle idéal. Supposons connus le mouvement et la position des molécules d'un gaz; parler de la température de ce dernier devient absurde. Le concept de température n'est significatif que si le système est insuffisamment connu et que l'on désire tirer des conclusions statistiques de cette connaissance incomplète » (p. 45).

Notons le lien entre la connaissance incomplète et le principe d'indéterminisme. Imparfaite, la connaissance incomplète est par nature une réalité indéterminée. L'examen de la matière à l'échelle atomique ou corpusculaire nous offre une multitude de phénomènes aux comportements extrêmement variés, incontrôlables et imprévisibles. L'exemple pris par Heisenberg (1962) est significatif à cet égard. Un atome de radium émet des rayons a; la théorie quantique est en mesure de déterminer, par unité de temps, le degré de probabilité d'abandon du noyau par la particule. Mais comment prévoir le moment précis d'occurrence d'un tel événement? Son indétermination essentielle empêche de dire quoi que ce soit à son sujet.

Sous la pression de ces découvertes, la notion de cause changea donc de signification pour s'identifier au probabilisme. Les savants, aujourd'hui, pensent unanimement que les lois scientifiques les plus rigoureuses sont précisément celles qui tiennent compte de la donnée probabilitaire, en dépit des réserves expresses de Max Planck (cité par Heisenberg 1962:45) qui laisse au physicien la liberté d'opérer avec le type de causalité qui convient aux circonstances. Pour cela, le chercheur se ralliera d'abord, à titre d'essai, soit à la causalité rigoureuse, dynamique, soit à la causalité statistique, puisque seul importe le résultat. Mais Planck lui, préférait s'en tenir à la causalité rigoureuse, plus apte à faire appréhender la réalité que la causalité statistique, accusée d'ailleurs par le savant de renoncer à toute connaissance certaine. Malgré ces réserves, la causalité statistique ne manqua pas d'influer sur la sociologie

de la connaissance. La déconstruction des catégories fondamentales de la métaphysique date de cette époque. Foucault, Derrida et Deleuze sont en France, les architectes de cette déconstruction qui a modifié la conception de la modernité.

Il serait naïf de croire que la causalité statistique prit tant de place en sciences physiques et sociales pour des raisons purement scientifiques. En fait, cette théorie servit d'alibi aux entreprises de discrédit de la raison et de dépréciation de la certitude. Son exploitation idéologique ouvrit notamment la voie à la vague de dé-légitimation des « grands récits » (en fait les grandes idéologies) dont l'ambition était de fournir un sens global à la destinée historique de l'homme moderne. Le discrédit des « grands récits » découle de la « crise » de la « métaphysique » elle-même. Celle-ci désigne l'âge spirituel et culturel de l'Humanité allant de la Grèce à l'ère techno-scientifique, en passant par la Renaissance et les Lumières. Pour être précis, la « métaphysique » cristallise l'idéal philosophique en soi, fait de lucidité, de rationalité et d'ordre.

S'inspirant de Heidegger, Schürmann (cité par Badillo 1991:111) distingue trois grandes périodes dans l'histoire de la culture occidentale: les périodes « pré-métaphysique », « métaphysique classique » et « post-métaphysique ». La première période renverrait aux présocratiques (poètes tragiques et philosophes). L'âge métaphysique lui, se rapporterait à la séquence historique de 2500 ans qui, grâce à la maîtrise des lois de la pensée et de la nature, détermina la suprématie historique de l'Occident. L'âge post-métaphysique enfin, caractériserait l'époque culturelle actuelle, dominée par le pragmatisme et l'herméneutique (Rorty 1990a:394).

L'âge métaphysique classique retient l'attention des postmodernes, parce que chaque grand courant de pensée de cette ère s'appuie sur l'affirmation d'un grand principe explicatif unique, la prétention étant de rendre compte, non seulement de la pensée et de l'action, mais aussi de l'origine même de l'être. Aussi la philosophie grecque s'articula-t-elle autour de la notion d'essence (Platon) et de substance (Aristote). L'époque médiévale elle, trouva son principe explicatif dans l'idée de Dieu, tandis que le concept de l'homme constituait le principe unificateur de l'humanisme. Pendant que la suprématie de la raison s'affirmait au XVIIIè siècle, l'époque actuelle voit dans la techno-science le principe d'ordonnancement de l'ordre du monde.

Pour la postmodernité, le principe unique prétend rendre le réel intelligible, d'où sa finalité rationnelle. Comme Raison au cœur du cosmos, à l'origine du monde, de l'être et de la pensée, le principe veut totaliser le réel et réduire à l'unité, la diversité des phénomènes du monde, du langage et de la pensée. C'est cette suprématie du principe que vise le postmodernisme.[1] La « déconstruction » de la métaphysique veut donc ruiner définitivement la confiance dans le principe, le système et la raison. D'où, la dé-légitimation des méta-récits se réclamant d'un principe métaphysique unique (Appiah 1992:110-111). Du fait de l'étroitesse de leurs cadres et de leurs postulats catégoriques, les principes et leurs expressions culturelles et politiques (« méta-récits » ou « grandes théories », « grandes synthèses » ou « maîtres récits », etc.), brideraient la pensée au lieu de l'émanciper. Aussi, à la place des principes et des idéologies, la déconstruction privilégie une vie, une pensée sans principes, sans méthode (Badillo 1991:110). D'où la provocation de Feyerabend (1979) contre Descartes.

Seule une époque comme la nôtre a pu véritablement célébrer la « pensée fragmentée » (Heyndels 1985), jusqu'à ses conséquences les plus extrêmes. Durant cette époque, des reliques oubliées comme Heine sont sans cesse convoquées, pour témoigner contre l'esprit de système de la science et de la philosophie. « Trop fragmentaires en vérité sont le monde et la vie », s'écriait le poète; « Il faut que j'aille consulter un Herr Professor, Lui seul saura comment recomposer la vie, En faire un système clair et distinct (…) Il bouchera les trous de l'édifice du monde » (Heine, cité par Heyndels 1985:26).

Le dédain du principe et de la méthode résume *L'Homme spéculaire* de Rorty (1990a), et avant lui *L'être et le temps* de Heidegger (1964:§ 44), sans oublier *Vérité et méthode* de Gadamer (1976).[2] C'est ainsi que le postmodernisme annonce l'aurore d'un âge d'or, où il serait enfin possible à l'homme de vivre sans philosopher, à l'abri de la violence du « discours uni-total », avec son « pouvoir systématique absolu » (Nzinzi 2002). Rorty prétend même que « si l'on veut donner toutes ses chances à la philosophie, il faut s'interdire de pratiquer la philosophie » (Rorty 1993:16). Aussi appelle-t-il de ses vœux l'avènement d'une culture post-philosophique, à la manière de Heidegger qui écrivait:

> Le moment est venu de cesser de surestimer la philosophie et, par le fait même, de trop lui demander. Tel est bien ce qu'il nous faut dans la pénurie actuelle du monde: moins de philosophie et plus d'attention à la pensée; moins de littérature et plus de soin donné à la lettre comme telle. La pensée à venir ne sera plus philosophie, parce qu'elle pensera plus originellement que la métaphysique, mot qui désigne la même chose. La pensée à venir ne pourra pas non plus, comme Hegel le réclamait, abandonner le nom d' « amour de la sagesse » et devenir sagesse elle-même sous la forme du savoir absolu. La pensée redescendra dans la pauvreté de son essence provisoire. Elle rassemblera le langage en vue du dire simple (Heidegger 1966:153-154).

La référence à Heidegger est intéressante, parce qu'elle nous permet de mieux voir la part de l'herméneutique dans la mise en place de la problématique qui nous intéresse ici. Les concepts majeurs de cette théorie rappellent les principes de « l'ontologie faible ou de l'ontologie éclatée » (Shayegan 2001:166). Car, que l'on considère *De l'Interprétation* ou *Le Conflit des interprétations*, « la justification de l'herméneutique n'est radicale que si l'on cherche dans la nature même de la pensée réflexive le principe d'une logique du double sens… » (Ricœur 1965:56). Cette logique est celle qui suppose « la guerre des herméneutiques », dans un contexte où « l'universalité du discours philosophique passe [nécessairement] par la contingence des cultures » (p. 55).

Comme le néo-pragmatisme, l'herméneutique revendique un statut irrationaliste. Et, entre ces deux courants de pensée, il y a plus qu'une simple ressemblance, car, séduit par le caractère édifiant de l'interprétation, le postmodernisme revendique l'héritage herméneutique (Rorty 1990a). Aussi, contre la « théorie de la connaissance », le néo-pragmatisme affirme-t-il la nette supériorité de l'herméneutique et de l'édification.

Ricœur démystifie la prétention à une connaissance absolue et assimile le *cogito* à une « coquille vide » (Shayegan). En effet, pour lui,

> seule la réflexion abstraite parle de nulle part. Pour devenir concrète, la réflexion doit perdre sa prétention immédiate à l'universalité, jusqu'à ce qu'elle ait fondu l'une dans l'autre la nécessité de son principe et la contingence des signes à travers lesquels elle se reconnaît. C'est précisément dans le mouvement d'interprétation que cette fusion peut s'accomplir (Ricœur 1965:55).

L'herméneutique constitue un violent procès contre la raison. Dans cette perspective, la fonction essentielle de la philosophie n'est pas d'éduquer la raison, mais d'édifier; elle n'est pas connaissance objective, mais au contraire expérience vivante. La philosophie n'est pas appelée à énoncer une vérité, « une interprétation, mais plusieurs interprétations qu'il faut intégrer à la réflexion » (p. 61). Le « pluralisme » est à ce prix, l'édification aussi, celle-là même qui pointe vers les continents les plus obscurs de la psyché humaine. C'est sur ce terrain que l'herméneutique rencontre le postmodernisme, qui voit dans le « grand récit de l'esprit » ou encore du « savoir spéculatif », un projet moderne de totalisation du savoir. Il s'agit, pour lui, d'une « méta-narration » qui prétend qu'il existe une histoire rationnelle de l'esprit; cet esprit étant Vie, Sujet (Hegel 1969:467; 1978:127). Rappelons que pour Hegel, le savoir spéculatif, dont la philosophie constitue la forme la plus achevée, apparaît comme un savoir qui se sait, et qui de ce fait, peut se prononcer sur la légitimité des savoirs particuliers. Seul, un tel savoir peut dire ce que sont l'Être, l'État, la Société. Ce qui est donc ici visé, c'est le grand projet moderne qui va de Descartes à Hegel, en passant bien entendu, par l'acmé des Lumières. Ainsi se présente le méta-récit de l'esprit que s'efforce de déconstruire le postmodernisme.

Foucault notait déjà que loin d'être celle de son « affinement progressif, de sa rationalité continûment croissante, de son gradient d'abstraction », l'histoire d'un concept est plutôt celle de « ses divers champs de constitution et de validité, celle de ses règles successives d'usage, des milieux théoriques multiples où s'est poursuivie et achevée son élaboration » (Foucault 1966:11). Le postmodernisme radicalise cette perspective dans sa saisie de la rationalité. Comprendre le monde d'aujourd'hui revient à développer une conception post-wébérienne de la modernité (Appiah 1992:145). Ceci revient à réfuter le principe d'une raison transhistorique destinée à triompher de façon fatale et à rejeter le postulat de l'inéluctable rationalisation du monde, en ses aspects économiques, culturels et politiques. D'après cet auteur, rien n'indique, dans l'histoire contemporaine, qu'on s'approcherait même d'un tel idéal. En prenant comme exemples la laïcisation et le « désenchantement du monde » contemporain, thématiques chères à Weber, ce penseur souligne les difficultés encombrant cette voie, au regard de la montée des intégrismes religieux, avec des télévangélistes qui voient leurs affaires prospérer à l'ombre du capitalisme. Ainsi donc, loin de symboliser la souveraineté de la Raison, la société contemporaine, au contraire, aurait vu s'étendre l'Empire de Mammon qui, comme tous les empires, s'efforce d'envelopper sous sa juridiction propre, même les territoires sains de la pure Raison. Loin donc d'évoluer vers cette Terre promise de la rationalisation, le

monde voguerait plutôt vers les sombres continents de l'inconscient, de la foi et de la marchandisation universelle.[3] Mais, le postmodernisme restera inintelligible aussi longtemps qu'on évitera de remonter à sa véritable source, le pragmatisme lui-même.

Paradigmes pour un monde nouveau

Le renouveau pragmatiste

Dans sa tentative d'ajuster le monde au néolibéralisme, l'Occident a brusquement ressorti les recettes éculées du pragmatisme. Inspirant des penseurs comme Rorty, cette doctrine s'est signalée rapidement dès sa fondation comme la philosophie de la bourgeoisie industrielle avancée. Sa prétention a été alors de se substituer aux Lumières, perçues comme la métaphysique spécifique à la bourgeoisie ascendante et en quête d'identité propre.

Siècle par excellence de la révolution et de la réforme des esprits et de la société, le XVIIIè siècle avait besoin d'une métaphysique cohérente et stable. C'est elle que récapitule l'odyssée de la Raison. Par l'affirmation de l'idée rationnelle, la bourgeoisie se donnait les moyens théoriques et politiques de réaliser sa vocation historique essentielle, par la promotion de la science et de la technique, l'édification d'une économie moderne, capitaliste, et la construction d'un État libéral et démocratique. C'est ce nouvel esprit que célébrait Hegel dans sa philosophie de l'histoire. La Raison dans l'histoire est une théorie, une vision du monde, une explication générale des énigmes de l'univers. Cette Raison traduit un projet humain global, qui se conclut dans la fin de l'histoire, c'est-à-dire, le moment où l'Occident couronne l'histoire idéologique de l'humanité, en le portant à sa plénitude. Ce moment correspond philosophiquement à l'idée absolue, principe actif et dynamique dont la forme d'activité est la pensée elle-même ou encore, la connaissance de soi.

Le pragmatisme correspond à la ruine de ce principe. En même temps, il s'oppose aux grandes philosophies de l'histoire incarnant un projet, une vision. Car, aussitôt que l'hédonisme était devenu l'idéal de la société bourgeoise, et l'accès aux nouvelles technologies aidant, il était logique que le pragmatisme supplantât la vision, le projet, l'utopie. Dans la foulée, la philosophie changea de vocation; elle n'était plus une doctrine, mais une activité, et « une œuvre philosophique consiste seulement en élucidations » (Wittgenstein 1961:52). Lancé en Amérique par Peirce (1933/1958) et popularisé par James (1968) et Dewey (1929, 1948), ce courant de pensée ne regarde pas la raison et la science comme une explication globale du monde ou un déchiffrage des énigmes de l'univers, mais simplement comme un moyen d'agir sur lui. Doctrine propre à l'ère des laboratoires, il signifie – comme le positivisme, l'empirisme, le nominalisme et l'utilitarisme auxquels il est étroitement associé – qu'après la grande révolution du XVIIIè siècle, la bourgeoisie, n'a plus aucun projet global de société à formuler, aucune métaphysique à promouvoir, aucune explication du monde à fournir et aucune vérité à défendre; qu'elle peut désormais se contenter de gérer les acquis de la révolution industrielle, notamment en promouvant l'esprit du laboratoire et du capitalisme. Prétendant ouvrir un nou-

veau chapitre des Lumières, le pragmatisme estime que celles-ci ne renvoient plus à un idéal de Raison et de liberté, elles signifient au contraire l'éclaircissement des idées à l'aide de l'expérience. D'où le scepticisme affiché des pragmatistes à l'égard des « lumières naturelles de la raison », dont l'horizon reste la lumière construite artificiellement dans l'expérience. Aussi peut-on affirmer que le pragmatisme incarne l'esprit du laboratoire, qui se confond avec l'esprit expérimentaliste. La disposition d'un tel esprit est de penser toute chose exactement comme toute chose est pensée en laboratoire, autrement dit, comme une question d'expérimentation. Pour les pragmatistes, l'expérience constitue le point de départ garanti de la pensée, en tant qu'elle est l'instrument privilégié aux mains des Aufklärer modernes, pour éviter les erreurs et parvenir à la connaissance. Il s'agit de soumettre à l'expérience tous les concepts au moyen desquels nous opérons, afin de mettre en évidence ce qu'ils recouvrent. À titre d'exemple, le concept de force n'est intelligible que référé à ses effets, c'est-à-dire que d'un point de vue pragmatiste, la force n'est rien d'autre que la somme de ses effets. D'après lui, c'est à leurs conséquences que nous reconnaissons les objets, et c'est seulement à l'expérience que ces conséquences apparaissent avec le plus d'évidence.

L'esprit du laboratoire n'a pas manqué d'influer sur le concept même de vérité. Désormais, ni l'illumination des prêtres, ni la logique pure des métaphysiciens, ne sont plus sources de vérité; le penseur qui veut expérimenter n'est pas censé avoir une idée; il ne s'appuie sur aucun *a priori*. Au contraire, il affronte directement la réalité afin que cette dernière lui révèle son secret. La notion de pratique se comprend ainsi. Elle signifie l'action expérimentale à laquelle une idée doit se soumettre pour être légitimée (Marcuse 1967:74). Il a suffi à Peirce (1933/1958) et à James (1968) d'interroger son étymologie grecque *pragma*, pour se rendre compte que pratique signifie action. Ayant remarqué que nos croyances constituaient des règles pour l'action, ces penseurs en concluent que « pour développer le contenu d'une idée, il suffit de déterminer la conduite qu'elle est propre à susciter » (James 1968:49).

Le pragmatisme pense que, pour que nos pensées concernant un objet soient parfaitement claires, il nous suffit de chercher quels effets pratiques l'objet en question contient; aussi postule-t-il le primat de l'acte sur la pensée. Pour lui, la validité du raisonnement est purement une question de fait et non d'idée. C'est en cela qu'il oppose l'esprit de la science moderne à l'esprit de la philosophie ancienne. Dewey (1929, 1948) croyait cette dernière attachée à la saisie d'un monde clos, intérieurement constitué d'un nombre limité de formes fixes et extérieurement délimité par des frontières définies. Le monde de la science moderne, au contraire, apparaît comme un monde ouvert, varié à l'infini, sans limite assignable possible dans sa constitution interne; il s'agit d'un monde qui s'étend au-delà de toute borne externe assignable. Or, avec l'abandon de la substance immuable aux propriétés fixes, disparaît nécessairement l'idée d'une certitude liée à l'attribution de caractères fixes à des objets fixes. Pour Dewey, la recherche de la certitude se confond avec la recherche de méthodes expérimentales de contrôle, c'est-à-dire de régulation des conditions de changement par rapport à leurs conséquences. Ce penseur assimile la recherche de

la certitude à la certitude pratique, à la sécurité et à la sûreté des opérations instrumentales. Il en est ainsi parce que les objets scientifiques lui apparaissent comme des instrumentalités de contrôle, propriétés de la réalité elle-même et non des découvertes de propriétés immanentes des substances réelles.

Peirce (1933/1958) était déjà convaincu de la vacuité de tout jugement émis par la « métaphysique ontologique ». Si l'on supprime les postulats de base d'une telle métaphysique, pensait-t-il, la philosophie se réduirait à une série de questions que chacun peut soumettre à l'observation, dans le sens de la science exacte. Cet auteur ne s'intéressait à la philosophie que dans la mesure où elle pouvait transformer les questions philosophiques en questions scientifiques. C'est ainsi que le pragmatisme amena de force toutes les questions dans le lit de Procuste de la science (Marcuse 1967:77) révélant ainsi son positivisme.

Avec la science expérimentale, ce que Dewey (1929, 1948) appelle le test de validité des idées subit une transformation radicale. Car, dans le test d'inspiration newtonienne par exemple, ce qui est visé, ce sont les propriétés inhérentes aux objets réels ultimes, isolés les uns des autres et donc fixes et immuables. L'enquête expérimentale au contraire, fait dépendre la validité de l'objet de pensée des conséquences qui définissent ces objets. Ainsi, contrairement au système de Newton où l'ordre et l'unité du monde sont immuables, la science expérimentale fait perdre au monde, non seulement son unité et son ordre, mais aussi son éternité. Fondée sur la variété et le pluralisme, la doctrine de James par exemple est une croisade contre les métaphysiques de type moniste (James 1968:119).

Soulignons que s'il accorde tant d'importance à l'action et à l'expérience, c'est bien parce que le pragmatisme veut rompre avec les métaphysiques qui offrent les images de réalités transcendantes et d'abstractions solennelles et vagues. Pour lui, les métaphysiques anciennes reposent sur des principes autoritaires et immuables derrière lesquels se camouflent des abstractions vides:« Dieu », la « Matière », la « Raison », l'« Absolu » (James 1968:52).

Ainsi donc, la croyance fondée sur l'autorité de la Raison ou de quelque autre principe absolu, est remplacée par une nouvelle croyance, codifiée nulle part et nullement statique; il s'agit de la croyance dans les révélations imprévisibles de l'expérience toujours nouvelle et ouverte. C'est elle qui met fin à l'unité d'un monde clos, achevé, absolu. L'antique univers se disloque ainsi devant le flot kaléidoscopique des phénomènes (Marcuse 1967:235). Fondée sur l'expérience, et propre à l'ère industrielle, la nouvelle foi proclame la fin des tables de bronze. C'est en effet l'ère industrielle qui, la première, introduisit « cette abondance organisée de la révélation que la nouvelle croyance appelle expérience » (Marcuse 1967:236). Cette ère met fin au règne des hérauts de l'éternité ou de la pensée, puisque, désormais, ils sont appelés à témoigner de la vie temporelle. Tel est donc l'héritage de Rorty, qui assume même les aspects patriotiques du pragmatisme. Aussi, voit-il dans les États-Unis d'Amérique, le peuple du futur (Rorty 1995:52, 47, 58). Se définissant elle-même comme « anti-essentialiste », sa philosophie veut substituer au monde des substances et des essences celui des relations. Comment? Le néo-pragmatisme est d'abord une

croisade contre les hiérarchisations dualistes. Il s'agit donc pour lui de mettre fin au « dédoublement du monde », en ruinant la théorie du reflet. Rappelons que le problème posé par le dualisme est d'abord celui de la connaissance et de la vérité objective, c'est-à-dire, la manière dont le monde extérieur se reflète dans notre pensée.

Rorty s'inscrit ouvertement dans la lignée de James (1968), Dewey (1929, 1948), Nietzsche (1950 et 1985). Ce qui unit ces penseurs, c'est fondamentalement leur anti-dualisme radical, car, ils veulent tous ébranler l'influence qu'exercent encore les dualismes de l'essence et de l'accident, de la substance et de la propriété, de la réalité et de l'apparence hérités des Grecs (Rorty 1995:58). En même temps, ils cherchent, chacun à sa manière, à remplacer ces images construites à l'aide des oppositions « par l'image d'un flux de relations sans termes, de relations entre les relations » (*ibidem*). Rorty parle de « pan-relationnalisme » pour désigner la nature exacte des phénomènes peuplant le monde. L'intérêt gnoséologique du pan-relationnalisme est qu'il supprime la « distinction entre le sujet et l'objet, entre les éléments de la connaissance forgés par l'esprit et ceux qu'apporte le monde, et par-là, il nous aide à mettre de côté la théorie de la vérité comme correspondance » (*ibidem*). Ce qui est visé ici, c'est la théorie du reflet elle-même, que Marx (1976b:20-21), critiquant la théorie de la connaissance, inscrivait au cœur du matérialisme philosophique. La théorie du reflet pose le problème de la connaissance et de ses fondements.

Rorty (1990a:13sq) prône « une vérité sans correspondance avec la réalité »; « un monde sans substances ni essences ». Mais, en ouvrant les énormes volumes de ce penseur, on croit y trouver une pensée originale; mais quelle n'est pas la surprise de constater qu'il n'a affaire qu'à une vulgate de l'idéalisme subjectif. Il suffit de relire la prosopopée de Berkeley sur Philonous (l'ami de l'Esprit) et Hylas (la Matière) pour s'en rendre compte. Fulminant contre la métaphysique, Berkeley s'inquiétait, il y a trois siècles, de l'obscurcissement de notre connaissance par l'hypothèse de la double existence des choses sensibles, c'est-à-dire, de l'existence intelligible, d'une part et de l'existence réelle, en dehors de la conscience de l'homme d'autre part. Ce qui est ici en cause, c'est principalement l'existence de la matière et son reflet dans la pensée. Tel est donc l'enjeu de la prosopopée sur Hylas et Philonous.

Comme son nom l'indique, Hylas est matérialiste et affirme donc l'existence de la matière. Pour lui, les apparences sensibles (couleurs, formes…), constituent la manière dont les phénomènes apparaissent à la conscience qui les perçoit. Derrière ces phénomènes, il y a des essences, des en-soi qui ne dépendent pas de l'esprit qui perçoit. Cela signifie que cette forme ronde et jaune qui pend au milieu des formes vertes est une orange, et que cette orange est bien là, devant moi. Il suffit que je la cueille, la palpe ou la déguste, pour me rendre compte de sa réalité effective.

Philonous incarne au contraire l'immatérialisme. Porte-parole de Berkeley lui-même, « l'Ami-de-l'esprit » ne croit pas à l'existence de la matière. Par exemple, l'orange que je cueille, palpe et consomme n'a rien de matériel; il est loin d'être un phénomène existant indépendamment de mes sensations. L'orange – tout comme cette table que je heurte – constitue en fait un complexe de sensations, une somme de représentations mentales ou d'idées, et non le reflet du monde extérieur. Tant la

forme que l'étendue que ces phénomènes occupent dans l'espace, constituent des sensations. La couleur jaune de l'orange est une sensation visuelle, le contact de ma main, une sensation tactile, la saveur que j'éprouve, un état de conscience. D'après Philonous, les choses n'ont de réalité qu'en tant qu'elles sont perçues, touchées, goûtées, senties. Aussi ne puis-je guère m'autoriser l'affirmation suivant laquelle il existe une idée de la chose ou encore que la chose se reflète dans ma conscience. La chose, c'est un ensemble d'idées, et rien d'autre. Si Hylas admet l'existence d'une substance matérielle, d'une essence cachée derrière les apparences sensibles, Philonous lui, au contraire, nie l'existence d'une telle substance; il veut au contraire transformer les choses en idées, c'est-à-dire, en pures représentations.

Réaliste concret, Berkeley raille Descartes qui doute des sens, alors que ces derniers constituent le véritable siège des phénomènes. Il est convaincu que le monde qui se déploie devant nous est vraiment coloré, sonore, doux ou dur, ainsi qu'il nous apparaît. Aussi, les représentations sensibles, c'est-à-dire les idées, constituent-elles la réalité elle-même: l'apparence et le phénomène sont l'être même du monde. D'où il ressort que phénoménologie (description que nous faisons du monde) et ontologie coïncident; elles ne s'opposent pas comme chez Platon ou chez Kant.

Dans cette philosophie, les seules choses existantes sont celles que nous percevons avec nos sens. Par conséquent, tout ce qui échappe à notre perception n'existe pas, la matière étant coextensive à nos représentations. Et cette matière n'a ni substance, ni essence; elle ne renvoie pas à un en-soi inconnaissable. Les choses du monde sont donc transparentes, comme étalées devant nous et sans mystère. L'essence et la substance, l'en-soi et le substrat ontologique des phénomènes, apparaissent à Berkeley comme de simples fictions métaphysiques. Seul existe véritablement le flux kaléidoscopique des phénomènes, des apparences changeantes et diverses. Ainsi par exemple, le fruit que je vois rond et jaune, et celui que je touche lisse ou rugueux, ne renvoient pas, à dire vrai, au même objet. Car, il n'existe dans la nature aucun fruit réel qui serait à la fois rond et jaune, rugueux et lisse. Ce qui existe réellement, ce sont des apparences diverses, simultanées ou successives. L'unité de la chose supposée n'est, pour nous que l'unité du nom sous lequel nous regroupons quelques apparences. Tel est le fondement du nominalisme qui signifie que la chose ne tient pas son unité de son essence; que donc, cette unité, loin d'être réelle ou substantielle, renvoie à une pure convention.

Si Rorty (1990a, 1990b, 1993b) s'inspire effectivement de Dewey (1929, 1948), comme il le reconnaît lui-même, sa philosophie, comme celle des empiriocriticistes, apparaît donc d'abord comme un avatar du berkeleyisme. Cette doctrine est vraiment inoxydable. Déjà périmé au moment où Mach (1908), Bogdanov (cité par Lénine 1979) et Poincaré (1968), le « redécouvrent », l'idéalisme subjectif qui se camoufle sous le néo-pragmatisme est présenté aujourd'hui encore, comme la philosophie de l'avenir.

La question de la Vérité

Il est donc difficile d'éluder la question de Lénine (1979:114 sq.): « Existe-t-il une vérité objective? » Or, cette question en cache une autre: « Existe-t-il une réalité objective? » Rappelons qu'en posant cette question, Lénine avait en vue les subjecti-

vistes, les solipsistes et les relativistes de son époque, en la personne des empiriocriticistes et des empiriomonistes.

Comme Berkeley et ses épigones, Rorty (1990) conteste la prétention de l'homme à parvenir à la vérité « absolue », « éternelle » et « immuable ». Cette contestation se justifie, car, l'homme est incapable de se représenter fidèlement le monde extérieur. Toute tentative de se représenter la réalité, le monde en soi ou encore, la nature intrinsèque des choses est vouée à l'échec. L'Homme spéculaire décrit précisément la vanité d'une telle tentative.

Contre la théorie du reflet, qui suppose une connaissance objective des lois du monde et une certaine approche de l'absolu, Rorty réintroduit l'idée surannée de consensus ou de convention. Selon lui, les anti-essentialistes ne définissent pas l'« objectif » en fonction d'une relation avec l'essence des choses, mais simplement « en fonction de la facilité avec laquelle ceux qui observent ces objets parviennent à un consensus » (Rorty 1995:64). C'est donc le « degré de facilité avec laquelle les objets suscitent un consensus » qui se substitue à la distinction objectif-subjectif. Ainsi, d'après l'auteur, affirmer par exemple que les valeurs sont plus subjectives que les faits, revient simplement à dire qu'il est moins aisé de s'accorder sur le beau, le laid, le mal que sur les figures géométriques par exemple.

Mais, pour disqualifier ainsi les notions de réalité objective et de vérité absolue, il faut renoncer à la logique la plus élémentaire. Réduire la vérité à l'ajustement, à la justification ou à la simple commodité, c'est, comme le notait Lénine (1979:68), essayer de faire passer pour de la philosophie un dérisoire assemblage de mots et pur obscurantisme philosophique. Pour qu'elle soit vraie, la thèse pragmatiste doit d'abord – par exemple –, prouver que l'affirmation selon laquelle la Terre est ronde, qu'elle a une histoire et tourne autour du soleil, est une simple convention, une commodité, qu'il dépend de nous d'y croire ou de ne pas y croire. Et pourtant, cette connaissance-là est, non seulement objective et absolue, mais aussi « éternelle ». La posture postmoderniste est aussi aberrante que celle d'un historien professant que l'Holocauste n'est qu'une vérité relative, et que les fours crématoires sont directement sortis de l'imagination des gens appréciant le monde de leur seul point de vue. Il s'agit là d'un exemple typique de vérité historique absolue, éternelle, qui ne dépend ni de mon point de vue, ni de ma croyance, encore moins d'une simple convention ou commodité. Car, pour admettre la vérité absolue, objective, il faut d'abord reconnaître que le monde existe indépendamment de nous et se reflète dans notre conscience par le biais des sens. L'idéalisme subjectif est bien la preuve que si les sensations sont la source de nos connaissances, elles peuvent également entraîner au subjectivisme et au solipsisme si on les confond avec la conscience du sujet connaissant. Cette doctrine voit dans les corps des « complexes de sensations » ou de « phrases ». L'approche scientifique et matérialiste philosophique est différente: elle reconnaît dans les sensations, les images des corps et du monde extérieur. C'est cette méthode qui nous dispose à admettre l'existence d'un monde objectif, indépendamment des sensations et des phrases que nous utilisons pour le nommer. La vérité absolue existe parce que la réalité objective elle-même existe.

Une fois ce problème réglé, il reste à bien le situer à l'intérieur de la théorie de la connaissance, et surtout, à examiner la dialectique qui conduit à la vérité objective, absolue. La principale faiblesse du pragmatisme réside dans le fait que cette doctrine n'a jamais été capable de poser correctement le problème de la vérité. Or, on ne résout aucun problème en prodiguant à gauche et à droite des sentences pompeuses et assourdissantes du genre: convention, commodité, ajustement, croyance. La tâche scientifique et philosophique de première importance est, au contraire, d'affronter dialectiquement le problème des rapports entre la vérité absolue et la vérité relative.

C'est cette dialectique qu'Engels examine, dans des termes vraiment appropriés. En effet, il pose et répond clairement à « la question de savoir si les produits de la connaissance humaine, et lesquels, peuvent avoir une validité souveraine et un droit absolu à la vérité » (Engels 1973:117). La solution de la question de la souveraineté de la pensée humaine, passe par l'examen de la question de la pensée humaine elle-même. Qu'est-elle donc, par nature: la pensée d'un individu ou celle de l'humanité dans sa totalité? Pour Engels, loin d'être l'affaire d'un individu, la pensée humaine doit être comprise comme la pensée de l'humanité, prise comme un tout, bien qu'elle ne puisse concrètement exister « qu'en tant que pensée individuelle de milliards et de milliards d'hommes, passés, présents et futurs » (*ibidem*). Voilà comment Engels exprime de façon dialectique, la contradiction entre le caractère absolu de la pensée humaine et son actualisation dans des êtres vivants, à la pensée extrêmement limitée. La souveraineté de la pensée se réalise donc dans une série d'individus dont la pensée est extrêmement limitée; et la connaissance d'un droit absolu à la vérité, se réalise elle-même dans une série d'erreurs relatives. Ainsi, « ni l'une ni l'autre ne peuvent être réalisées complètement sinon par une durée infinie de la vie de l'humanité » (*ibidem*).

On peut donc dire de la pensée humaine qu'elle est tout aussi souveraine que non souveraine, tout aussi absolue que non absolue: « souveraine et illimitée par sa nature, sa vocation, ses possibilités et son but historique final; non souveraine et limitée par son exécution individuelle et sa réalité singulière » (p. 118). Cette dialectique du relatif et de l'absolu s'applique également aux « vérités éternelles ». Car,

> si jamais l'humanité en arrivait à ne plus opérer qu'avec des vérités éternelles, des résultats de pensée ayant une vérité souveraine et un droit absolu à la vérité, cela voudrait dire qu'elle en est au point où l'infinité du monde intellectuel est épuisée en acte comme en puissance, et ainsi accompli le fameux prodige de l'innombrable nombré (*ibidem*).

C'est ainsi que le matérialisme philosophique évite aussi bien le dogmatisme que le relativisme. Et l'outil méthodologique permettant d'obtenir ce résultat est la dialectique elle-même. Celle-ci affirme l'infinie puissance de la pensée humaine, tout en reconnaissant sa relativité historique. C'est en ce sens qu'on peut dire qu'objectivement, il n'existe pas de ligne de démarcation infranchissable entre la vérité absolue et la vérité relative ou même, entre la vérité et l'erreur. D'après Engels :

> La vérité et l'erreur, comme toutes les déterminations de la pensée qui se meuvent dans des oppositions polaires, n'ont précisément de validité absolue que pour un

> domaine extrêmement limité... Dès que nous appliquons l'opposition entre vérité et erreur en dehors du domaine étroit que nous avons indiqué plus haut, elle devient relative et impropre à l'expression scientifique exacte; cependant si nous tentons de l'appliquer comme absolument valable en dehors de ce domaine, nous échouons complètement; les deux pôles de l'opposition se transforment en leur contraire, la vérité devient erreur et l'erreur vérité (p. 121).

La dialectique de la vérité et de l'erreur, de l'absolu et du relatif, nous protège donc contre non seulement le dogmatisme, mais aussi le relativisme, caractéristiques de toute pensée métaphysique. Or, cette dernière oscille sans cesse entre le dogmatisme de la vérité absolue et le dogmatisme de la négation absolue. En général, les relativistes sont « des pessimistes de la connaissance, des aigris, des déçus par la métaphysique, qui regrettent la vérité absolue et affirment avec une colère contenue que cette vérité "nouménale" existe mais nous échappe » (Lefebvre 1982:67). Telle est par exemple la version kantienne de l'agnosticisme et du relativisme. La version pragmatiste et postmoderniste est plus radicale encore, puisqu'elle nie jusqu'à l'existence même de la « vérité nouménale ». Nous savons avec Rorty (1995) que le pragmatisme est un anti-essentialisme qui nie l'existence non seulement des vérités absolues et éternelles, mais aussi celle des essences et des substances. À la place des essences, il ne voit que des nœuds mobiles de relations.

Contrairement au « relativisme cognitif » (Sokal 2005:191) des déçus de la métaphysique (néo-kantiens, pragmatistes), le relativisme dialectique est foncièrement optimiste. Il reconnaît la relativité des connaissances, non pas à cause de quelque « fatalité métaphysique » ou de quelque infirmité d'une raison humaine condamnée à ne jamais pénétrer dans l'essence des choses; la relativité s'explique simplement « par rapport à l'étape effectivement atteinte par notre connaissance » (Lefebvre 1982:67). Le relativisme dialectique postule donc la relativité du savoir humain, non pour rejeter le concept de vérité objective en soi, mais bien pour souligner le dépassement perpétuel et infini des limites de la connaissance; il enseigne que chaque nouvelle étape du développement du savoir humain enrichit ce dernier de nouveaux grains d'une vérité toujours plus étendue, plus précise, plus fine. C'est ainsi qu'on peut affirmer que chaque vérité particulière atteinte est essentiellement relative, cependant que l'ensemble de la moisson des vérités particulières atteintes par le savoir humain fait partie du vaste ensemble de la connaissance objective absolue.

Lénine soulignait que si « les limites de l'approximation de nos connaissances par rapport à la vérité objective, absolue, sont historiquement relatives », il ne fait aucun doute que « l'existence même de cette vérité est certaine comme il est certain que nous nous en approchons » (Lénine 1979:129). L'analogie du tableau est éclairante: ses contours « sont historiquement relatifs, mais il est certain que le tableau reproduit un modèle existant objectivement ». D'après ce penseur,

> le fait qu'à tel ou tel moment, dans telles ou telles conditions, nous avons avancé dans la nature de la connaissance des choses au point de découvrir l'alazarine dans le goudron de houille ou de découvrir des électrons dans l'atome, est historiquement relatif; mais ce qui est certain, c'est que toute découverte de ce genre est un progrès de

> la "connaissance objective absolue". En un mot, toute idéologie est historiquement relative, mais il est certain qu'à chaque idéologie scientifique (contrairement à ce qui se produit, par exemple, pour l'idéologie religieuse) correspond une vérité objective, une nature absolue (*ibidem*).

En soulignant que fonder la théorie de la connaissance sur le relativisme, c'est se condamner fatalement non seulement au subjectivisme, au scepticisme, à l'agnosticisme, mais aussi à la sophistique, Lénine se situe au cœur même de notre problème. Car, la sophistique est l'horizon indépassable du relativisme, du pragmatisme et du postmodernisme. En partant du relativisme absolu, il est possible de justifier n'importe quel sophisme. Les vues cyniques de Rorty (1995:120) sur les droits de l'homme en sont une parfaite illustration.

Description, croyance et justification

Les concepts de croyance, de justification, de description et de convention révèlent la nature sophistique du néo-pragmatisme. En les plaçant au cœur du processus de la connaissance, cette théorie vise à réfuter l'idée de « vérité objective ». Croquemitaine de l'idéalisme subjectif, celle-là constitue le dernier adversaire des doctrines enclines au fidéisme. Admettons, écrit Rorty, que la vérité soit ce qui distingue la connaissance de l'opinion bien fondée; mais si, comme l'affirmait James (1968:68-69), la vérité est le nom donné à tout ce qui se montre avantageux au regard de la croyance, alors, on ne voit pas en quoi elle différerait de ce qui est justifié (Rorty 1995:33). Or, n'ayant pas grand-chose à dire de la vérité, la philosophie doit « se limiter à la justification ou à "l'assertabilité garantie" » (*ibidem*). Pour ce penseur, la vérité est aussi peu pertinente que l'idée de « correspondance avec le réel » (*ibidem*). Car, s'il n'existe pas « une manière d'être du monde », s'il « n'existe rien de tel que la "nature intrinsèque de la réalité" », « il n'y a donc pas non plus de façon selon laquelle elle devrait être représentée » (pp. 35-36). Ce qui existe par contre, ce sont « les pressions causales » (p. 34) ou encore, les multiples « façons d'agir afin de réaliser les espoirs humains de bonheur » (p. 36). Comme « l'accès à un tel bonheur n'est pas quelque chose de distinct de l'accès à une croyance justifiée » (*ibidem*), nous devons abandonner « l'idée selon laquelle la connaissance est une tentative de représenter la réalité » (p. 35). Cette approche rend l'idée de « certitude improbable ». Or, de l'aveu même de Rorty, les pragmatistes voient dans la recherche de la certitude une simple « tentative de fuir le monde » (p. 36). Aussi doit-on « cesser de se préoccuper de savoir si ce que l'on croit est bien fondé, et commencer à se demander si l'on possède une imagination suffisante pour inventer des alternatives intéressantes à nos croyances présentes » (p. 37).

Le fait de remplacer la connaissance par la croyance est important pour le pragmatisme. Il s'agit pour lui d'abandonner les idées fondamentales de Kant: la « "nature de la connaissance humaine", "la portée et les limites de la connaissance humaine" ou, si l'on veut, "la situation épistémique humaine" » (p. 37). Aussi cesserons-nous « d'admettre l'existence d'une chose comme "notre connaissance du monde

extérieur" ou d'un ordre comme "l'ordre naturel des raisons" » qui commencerait par exemple par les « données des sens » (pp. 37-38). Pourquoi existerait-il un tel ordre, puisqu'il n'y a aucun moyen de distinguer entre science et non-science (p. 40)? Si l'idée d'un « ordre naturel des raisons » auquel chacun devrait se conformer pour justifier ses croyances est absurde, il faudrait alors admettre la légitimité de toutes les croyances. Ainsi, la science et la religion peuvent toutes être conçues comme deux voies légitimes menant « à des croyances vraies, même si ces croyances répondent à des fins complètement différentes » (p. 41).

L'objectif de Rorty est d'invalider la vérité en tant que concept épistémique et heuristique. Car, lorsqu'il en est question, il n'existe aucun critère correspondant à l'idée que les théoriciens de la connaissance s'en font. Or, si l'on admet que les croyances constituent davantage des règles d'action que des « tentatives pour représenter la réalité » ou encore, si l'on accepte l'assertion selon laquelle par nature, toute croyance est véridique, alors, la vérité cesse d'être un « concept épistémique » (p. 42).

Sur le plan épistémologique donc, dire que la « vérité est le but de la recherche » constitue une vaine et fausse prétention (pp. 43-44). Selon Rorty, il est incontestable que « la recherche et la justification poursuivent une multitude de buts particuliers ». Mais, souligne-t-il, « il n'existe pas de but qui surplomberait tous les autres et qui serait la vérité » (p. 44). D'ailleurs, dans nos entreprises de recherche et de justification, nul n'a besoin d'un but nommé « vérité », pas plus que les organes de digestion n'ont besoin d'un but nommé « santé » pour fonctionner. Pour Rorty, « il ne peut y avoir un but plus "élevé" de la recherche et qui serait appelé "vérité" que s'il existait une telle chose qu'une justification ultime: une justification devant Dieu ou devant le tribunal de la raison, devant un tribunal tel qu'on pourrait l'opposer à un quelconque auditoire humain fini » (*ibidem*).

Rorty récuse toute idée de tribunal de la raison; un tel tribunal ne pouvant se prononcer qu'à partir du « point de vue de Dieu », puisqu'il « lui faudrait embrasser non seulement tous les aspects sous lesquels le monde est habituellement décrit, mais également ceux qui appartiennent à toute autre description possible » (p. 45). Pour les pragmatistes, si la justification – et non la vérité – est relative à un public donné, il n'y a donc strictement rien à dire sur la « justification en général »; il n'y a « rien à dire de général sur la nature ou les limites de la connaissance humaine » (pp. 45-46). La justification est étroitement liée à l'utile. Rorty incite à remplacer le dualisme essence-apparence par une distinction plus opératoire et pragmatique, à savoir la distinction entre « une description moins utile du monde » et « une description plus utile du monde » (p. 59). Car, nous n'entreprenons pas d'entrer en liaison avec le monde pour le connaître ou pour découvrir la vérité de son essence. L'ambition de l'homme est plutôt modeste, puisqu'il s'agit simplement de le décrire en fonction de ses besoins. Et ce que chacun de nous retient du monde, ce n'est donc pas tant la vérité sur son essence la plus profonde et ses énigmes que ce qui nous est utile, conformément aux préceptes de James qui réduit la vérité à tout ce qui se montre avantageux pour nous, au regard de la vie (James 1968:67-68). C'est dans ce contexte fait de pragmatisme et d'utilitarisme que la justification vient soutenir nos

croyances. Aussi la fonction de la philosophie n'est-elle pas de dire la vérité, mais de justifier. La justification s'explique à partir du rôle modeste que Rorty réserve à la connaissance qui se réalise « sous forme de descriptions adaptées à nos objectifs sociaux courants » (Rorty 1995:60).

Une fois affirmée l'idée selon laquelle toute conscience existe sous forme de descriptions, qui sont fonction des besoins sociaux courants, alors, les termes de « nature » et de « réalité » s'invalident; désormais, ils apparaissent comme des noms de quelque chose d'inconnaissable. On ne peut rien saisir en deçà du nœud de relations qui relient l'objet aux autres phénomènes du réel. Décrire ce nœud de relations qui enserre par exemple le nombre, c'est renoncer à dire la « vérité » sur ce qu'est intrinsèquement le nombre. Car, toutes les descriptions des choses sont essentiellement accidentelles, extrinsèques, et jamais intrinsèques. La seule manière de définir l'essence d'une chose, c'est de découvrir un mécanisme permettant d'établir toutes les « descriptions vraies » de cette chose-là; la propriété de telles descriptions étant de spécifier toutes les relations que cette chose entretient avec les autres phénomènes du réel. Une telle tâche s'avérerait pratiquement impossible, cela va de soi.

Contre la vérité objective, Rorty (1995) affirme le privilège du langage, auquel il réduit l'ensemble de la conscience, car, « toute conscience est une affaire de langage ». C'est ainsi qu'il réduit tous les phénomènes du monde à une construction sociale (p. 58), conformément aux principes du « nominalisme psychologique ». Enclin à la dissolution langagière de la réalité » (Morilhat 2004:107-110), celui-ci signifie que l'homme ne sera jamais capable de faire un pas en dehors du langage qui décrit les phénomènes, ou encore, de saisir la réalité en dehors de la médiation de la description linguistique (Rorty 1995:59).

Dans cette théorie, le nominalisme psychologique est présenté comme le « corollaire de la doctrine suivant laquelle il n'y a rien à connaître en dehors de ce qui est affirmé dans les énoncés qui le décrivent » (p. 69). Pour lui, chaque phrase énoncée au sujet d'un objet constitue la description, implicite ou explicite d'une relation que cet objet entretient avec les autres objets. À titre d'exemple, tout ce que je sais de cette table qui est devant moi, c'est qu'elle a une forme carrée, qu'elle a la couleur marron, qu'elle est laide d'aspect, qu'elle a été fabriquée à partir de telle essence, qu'elle me sert de meuble, etc. Or donc, il n'y a strictement rien à savoir de cet objet, hors des phrases véridiques que je peux en dire (p. 72).

Le nominalisme psychologique implique une approche relativiste de la connaissance. Car, d'après Rorty, aucune description d'un objet ne peut mieux décrire « l'objet réel » par opposition à « l'objet apparent » qu'une autre; de la même manière, il n'y a pas « de description qui décrirait, pour ainsi dire, la relation de l'objet à lui-même », ou encore, « qui décrirait son identité avec sa propre essence » (p. 70).

Entendons-nous bien. Rorty ne nie point que par rapport à d'autres, certaines de ces descriptions de l'objet puissent être meilleures. Mais si elles le sont effectivement, c'est en particulier parce qu'elles sont « plus utiles », compte tenu de chaque but particulier poursuivi (p. 70). Or, le penseur américain est convaincu que si l'on considère les buts d'un point de vue proprement philosophique – et non pratique –

tous les buts se valent, et, en rigueur de termes, « il n'y a aucun but qui coifferait tous les autres et qu'on pourrait appeler "découverte de la vérité" » (p. 70).

Comme indiqué plus haut, le pragmatisme ne croit d'ailleurs pas que la vérité soit le but ultime de la recherche, puisqu'un tel but réside essentiellement dans l'utilité. Or, de ce point de vue, il existe autant d'outils utiles différents que de buts à atteindre. Exactement comme Berkeley (1944) qui conférait aux sensations une fonction démiurgique tout en voyant dans les choses des complexes de sensations, Rorty (1995) fait du langage le véritable démiurge qui donne existence aux choses, dès lors que le rôle exclusif des phrases est « d'établir des relations entre les objets » (p. 72). Pour lui, chaque phrase décrit les objets du monde et attribue à chacun une propriété relationnelle. Ainsi, à supposer que nous cherchions à savoir ce qu'est réellement et intrinsèquement la table, nous ne pourrions obtenir de meilleure réponse que celle-ci: « C'est ce dont on peut dire véridiquement que c'est marron, que c'est laid, que cela fait mal aux poings qui la frappent, qu'on peut buter contre elle, que c'est constitué d'atomes, etc. » (p. 73).

Comme le réalisme concret de Berkeley, le pragmatisme nous enferme dans le subjectivisme et le solipsisme. S'il « est impossible d'aller au-delà du langage pour atteindre quelque forme de connaissance non linguistique » (p. 74), cela signifie que, pas plus que la réalité objective, aucune vérité objective n'est possible. Le nominalisme psychologique récuse l'idée suivant laquelle notre image de la réalité est le reflet d'un ordre des choses indépendant de la perception que nous avons du monde ou de la nomination que nous faisons des choses. Une fois de plus, c'est la théorie du reflet qui est ici rejetée. Rorty voit dans la physique l'ultime refuge de ceux qui croient à l'existence d'un univers extérieur à la conscience ou au langage. Car, la physique est « persuadée qu'elle nous projette hors de nous-mêmes, hors de notre langage, de nos besoins, de nos buts, en direction de quelque chose de superbement non humain et non relationnel » (p. 78). En fait, cette science ne nous apprend rien sur le monde ou sur la nature intrinsèque des choses; l'utilité pratique de ses descriptions du monde est sa seule qualité (p. 79). Cette science, comme toutes les autres, entre dans l'ordre des projets humains.

Le problème abordé ici par Rorty n'est pas nouveau; il remonte à l'époque où la révolution dans les sciences de la nature avait introduit, à partir de la fin du XIXè siècle, la crise dans la physique contemporaine. Plus généralement, ce problème fut au centre des débats sur la théorie de la connaissance, telle que développée par les théoriciens de l'analyse linguistique comme Wittgenstein ou, ceux de la physique moderne, comme Poincaré. Le *Tractatus logico-philosophicus* et les *Investigations philosophiques* de Wittgenstein (1961) portent en effet les marques du pragmatisme. Celles-ci caractérisent déjà le positivisme logique, notamment à ses débuts. D'après Wittgenstein, « 3 262 – Ce qui ne s'exprime point par les signes c'est ce que révèle leur application. Ce que les signes escamotent, c'est ce qu'exprime leur application » (p. 40). De la même manière, l'auteur énonce ce qui suit: « 3 327 – Le signe ne détermine une forme logique qu'en fonction de son utilisation dans la syntaxe logique » (p. 42). Ces professions de foi pragmatistes s'expliquent, si l'on se rappelle que pour

le philosophe, tout signe doit servir à quelque chose. En d'autres termes, « si un signe ne sert à rien, il est dépourvu de signification [...] (Si tout fonctionne comme si le signe avait une signification, il en a bien une) » (p. 43).

Le problème de l'utilité des descriptions du monde – et non l'explication de ce dernier – recoupe en fait celui de l'existence d'une réalité et d'une vérité objectives. Poincaré le clarifie à sa manière. Se fondant sur les conquêtes les plus récentes de la physique, cet auteur qui fut l'un des tous premiers physiciens à penser la « fin de la matière », affirme que « l'une des découvertes les plus étonnantes que les physiciens aient annoncées dans ces dernières années, c'est que la matière n'existe pas... » (Poincaré 1968:245). Son argument principal est fondé sur les mutations subies par le concept physique de masse ou inertie. En démontrant qu'elles n'appartiennent pas en réalité à la matière susceptible d'altération, on peut en conclure que la matière elle-même n'existe pas (*ibidem*). Ainsi donc, la théorie électronique de la matière aurait ruiné le principe de la conservation de la masse ou principe de Lavoisier.

Poincaré est également connu pour ses vues subjectivistes et relativistes en géométrie. Par exemple, l'espace et le temps lui apparaissent comme de pures constructions de l'esprit. Selon lui, plutôt que le monde les impose à nous, c'est au contraire nous qui imposons l'espace et le temps au monde. Ainsi, il fait coexister deux types d'espace: un espace géométrique objectif et un espace représentatif pouvant se décomposer en un espace visuel, un espace tactile et un espace moteur (pp. 75-81). Selon Poincaré, l'homme ne se représente pas les corps extérieurs dans l'espace géométrique, mais il raisonne sur eux, comme s'ils étaient situés dans l'espace géométrique (p. 82). Ce physicien accorde ainsi une place privilégiée à la conscience, au point d'installer définitivement la vérité géométrique dans le subjectivisme et le relativisme: « Une géométrie ne peut être plus vraie qu'une autre », écrit-il, « elle peut être seulement plus commode » (p. 76).

Ces notions de projet humain et de commodité, qui recoupent celles de besoin et de but, impliquent certes la répudiation de la vérité objective, mais aussi le fait qu'il existe une infinité d'approches, de descriptions ou de points de vue sur un même objet. Par exemple, Rorty établit la légitimité de tous les projets humains. Ainsi, nul ne doit se « permettre de ridiculiser aucun projet humain, aucune forme délibérée de la vie humaine » (Rorty 1995:81). Chacun est libre de tenir pour vrai ce que l'autre tient pour faux, et réciproquement. Au nom de ces vues, la discussion en philosophie devient sans objet (Deleuze 1991/2005:31 sq).

Bien entendu, ceci ouvre la porte à toutes sortes de croyances arbitraires. Inutile donc de chercher à convaincre un interlocuteur qui ne partage pas les mêmes besoins que vous: « La discussion requiert que l'on s'accorde sur la préséance des besoins » (Rorty 1995:84). Pour Rorty (1995), « tout ce dont nous avons besoin pour communiquer, c'est de nous entendre sur l'usage des mêmes instruments pour travailler à satisfaire des besoins partagés » (ibidem). Car, aucun argument, aucune discussion ne peut modifier le projet central d'un individu et l'amener à se convertir. Être converti signifie qu'on « ne voit plus l'intérêt, la pertinence des arguments » que l'on déployait auparavant (p. 85). La raison et la vérité n'existant pas, nous sommes

loin d'être des êtres cognitifs, rien, absolument rien, ne peut nous rendre « aptes à être convertis par des arguments plutôt que renversés par des forces irrationnelles » (p. 86).

Ceci est de la sophistique pure. Elle permet de créer un climat affectif et émotionnel propice à susciter l'adhésion. Le pragmatisme ne peut pas être autre chose. Il est significatif que sur la question de la vérité, les postmodernistes continuent d'assumer avec fierté, les vues contestées de Protagoras: « L'homme est la mesure de toute chose ». Ce postulat a conduit Rorty à répudier toute idée de vérité objective et absolue, que celle-ci soit scientifique ou morale.

Empirisme, utilitarisme, pragmatisme et cynisme ont partie liée. La fin justifiant les moyens, il n'y a rien d'absolu, d'inconditionnel, même dans le domaine moral. Cette vision du monde a conduit Rorty (1995) à relativiser l'« inconditionnalité » d'une notion essentielle comme celle des droits de l'homme. On prétend que ces droits sont inconditionnels; qu'ils « constituent le cadre fixe des délibérations politiques et morales »; qu'ils « sont au-delà de toute discussion », étant l'« atout maître qui a préséance sur toute autre considération de nécessité ou d'efficacité sociale » (p. 120). Or, du point de vue pragmatiste, « la notion de "droits de l'humanité inaliénables" » constitue une simple formule creuse, qui n'est ni plus ni moins bonne que n'importe quelle autre formule. En somme, les « droits de l'homme inaliénables » appartiennent à ces notions qui défient l'analyse et constituent simplement une autre façon d'affirmer: « C'est ma position: je ne puis rien faire d'autre (p. 121).

Que Rorty invoque Nietzsche, le doit-on au simple hasard? Ces deux penseurs sont d'accord pour dire que les droits de l'humanité ne sont rien que de naïves superstitions, des « fabrications à l'abri desquelles les faibles se protègent des forts » (Rorty 1995:121). Pour ce penseur, il est légitime que « les pragmatistes accordent à Nietzsche que la référence aux droits de l'homme n'est qu'une façon commode de résumer certains aspects de nos usages, réels ou prétendus ». Pour être clair, la notion de droits de l'humanité renvoie donc, comme n'importe quelle autre valeur, à de simples « constructions sociales » (p. 124) qui, par conséquent, n'ont aucun caractère impératif. C'est ainsi que le néo-pragmatisme dissout tout dans le relatif, ouvrant ainsi la voie à l'utilitarisme et au cynisme dans les rapports sociaux.

Réhabilitation des anciennes formes directrices de la pensée humaine

En acceptant non seulement la relativité de la vérité, mais aussi le « grand jeu de dés », le pragmatisme apparut vite comme l'ennemi de tous les tabous et de toutes les exclusions. Il se veut tolérant et ouvert: ouverture à l'expérience, à la diversité des savoirs, à l'anarchisme épistémologique, au pluralisme politique et culturel.

C'est l'expérience qui a rendu possible la légitimité de toutes les formes de savoir, y compris les formes traditionnelles de l'expérience humaine. Pour le pragmatisme en effet, la science et la technique sont un produit de la raison dont la fonction est d'assurer la puissance de l'homme sur le monde. Si donc ces créations du génie humain sont utiles, c'est simplement en tant qu'elles nous apprennent à domestiquer

la nature. Là s'arrête leur pouvoir, puisqu'elles sont incapables de nous instruire sur l'essence même des choses. Ici réside la contradiction fondamentale entre les doctrines inspirées des Lumières et le pragmatisme.

Pourtant, ces deux écoles de pensée sont d'accord pour reconnaître le lien entre la théorie et l'activité pratique, la pensée et le réel, la science et la technique. Leur contradiction vient du fait que le premier courant de pensée voit dans l'activité pratique la conséquence de la pensée, de la science et de la théorie, cependant que le second courant, au contraire, conçoit la science comme la conséquence de l'activité pratique. Il est légitime de voir, dans la première attitude, un dogmatisme de la science (propre en particulier au positivisme), et dans la seconde, un dogmatisme de l'acte (Lénine 1973:393). La première accorde le primat au savoir – la « connaissance fait l'action » – tandis que pour la seconde conception, la faveur va à l'acte: l'« action fait la connaissance ».

Du point de vue gnoséologique, le pragmatisme entraîne la conséquence principale suivante: non seulement les lois et les formes de la logique sont des fictions utiles, mais aussi la science elle-même n'est qu'une industrie spéciale, adaptée à certains besoins pratiques de l'homme. Il en résulte que la vérité constitue simplement une affirmation vraie, un artifice susceptible de réussir. Or, comme il existe de nombreux autres artifices capables de réussir, et étant donné qu'il y a, en fonction des individus, des groupes et des peuples, des besoins contradictoires, on peut en déduire que toutes les propositions susceptibles de conduire aux mêmes résultats pratiques, se valent du point de vue de la vérité, et toutes celles qui sont susceptibles d'aboutir à des résultats pratiques seront légitimes au même degré. Une telle conception de la vérité implique comme conséquence, l'idée suivant laquelle la science et la technique ne constituent que des artifices, des constructions essentiellement arbitraires, contingentes et fortuites. Ces artifices pourraient être tout autres qu'ils seraient tout aussi vrais, c'est-à-dire, utiles en tant que moyens d'action.

La conception pragmatiste de la vérité implique « la faillite de la science comme forme réelle de savoir, comme puissance de vérité » (Lénine 1973:394): elle reconnaît la légitimité d'autres artifices, différents de la science, de la raison et de l'intelligence, à l'instar de la religion, de la morale, du sentiment mystique. C'est ainsi que le pragmatisme en arrive à une apologie de l'instinct, lequel nous garantirait la certitude d'une vie future et la vision d'un dieu unique. La devise des philosophes expérimentalistes n'est-elle pas: « Ouvrez vos yeux et ouvrez votre cœur qui est aussi un organe de perception, et vous verrez Dieu? » D'ailleurs, pour le pragmatisme, les croyances instinctives de l'homme sont plus dignes de foi que n'importe quel acte de l'entendement. Tels sont les enseignements de James pour qui, « c'est toujours notre croyance, et non notre logique, qui finit par trancher les questions » humaines les plus sérieuses. « Personnellement », précise-t-il, « je ne reconnais à aucune prétendue logique le droit d'opposer le veto à ma croyance » (James 1968:204).

Relativisme et agnosticisme sont les conséquences logiques du pragmatisme. Car, pour lui, les « vérités scientifiques » ne sont que de pures fictions, des illusions. Plus exactement, il s'agit de croyances qui, par rapport aux autres croyances comme la

religion, sont nettement d'un ordre inférieur. La particularité de ces croyances est que leur utilité se limite essentiellement à l'action matérielle et ne peuvent servir que comme instrument technique. Donc, au regard de l'activité pratique, la morale, la religion, la métaphysique, le sentiment mystique et l'art sont nettement supérieurs à la science et à la technique. Ceci explique pourquoi, face à l'expérience scientifique et technique, le pragmatisme pose ces expériences comme des formes supérieures de l'action.

Soulignons que le pragmatisme est un symptôme du caractère paradoxal de la philosophie américaine. Il s'agit de « la juxtaposition rigoureuse d'une logique extrêmement subtile, formée sur le modèle des mathématiques, et d'une théologie extrêmement puérile » (Marcuse 1967:90). Cette puérilité apparaît nettement dans la porosité des réflexions des savants et des philosophes au bizarre, à l'insolite, aux phénomènes occultes, à la parapsychologie, à la magie et à la sorcellerie. Deux exemples: William James et Paul Feyerabend. Au premier, l'univers des voyants, des sorciers, des médiums, des fantômes, des possédés et des démons, était familier. Ainsi quand, en 1901, mourut à Rome Frederick Myers, on surprit James, montant la garde devant la porte du mort et prêt à recueillir le message que l'ami défunt était censé lui envoyer de l'Au-delà. Feyerabend est victime des mêmes superstitions. C'est le postulat axiologique et méthodologique suivant lequel, du point de vue de la connaissance, « tout est bon »; que le mélange de principes scientifiques et d'ingrédients non scientifiques est gage de succès, qui l'incline à se pâmer d'admiration devant les croyances populaires et à conférer une dignité épistémologique au mythe, à la religion, à la magie et à la sorcellerie (Feyerabend 1979:332-336).[4] Il pense que l'humanité contemporaine n'a pas fini de faire le bilan de l'apport prodigieux des croyances ethnologiques aux progrès de la connaissance et de la civilisation. Il y eut, certes, la domestication des animaux, la sélection des plantes, la découverte des médicaments, des lois de l'astronomie renfermées dans les légendes, les mythes, etc.; mais il y eut aussi et surtout les grands voyages cosmiques dans les sphères les plus éloignées et les plus inconnues de l'univers. Sans doute, n'y eut-il « pas d'excursions collectives dans la Lune, mais certains individus, insouciants des grands dangers qui menaçaient leur âme et leur raison, s'élevaient, de sphère en sphère, pour finalement se tenir face à Dieu lui-même, dans toute sa splendeur, tandis que d'autres se transformaient en animaux, puis redevenaient humains (p. 347). Eurêka ! À l'appui de sa trouvaille, Feyerabend renvoie à un bien étrange passage du *Corpus Hermeticus* (Hermès Trismégiste), où il est question des choses les plus bizarres. Ainsi, ordonnez « à votre âme de se retrouver aux Indes, de traverser l'Océan », et « ce sera fait en un moment ». De même, « si vous désirez traverser la voûte de l'univers – et voir ce qu'il y a au-delà du monde – vous pouvez le faire » (p. 209, note 2).

Voilà comment les dieux rendent fous ceux qu'ils veulent perdre. Dans sa fantasmagorie, Feyerabend est incapable de voir que son odyssée cosmique ressemble fort étrangement à un voyage dans les abîmes de l'inconscient. Comment comprendre cet ignoble commerce avec l'univers bigarré des spectres, des esprits et des mages? Veut-il mimer Pythagore et Empédocle? Mage, Pythagore semblait parfaitement

renseigné sur les détails de ses existences antérieures et était capable, prétend-on, de reconnaître la voix d'un ami ou d'un parent mort dans l'aboiement d'un chien. Philosophe-sorcier, Empédocle lui, affirmait être l'égal d'un dieu et faisait profession d'exorciste en prononçant des paroles susceptibles de guérir... Décidément, la philosophie mène à tout… A condition qu'on en sorte!

Les phénomènes occultes enthousiasment le pragmatisme parce qu'il y voit une chance nouvelle donnée à la vie individuelle et au pluralisme. Au nom de ce dernier, il estime possible, en partant des intérêts subjectifs de l'instant, de donner à un seul et même fait des explications contradictoires. Ainsi, enseigne Rorty (1995), si l'on y trouve avantage, l'on peut être sartrien ou spinoziste, nietzschéen ou aristotélicien, exactement comme d'autres prétendent qu'on peut reconnaître ou nier l'existence de Dieu, montrer la pertinence d'une science paranormale… C'est précisément cette « tolérance petite bourgeoise, philistine, pusillanime envers la croyance aux loups-garous, aux lutins, aux saints catholiques » que stigmatisait Lénine (1979:121).

Cette tolérance devient inacceptable lorsqu'elle s'attaque aux fondements mêmes de notre civilisation. Rorty prétend que nul n'a le droit de refuser la vision ou l'explication du monde d'un autre; nul n'a le droit d'accuser de fausseté la conception de la physique d'un adversaire; que ce dernier se trompe sur sa nature intrinsèque, etc.; « pour nous, la physique n'a pas plus de nature intrinsèque que le nombre 17. On peut la décrire comme 17, d'un nombre infini de façons, dont aucune n'est la façon "intérieure" » (Rorty 1995:81-82).

On ne peut pas régler les problèmes d'une telle gravité avec des sophismes. Par exemple, nul n'a le droit d'affirmer que « toute vérité possible peut être contournée, si on choisit de la décrire d'une certaine façon ou endossée, si on choisit une description différente » (pp. 82-83). Ce serait laisser la porte ouverte à l'arbitraire. Or, la science et la technique modernes ne se sont pas construites avec des croyances arbitraires, mais avec des vérités bien établies et des certitudes. Ce n'est pas faire preuve de tolérance et d'ouverture que d'affirmer ceci :

> Que vos projets soient religieux ou métaphysiques, que vous soyez prêt à renoncer, avec les avantages que cela entraîne, aux genres de politique révolutionnaire et d'art romantique dont Sartre relève les implications, et sa proposition ne relève même pas, pour vous, du domaine des vérités possibles. Vous pouvez dire qu'elle est fausse si cela vous fait plaisir; mais il ne s'agit pas de la fausseté d'un candidat à la vérité que l'on a examiné et jugé déficient. C'est plutôt qu'elle est, pour vous, manifestement inapplicable – elle n'est manifestement d'aucune utilité dans votre projet (pp. 83-84).

Pure démagogie que tout ceci, qui ouvre la voie au cynisme et au dogmatisme moral. Voyons comment. Dans sa profession de foi perspectiviste, le pragmatisme exalte l'anarchie des valeurs. Grâce à l'« empirisme radical » (James 2005), et partant de l'expérience immédiate, il entend reconstituer la « discontinuité et le désordre naturel ». Aussi célèbre-t-il le grand chaos de vérités, contrairement aux prétentions des philosophies « pures », « nobles », « éternelles », « rationnelles », « bureaucratiques ». Le pluralisme tirerait ses leçons de la nature elle-même. Car, « le monde que

nous habitons se présente comme répandu, déployé dans toutes les directions, sous la forme d'une multitude indéfinie de choses ayant chacune son existence particulière, mais rattachées entre elles de mille façons et à des degrés extrêmement divers... Nos pluralistes les acceptent, toutes ces choses, pour ce qu'elles sont, avec la valeur qu'elles ont ainsi. Ils savent s'accommoder de ce monde-là, car leur tempérament s'adapte bien à son instabilité (James 1968:184). Notons l'analogie avec l'univers rhizomique de Deleuze, « intermezzo », sans fin ni commencement, mais « pragmatique » (Deleuze et Guattari 1980:36-37). Contre l'arbre qui est une essence, le rhizome lui, prolifère sans fin, dans toutes les directions possibles.

Le pragmatisme prétend que contrairement aux « délicats »[5] du rationalisme qui s'accommodent mal de la diversité, les pluralistes, eux, acceptent le monde pour ce qu'il est. Ils s'en s'accommodent, parce que leur tempérament s'adapte à son instabilité. Les pluralistes s'opposent ainsi aux « rationalistes » qui prétendent venir au secours du monde, pour le transformer, le métamorphoser en un autre monde, meilleur.

Le conservatisme social et politique explique largement ces vues. À l'idéal de changement qualitatif du monde, le pragmatisme oppose le méliorisme, l'espoir que certaines choses nouvelles apparaîtront dans le monde (p. 93) et que « dans ses éléments les plus profonds, comme dans les phénomènes se produisant à sa surface, l'avenir ne répétera pas identiquement, ne fera pas qu'imiter, le passé » (*ibidem*). Ce que le méliorisme apporte de nouveau, c'est, comme le souligne James (1968), une « théorie cosmologique générale pleine de promesses » (*ibidem*), bref, une « doctrine réconfortante pour nous », car, fondée sur « la possibilité pour les choses de devenir meilleures » (p. 94).[6]

Nous reconnaissons dans ces vues l'esprit de la démocratie américaine. Au nom du jaillissement spontané de l'être, l'éthique pragmatiste tourne le dos aux grands ensembles: institutions politiques, classes sociales, syndicats, mouvements culturels: c'est un individualisme radical. À l'individu donc, le pragmatisme indique la direction, non pas pour sa société, sa nation, l'État, la civilisation, mais pour lui-même. Aussi l'invite-t-il à célébrer la douce richesse du monde, malgré l'abondance des désirs inassouvis. James rencontre ainsi Nietzsche pour réclamer la libération des instincts. Un peu comme Freud, il s'inquiète du refoulement des instincts qu'entraîne le processus de civilisation. C'est ainsi que, nostalgique, il se penche sur la suppression des pratiques sociales instinctives: polyandrie, polygamie, esclavage, arbitraire royal qui permet à ce dernier de tuer selon son bon plaisir, etc. (Marcuse 1967:139). Ces nombreux désirs étouffés sont une perte énorme, au regard de la « loi individuelle », injustement supplantée par un surmoi tyrannique et répressif. On retrouve à ce niveau le pragmatisme, qui répugne à sacrifier le désir et la loi individuelle au profit de la loi, de la convention, de la société et de l'État. N'admettant aucun commandement moral, il récuse le diktat des législateurs philosophiques et moraux qui imposent la différence entre les désirs légitimes et les désirs coupables.

Nous reconnaissons ici l'idéal moral du libéralisme qui, affranchi des entraves institutionnelles, morales et culturelles, s'adresse à l'individu isolé, intuitif et instinctif, parfait sujet postmoderne: égoïste dans ses rapports à autrui, hédoniste dans ses goûts, bondieusard et crédule dans ses croyances, conservateur dans ses choix politiques et sociaux, cocardier dans ses rapports aux nations.

Comme idéologie au service du capitalisme, le pragmatisme réhabilite les anciennes formes directrices de la pensée humaine: fidéisme, dogmatisme moral, bref autoritarisme social (Lénine 1973:395). Il s'oppose à la science et à la philosophie moderne, parce que depuis la Renaissance et les Lumières, celles-ci visent la sortie de l'homme de sa Minorité (Kant 1972:46). Avec sagacité, Lénine écrit: c'est du côté des « héritiers de l'esprit de la Renaissance » que l'on retrouve les novateurs; « ils ont surtout pour pères et pour éducateurs directs les philosophes et les savants du XVIIIè siècle, le grand siècle de l'affranchissement » (Lénine 1973:395). L'opposition entre les Lumières de la raison et les lumières de l'expérience est donc irréductible.

Notes

1 Anthony Appiah (1992:143) écrit: « *In philosophy, postmodernism is the rejection of the mainstream consensus from Descartes through Kant to logical positivism on foundationalism (there is one route to knowledge, which is exclusivism in epistemology) and of metaphysical realism (there is one truth, which is exclusivism in ontology), each underwritten by a unitary notion of reason; in thus celebrates such figures as Nietzsche (no metaphysical realist) and Dewey (no foundationalist). The modernity that is opposed here can thus be Cartesian (in France), Kantian (in Germany), and logical positivism (in America)* ».

2 Pour Rorty, il n'est pas déraisonnable de considérer *Vérité et méthode* comme un réquisitoire contre l'idée même de méthode. Il souligne ensuite le parallélisme entre ce livre et le manifeste de Feyerabend, *Contre la méthode* (Rorty 1990:394, note N° 1; 102).

3 Appiah écrit: « *What we can see in all these cases, I think, is not the triumph of Enlightenment capital-R Reason — which would have entailed exactly the end of charisma and the universalization of the secular — not even the penetration of a narrower instrumental reason into all spheres of life, but what Weber mistook for that: namely the incorporation of all areas of the world and all areas of even formerly « private » life into the money economy. Modernity has turned every element of the real into a sign, and the sign reads « for sale »; this is true even in domains like religion where instrumental reason would recognize that the market has at best an ambiguous place* » (Appiah 1992:145).

4 Son ouvrage est la bible de nombre de philosophes africains irrationalistes et superstitieux, soulagés de voir qu'ils ne sont pas les seuls à se barboter dans cet univers fangeux et obscur où l'esprit des pythons peut rendre les enfants malades, où les vestons disparaissent pour se retrouver enserrés dans une « coquille de palmiste » (sic), où enfin, les sorciers agissent sur les réactifs du laborantin, au point de faire tester HIV « positif » un paisible citoyen victime d'un « poison lent. » P.-M. Hebga, Père jésuite et ancien professeur de philosophie à l'Université de Yaoundé 1, apparaît comme le maître à penser de toute une génération de philosophes dont la mission est de répandre le poison de l'obscurantisme en milieu universitaire. Il est l'auteur d'un ouvrage paradoxal: *La Rationalité d'un discours africain sur les phénomènes paranormaux*, Paris, L'Harmattan, 1998.

5 Selon William James, le tempérament « délicat » est adapté à la conception absolutiste, que celle-ci renvoie à la raison ou à quelque autre principe transcendant: Dieu, la Matière, l'Absolu, l'Esprit, etc. Le pluralisme au contraire sied bien aux « robustes » (James 1968:202).

6 Il est difficile de ne pas voir ici une critique implicite de l'utopie révolutionnaire, avec sa promesse des « lendemains qui chantent ».

3

La question de l'histoire

La maîtrise structurale du monde

C'est dans les années 1960-1970 que le structuralisme commença à préparer le terrain à l'actuelle vague postmoderne. En dépit des dénégations de ses adeptes, la postmodernité prolonge bel et bien – et couronne – l'époque structurale. Le postmoderne prétend éclater la structure fermée du structuralisme; en réalité, il a conservé les principes essentiels de ce dernier: la structure par exemple, à la place du sujet, le formalisme, le signe, le langage… (Meschonnic 1988:260). Cette remarque peut s'étendre à la posthistoire elle-même, qui demeure un refus de l'histoire. Une étude sur le postmodernisme serait donc incomplète sans un sérieux regard sur le structuralisme lui-même. L'un et l'autre renvoient au même univers: celui des machines, des automates, des opérations, des systèmes, des manipulations, des symboles, du pouvoir. Meschonnic et Lefebvre (1982) ont raison lorsqu'ils reconnaissent dans ces théories le symptôme idéologique le plus éclatant d'un monde administré à son comble.

L'impensé de la déconstruction

Passées les visions infernales du nazisme, où Nietzsche et Freud furent accusés d'avoir ouvert la boîte de Pandore de l'inconscient obscur et des instincts sauvages, les années 1960 marquèrent le retour en force du nietzschéisme et du freudisme. Facilité en France par le mythe fascisant d'un État fort (gaulliste), ce retour venait en quelque sorte ratifier la téméraire entreprise de dénazification de Nietzsche, en dépit des avertissements de Lukacs (1958:298 sq.). Contemporaine de l'entreprise de dépréciation de la raison, la réhabilitation de l'inconscient et des instincts fut menée sur deux fronts convergents: le structuralisme et la psychanalyse.

La dépréciation structuraliste de la raison découle des travaux de Lévi-Strauss lui-même. C'est d'abord ce savant qui, le premier, souligna les liens intimes unissant l'ethnologie à la psychanalyse. Pour lui en effet, « l'ethnologie tire son originalité de la nature inconsciente des phénomènes collectifs » (Lévi-Strauss 1958:25). Lévi-Strauss prétend que, tant chez les peuples primitifs que dans les sociétés modernes, « il est

très difficile d'obtenir une justification morale ou une explication rationnelle d'une coutume ou d'une institution » (p. 25). La nature des phénomènes culturels est « d'échapper perpétuellement à la volonté comme à la réflexion » (p. 26).

Ces thèses inspirèrent les tendances irrationalistes présentes dans la variété des structuralismes contemporains, en anthropologie comme en psychanalyse. Ainsi, la philosophie de Foucault peut être considérée comme une brillante synthèse du freudisme et du nietzschéisme. Foucault développe ses thèses irrationalistes à partir des considérations sur la place de l'homme dans l'ordre des sciences humaines. Pour lui, l'homme que tentent de saisir ces sciences « ne peut pas se donner dans la transparence immédiate et souveraine d'un cogito » (Foucault 1966:333). Aussi sommes-nous condamnés à balancer entre le connu et l'inconnu, la pensée et la non-pensée. En tant que « doublet empirico-transcendantal », il est surtout le lieu de cette méconnaissance qui expose sa pensée à être débordée par son être propre (pp. 333-334). La question aujourd'hui n'est donc plus de savoir comment « l'expérience de la nature donne lieu à des jugements nécessaires »; il s'agit au contraire pour l'homme de prendre la mesure de sa propre finitude, au regard de ce corps, de cette vie, de ce travail et de ce langage qui le débordent de part en part. Le nouvel enjeu, ce n'est pas, comme dans la philosophie classique, l'établissement de la vérité, mais bien l'être; non plus la nature, mais l'homme; non plus la possibilité d'une connaissance, mais celle d'une méconnaissance première. Foucault accuse la philosophie classique d'avoir pensé la vérité contre l'être, la nature contre l'homme, la connaissance contre l'ignorance. Un exemple. C'est à partir des expériences de la pensée non fondée – de l'erreur, de l'illusion, du rêve et de la folie – que Descartes aurait découvert l'impossibilité qu'elles ne soient pas pensées. Descartes, prétend-il, voulait « mettre au jour la pensée comme forme la plus générale de toutes ces pensées que sont l'erreur et l'illusion, de manière à en conjurer le péril, quitte à les retrouver, à la fin de sa démarche, à les expliquer et à donner alors la méthode pour s'en prévenir » (p. 335). Derrida (1967a) exprime aussi un point de vue similaire. Or, la pensée moderne aurait pris une dimension différente, en s'enracinant dans le non pensé, en affirmant l'articulation de la pensée sur ce qui n'est pas pensé, mais qui ne lui est pas pour autant étranger. L'objet ici visé est de rompre avec l'illusion que toute pensée est pensée; que tout l'être des choses se ramène à la pensée, c'est-à-dire, moulée par la raison et structurée par la logique. D'ailleurs, précise-t-il, le « Je pense » ne conduit pas nécessairement à l'évidence du « Je suis »; ce qui signifie que « le cogito ne conduit pas à une affirmation d'être, mais... ouvre justement sur toute une série d'interrogations où il est question de l'être » (p. 335). C'est sur cet être qui « clignote dans l'ouverture du cogito mais n'est pas donné souverainement en lui et par lui », que s'interroge Foucault. Ce faisant, il tente de saisir le rapport de la pensée à l'être et à l'impensé. Dès lors, souligne-t-il, une forme de réflexion s'instaure, radicalement différente et éloignée du projet cartésien et de l'approche kantienne, « où il est question pour la première fois de l'être de l'homme dans cette dimension selon laquelle la pensée s'adresse à l'impensé et s'articule sur lui » (p. 336).

Foucault veut ainsi questionner les limites de la ratio occidentale. Car, pour lui, la fonction du *cogito* n'est plus forcément de « conduire à une existence apodictique, à partir d'une pensée qui s'affirme partout où elle pense, mais de montrer comment la pensée peut s'échapper à elle-même et conduire ainsi à une interrogation multiple et proliférante sur l'être » (p. 336). Telle est la tâche de la phénoménologie de Husserl, qui constitue moins « la ressaisie d'une vieille destination rationnelle de l'Occident, que le constat, fort sensible et ajusté, de la grande rupture qui s'est produite dans l'épistémè moderne au tournant du XVIII[e] siècle » (*ibidem*).

La nouvelle épistémè s'explique à partir, non seulement de la découverte de la vie, du travail et du langage, mais aussi de l'interrogation sur le mode d'être de l'homme et sur son rapport à l'impensé. D'après Foucault, « le projet phénoménologique ne cesse de se dénouer en une description du vécu, qui est empirique malgré elle, et une ontologie de l'impensé qui met hors circuit la primauté du "Je pense" » (p. 337).

C'est l'apparition de l'homme dans l'épistémè occidentale, en tant que « figure positive sur le champ du savoir », qui mit fin au vieux privilège de la connaissance réflexive, de la « pensée se pensant elle-même » (Hegel). Ceci expliquerait le fait que toute la pensée moderne soit « traversée par la loi de penser l'impensé » (p. 338). Foucault prétend que la pensée objective « parcourt l'homme en son entier », « quitte à y découvrir ce qui [...] ne pouvait être donné à sa réflexion ni même à sa conscience »: il s'agit « des mécanismes sombres, des déterminations sans figures, tout un paysage d'ombre ». C'est l'inconscient lui-même qui est ici visé. Ce philosophe le définit comme « ce qui se donne nécessairement à la pensée scientifique que l'homme applique à lui-même lorsqu'il cesse de se penser dans la forme de la réflexion » (p. 337). Car, l'impensé – et ses formes les plus expressives – est loin de constituer « la récompense offerte à un savoir positif de l'homme » (*ibidem*). Penser l'impensé, telle est donc la tâche assignée à la pensée moderne; telle est sa loi intime, la seule qui assure à l'esprit, plasticité et adaptabilité.

Mais, sous l'irrationnel et l'apparente souplesse, se cache en fait l'un des projets opératoires les plus durs. C'est vers un monde administré à l'extrême qu'il faut se tourner pour saisir la véritable essence de cette doctrine.

De l'idéologie du pouvoir

C'est comme idéologie du pouvoir qu'il faut saisir le structuralisme (Lefebvre 1971/1975:7). Un moment concurrent du pragmatisme – idéologie du capitalisme avancé dans le monde anglo-saxon –, le structuralisme réussit cependant à « fusionner » avec ce dernier. Ce qui donne à leur avatar postmoderne sa tonalité éclectique particulière.

Faisant suite, non seulement à la grande crise des années 1930, mais aussi aux destructions de la guerre 39-45, la décennie 1950-1960 marque en gros, la reconstruction capitaliste de l'Europe occidentale. Traduisant la consolidation du capital, la décennie suivante correspond à une période de prospérité économique sans précédent et consacre la mainmise absolue de l'État capitaliste sur l'ensemble de la so-

ciété. La forte concentration du pouvoir politique, pour une meilleure gestion des intérêts du capitalisme des monopoles, explique, au cours de cette période, la naissance du mythe de l'« État fort ». L'État gaulliste en est le modèle achevé (Brohm, Touvais, Pelligrini et Frank 1974). Tel est donc l'environnement économique, social et politique qui voit naître le structuralisme. Il s'agit d'un environnement au cours duquel l'État et sa bureaucratie s'efforcent de structurer « efficacement le monde entier, la production et les producteurs », et où « les hommes de l'État » du capitalisme monopoliste décident de faire « main basse sur le savoir et les espaces, comme les promoteurs sur les constructions et l'architecture, comme les spéculateurs sur l'expansion et la croissance » (Lefebvre 1971/1975:9).

Le structuralisme n'est donc pas « pur » de toute souillure politique ou sociale, comme le prétend son formalisme; il n'est pas coupé de la pratique, ne surgissant guère « de la rencontre fortuite entre des abstractions, l'épistémologie et le concept de structure » (*Ibidem*). La problématique structurale doit au contraire être comprise comme l'idéologie d'une époque où, sur le plan mondial, la pratique sociale et politique s'appuie sur l'idée de structure. Le contexte est donc celui du capitalisme des monopoles et des rapports sociaux et politiques qui en découlent. L'idéologie structurale camoufle donc, tout en les justifiant, les objectifs opératoires de ce capitalisme et de sa superstructure politique.

Dans le cadre du capitalisme avancé, l'idéologie structuraliste a une fonction stabilisatrice et apologétique. C'est seulement de façon suspecte qu'elle met l'accent sur l'intemporalité des structures mentales et sociales. Car, celle-ci ne peut signifier qu'une chose, à savoir que bon ou mauvais, désirable ou indésirable, le Système est non seulement extérieur au monde qui nous entoure et à ses aléas, mais surtout, qu'il lui est infiniment antérieur. On ne pouvait mieux faire pour échapper au mouvement et à ses infortunes, à l'histoire et à ses tragédies.

Le structuralisme pose le problème décisif du rapport du capitalisme à l'histoire. La structure est exactement comme l'abstraction et la catégorie dont parlait Marx (1977). Séparée des hommes et de leur activité matérielle, l'abstraction « est naturellement immortelle, inaltérable, impassible, elle n'est que raison pure, ce qui veut dire seulement que l'abstraction prise comme telle est abstraite. Tautologie admirable » (Marx 1977:546). Le structuralisme postule indirectement que la vie bourgeoise est une vérité éternelle. En absolutisant les catégories qui expriment les rapports capitalistes en termes de structure, il voit dans les produits de la société bourgeoise, des « êtres spontanés », « doués d'une vie propre », « éternels », chaque fois qu'ils se présentent à lui sous la forme de structures, de catégories, de pensées. Comme la structure n'a pas d'histoire, le structuralisme s'avère donc incapable de s'élever au-dessus de l'horizon que lui propose la société bourgeoise. Parlant de Proudhon, Marx écrit: « Parce qu'il opère sur des pensées bourgeoises en les supposant éternellement vraies, il cherche la synthèse de ces pensées, leur équilibre et ne voit pas que leur mode actuel de s'équilibrer est le seul mode possible » (Marx 1977:546). Ceci est plus vrai encore du structuralisme.

La question qui mérite donc d'être posée est la suivante: la modernité capitaliste met-elle véritablement fin à la diachronie? Depuis l'époque qui a immédiatement suivi la Révolution bourgeoise – depuis l'époque de Comte en particulier –, le débat sur la diachronie et la synchronie n'a pas cessé (Ricœur 2000:287-291). Ce débat recoupe en fait le conflit entre l'historique et le structural, l'histoire et la sociologie, le dynamique et le statique. Et à chaque fois, le primat va à la synchronie, au structural, aux invariants. Ce qui est en jeu, ce sont les conditions d'équilibre actuel de chaque société, les lois qui président à un tel équilibre. Si la démarche positiviste, et plus tard structuraliste, est dirigée contre l'histoire, c'est d'abord parce que le positivisme et le structuralisme voient dans l'histoire « une suite d'illusions, d'erreurs et d'oscillations autour de l'équilibre terminal » (Lefebvre 1971/1975:20). Là, réside l'une des contradictions fondamentales du positivisme. Philosophie de l'histoire, il est lui-même dirigé contre la pensée historique et l'histoire.

La contestation structurale de l'historique

Comme le rappelle Lefebvre (1971/1975), le conflit entre l'historique et le structural, la diachronie et la synchronie, le dynamique et le statique s'est radicalisé depuis que s'est affirmée sur la scène internationale, une société – celle des États-Unis d'Amérique – qui n'avait pas beaucoup d'histoire derrière son actualité et sa culture, et qui donc entretient avec celle-ci des rapports conflictuels. Cette dimension de la mentalité américaine, qui isole chaque segment de la temporalité, est à l'origine de nombreux malentendus avec les États-Unis. D'un point de vue théorique, le structuralisme suppose qu'une telle société ne peut être éclairée que par la sociologie quantitative et empirique. Jamais par l'histoire. D'ailleurs, la puissance nord-américaine avoue ne connaître d'autre histoire que celle de la technique, si l'on exclut le culte rendu aux pères fondateurs de la nation, regardés comme des héros mythiques. Sa société est, par excellence, la société de la cybernétique et de l'automatisation.

L'opposition entre l'idéologie structuraliste et la pensée historique est radicale, à moins de se situer dans la perspective du structuralisme génétique, tel qu'envisagé par Lucien Goldmann (1959, 1966, 1970). À l'opposé du structuralisme qui évacue les contenus, la pensée historique elle, affirme que les contenus ont autant, sinon plus d'importance que les formes hypostasiées. La pensée historique s'appuie sur la dialectique de l'histoire réelle, dont la vocation est d'enseigner les transformations des formes et des structures qui se font en même temps qu'elles se défont, en un processus éternel de dissolution et d'éclatement, selon les lois de l'histoire concrète des hommes. C'est ainsi que la pensée historique met sur le même plan et dans le même temps, la formation des structures et leur disparition; « elle montre au sein de la structuration, la dissolution commençante ou l'éclatement inévitable ». C'est dire que la pensée historique « ne se réduit ni à un poids mort, ni à un pittoresque superflu. Au sein de la mondialité technicienne se manifestent et se manifestèrent des différences, dues à l'histoire des sociétés, des groupes, des classes, des peuples, des nations. L'histoire continue » (Lefebvre 1971/1975:26).

Une telle perspective contredit fondamentalement la conception structurale de la temporalité. Le « temps structural » se détermine par rapport à l'actualisation de la structure. L'exemple classique est celui de la totalité virtuelle de la langue (structure) s'actualisant selon des lois spécifiques dans des langues particulières (sous-structures), dont chacune incarne certains rapports, certaines singularités. L'autre exemple classique est celui de la société totale, mais dont chaque forme sociale spécifique incarne certains éléments, certains rapports. Le processus d'actualisation ainsi défini « implique toujours une temporalité interne, variable suivant ce qui s'actualise » (Deleuze 1973:314). On peut donc en déduire, s'agissant de la société, que chaque type de production sociale possède une « temporalité globale interne », mais aussi que chacune de ses parties organisées possède un rythme qui lui est propre. Le temps structural apparaît ainsi comme un « temps d'actualisation », d'après lequel les éléments de coexistence virtuelle s'effectuent suivant des rythmes spécifiques (*ibidem*). On retiendra qu'il évolue « du virtuel à l'actuel », autrement dit, de la structure comme telle à ses actualisations. Ce temps s'oppose au temps de l'historisme, déterminé selon l'axe de succession, de progression d'une forme actuelle à une autre. Sinon, « le temps conçu comme relation de succession de deux formes actuelles se contente d'exprimer arbitrairement les temps internes de la structure ou des structures qui s'effectuent en profondeur dans ces deux formes, et les rapports différentiels entre ces temps » (pp. 314-315).

Lévi-Strauss expose clairement ces vues dans son débat avec Sartre. Quand il ne la nie pas carrément, le premier auteur insère de force l'histoire dans le lit de Procuste de la structure. Par exemple, « l'historien s'efforce de restituer l'image des sociétés disparues telles qu'elles furent dans des instants qui, elles, correspondirent au présent » (Lévi-Strauss 1962:339). Par ce biais, celui-ci tente de retrouver la « diversité des formes sociales » que l'ethnologie elle, saisit « étalées dans l'espace » et offrant « l'aspect d'un système discontinu » (*ibidem*). L'erreur profonde de la pensée historique est de croire que « grâce à la dimension temporelle, l'histoire nous restitue, non des états séparés, mais le passage d'un état à un autre sous une forme continue ». Et comme l'homme croit appréhender son devenir personnel sous le mode du changement continu, il lui semble que « la connaissance historique rejoint l'évidence du sens intime » (*ibidem*). D'après une telle approche, poursuit Lévi-Strauss,

> l'histoire ne se contenterait pas de nous faire décrire des êtres en extériorité, ou au mieux, de nous faire pénétrer par fulgurations intermittentes des intériorités qui seraient telles chacune pour son compte, tout en demeurant extérieures les unes aux autres: elle nous ferait rejoindre, en dehors de nous, l'être même du changement (*ibidem*).

Cet auteur n'accorde aucun crédit à « cette prétendue continuité totalisatrice du moi ». Car, pour lui, la conception de l'histoire habituellement proposée ne semble correspondre à aucune réalité concrète. Si le fait historique est ce qui s'est réellement passé, on est en droit de se demander « où s'est-il passé quelque chose? » Il suffit de prendre chaque épisode d'un grand événement, révolution ou guerre, pour se rendre compte à quel point cet épisode se résout en une infinité de « mouve-

ments psychiques » et « individuels ». Lévi-Strauss voit dans chacun de ces mouvements la traduction concrète des « évolutions inconscientes », qui se résolvent elles-mêmes en purs « phénomènes cérébraux », « hormonaux », « nerveux », dont les références nous renverraient invariablement à l'ordre physique ou chimique lui-même. Pour lui, le « fait historique n'est pas plus donné que n'importe quel autre fait; c'est seulement le théoricien de l'histoire ou l'« agent du devenir historique » qui constitue ce fait par abstraction pure, et comme sous la menace permanente d'une « régression à l'infini » (p. 340). Ces remarques sur la constitution du « fait historique » peuvent également s'appliquer à sa sélection.

Selon Lévi-Strauss, « l'historien et l'agent du devenir historique choisissent, tranchent et découpent »; toute tentative de constitution d'une histoire vraiment totale les confronterait immanquablement au chaos le plus absolu. Il suffit de rappeler, souligne-t-il, que chaque coin de l'espace comprend une multitude d'êtres, d'individus, dont chacun, pour soi, « totalise le devenir historique » d'une manière spécifique, et donc incomparable aux autres. Pour un seul de ces individus, chaque moment de la temporalité est d'une richesse inépuisable, en termes d' « incidents physiques et psychiques ». Et chacun de ces incidents joue un rôle décisif dans le processus de totalisation. Lévi-Strauss prétend que même une histoire qui se voudrait universelle ne serait en fait qu'une simple « juxtaposition de quelques histoires locales au sein desquelles (et entre lesquelles) les trous sont bien plus nombreux que les pleins » (*ibidem*). C'est dire que la prétendue « histoire totale » ne constitue qu'un mythe, qui ne ferait par exemple qu'accréditer l'idée d'une Révolution française qui est loin d'avoir existé. Si une histoire vraiment totale ne peut que se neutraliser elle-même, si son produit est « égal à zéro », c'est, selon l'auteur, parce que l'histoire est condamnée « à choisir des régions, des époques, des groupes d'hommes et des individus dans ces groupes, et à les faire ressortir, comme des figures discontinues, sur un continu tout juste bon à servir de toile de fond » (p. 341).

Dès lors, que peut bien signifier par exemple, écrire l'histoire de la Révolution française? Pour Lévi-Strauss, l'on devrait en effet savoir qu'une telle histoire ne sera jamais, simultanément et au même titre, l'histoire du jacobin et l'histoire de l'aristocrate. Mais, admettons l'idée de totalisation par pure hypothèse. Les totalisations respectives de ces histoires en rapport avec le jacobin ou avec l'aristocrate ne semblent pas seulement antisymétriques, l'une avec l'autre. Il y a plus, ces totalisations « sont également vraies » (*ibidem*). Le dilemme du théoricien de l'histoire est donc clair. Soit, il retient l'une de ces deux totalisations ou une autre – il en existe une infinité – et alors, renonce définitivement « à chercher dans l'histoire une totalisation d'ensemble de totalisations partielles »; soit, il reconnaît à toutes les totalisations une égale réalité, s'exposant ainsi à découvrir, à sa grande déception, que la Révolution française telle qu'elle est racontée, n'est qu'un mythe, puisqu'une telle Révolution, dispersée entre les points de vue propres du jacobin, ceux de l'aristocrate et ceux des autres groupes sociaux, « n'a pas existé », en rigueur de termes (p. 342).

La revanche des Éléates

C'est donc par la fragmentation du temps et des événements historiques que le structuralisme liquide la pensée historique. Dans l'Antiquité, une telle fragmentation avait déjà été opérée par les Éléates. C'est donc à juste titre que Lefebvre voit dans le structuralisme une version moderne de l'éléatisme (Lefebvre:1971/1975:45).

Comme les structuralistes, les Éléates s'appuyaient sur la raison analytique, conformément au principe parménidien d'après lequel « l'acte de pensée et l'objet de la pensée se confondent » (Parménide, *frag.* 8). En rapport avec le mouvement et l'histoire, la particularité de cet intellect est de décomposer les trajectoires et les trajets en une infinité d'unités distinctes et discrètes. C'est par ce biais que l'éléatisme disqualifie le mouvement et ses modalités essentielles, que celui-ci se rapporte au cosmos ou à la société. Articulée autour de trois arguments essentiels, la dichotomie, Achille et la tortue et, enfin la flèche, la doctrine de Zénon d'Élée est intéressante de ce point de vue.

Prenons d'abord la dichotomie. Son argument repose sur l'idée que si le mouvement est inconcevable, c'est avant tout parce que, pour parcourir la distance qui sépare deux points déterminés, le mobile est d'abord condamné à parcourir la moitié de cette distance, ensuite, la moitié de la moitié, etc. C'est une régression à l'infini. Le mobile se condamne ainsi à ne jamais atteindre son but final. Passons maintenant à Achille. Selon Zénon, le plus lent à la course ne sera jamais rattrapé par le plus rapide, car, celui qui poursuit doit d'abord atteindre le point d'où est parti son concurrent de telle manière que le plus lent aura toujours une grande avance. Cet argument est isomorphe à celui de la dichotomie. L'un et l'autre cas montrent l'impossibilité d'arriver à la limite, la grandeur étant divisée d'une manière ou d'une autre.

En termes simples, l'argument d'Achille prétend donc que dans une compétition avec Achille, la tortue ne sera jamais rattrapée, si son départ précède celui du héros de la vitesse. Car, pour rattraper le chélonien, Achille doit d'abord parcourir la moitié de la distance qui le sépare de la bête, ensuite, la moitié du trajet restant, à quoi il faut ajouter la nouvelle distance parcourue par la tortue pendant qu'Achille parcourait la moitié du trajet initial. Comme la dichotomie, l'argument d'Achille nie, non seulement le mouvement en tant que tel, mais aussi le principe même de l'accélération. Le héros de la vitesse a beau accélérer, il ne rattrapera jamais la tortue. Par ce biais, Zénon prétend ruiner le concept de mouvement en niant la possibilité de l'accélération.

Prenons enfin la flèche. L'argument est le suivant: la flèche en train d'être transportée, demeure dans un état stationnaire. C'est la conséquence de l'idée que le temps est composé d'instants. Seule l'illusion d'optique nous fait dire que la flèche volant vers une cible est en mouvement. En réalité, elle est statique, parce que Zénon décompose le temps en une infinité d'instants. Cela veut dire que la flèche en mouvement dans l'air occupe à chaque instant un espace égal à lui-même; on peut donc concevoir que la flèche est en repos absolu dans cet espace qui coïncide avec un instant qui lui correspond. Selon Zénon, il est illusoire d'obtenir du mouvement par une simple addition des instants d'immobilité. Conséquence: la flèche en mouve-

ment apparent est en réalité immobile. L'hypothèse de la flèche supprime donc la réalité du temps en posant qu'il est essentiellement composé d'une infinité d'instants minimaux, irréductibles les uns aux autres.

Que les Éléates résolvent la mobilité en segments, en lieux, en instants, en points – c'est-à-dire en unités discrètes et distinctes – voilà qui était nécessaire, puisque leur prétention était d'indiquer aux hommes la voie de la perfection ou, comme l'affirmait Parménide, de la Certitude, de la Vérité; la perfection se confondant avec l'immobilité. D'ailleurs, l'Être de Parménide est identique à lui-même, n'étant sujet ni à l'accroissement ni à la diminution. Immobile, il est contenu dans l'étreinte des liens puissants. Parménide nie son historicité, sa détermination temporelle. L'Être est sans commencement ni fin, puisque le penseur invalide l'idée même de sa naissance comme celle de sa mort. Or, les doctrines de la génération, de l'évolution et de la mort des structures appartiennent à l'opinion dont il faut absolument s'écarter (Parménide, *frag.* 9-18). À la pensée historique, Parménide oppose la métaphysique du Système. C'est dans sa philosophie qu'on rencontre en effet la première formulation vraiment radicale de cette idée. Dans sa sphéricité, l'Être parménidien apparaît comme un Système fermé, complet, immobile et éternel. D'un tel Système, l'on ne peut affirmer qu'il a été ou qu'il sera: il est à la fois tout entier dans l'instant présent, un et continu (*frag.* 8). De la même façon, l'Être demeure identique à lui-même, dans le même état et par lui-même. Ainsi reste-t-il immuable, à la même place, car la puissante Nécessité le maintient étroitement dans des limites qui l'enserrent de tous côtés.

La visée de ces attaques, c'est « la conception catastrophique du devenir, cette généralisation du temps cyclique à l'arrière-plan de laquelle se découvre l'idée de la grande Année et de l'embrasement terminal » (Lefebvre 1971/1975:49). Il suffit de se référer à Héraclite pour saisir la frayeur que le mobilisme universel inspirait aux Éléates. L'Éphésien concevait lui aussi l'unité du monde, mais à la différence de Parménide, il introduisit dans le cosmos et la société « un potentiel permanent d'instabilité » (Nkrumah 1976:51). C'est le feu lui-même qui constitue ce potentiel, car, affirme-t-il, le monde « a toujours été et il est, et il sera un feu toujours vivant, s'allumant avec mesure et s'éteignant avec mesure » (Héraclite, *frag.* 30).[1] Héraclite avance ainsi la thèse, toujours actuelle, du mouvement et du devenir universel. Selon lui, seule l'instabilité rend possibles toutes les transformations s'opérant dans le monde. C'est dire que la stabilité du cosmos et de la société n'est qu'apparente, puisqu'un fragile équilibre des forces le traverse de part en part. La loi universelle de l'unité et de la lutte des contraires domine le devenir éternel des choses; et cette loi agit aussi bien dans la nature que dans la société. L'Éphésien voit en effet dans la lutte des contraires le ferment indispensable à la création et à l'évolution, qu'il s'agisse de la nature ou de la société. D'après Héraclite, le progrès est le résultat d'une lutte des contraires, qui amène à des équilibres nouveaux sans cesse dépassés. La traduction politique et sociale de ce principe est la révolution en tant que moteur de l'évolution sociale et du progrès humain.

La visée ultime de l'héraclitéisme est donc politique, tout comme celle de Parménide et de Zénon, bien qu'en sens inverse. L'une et l'autre concernent le destin social et politique de la Grèce. C'est précisément à ce niveau que Platon les saisit. Réfutant Héraclite dans le *Cratyle* (440c), il fut incapable de concevoir le mouvement autrement que sous la forme de la corruption et de la décadence. C'est ce que suggère, du reste, le mythe du *Politique* où, abandonné à lui-même, le monde s'engage naturellement dans une marche à rebours pendant plusieurs myriades de révolutions.

Qu'ils professent le mouvement rétrograde de l'univers, l'*Éternel retour* ou, plus généralement l'anhistorisme, les penseurs de l'Antiquité sont en général tributaires de l'histoire de la Grèce elle-même. Si l'homme antique aspire éternellement à quelque chose, il ne peut cependant pas transgresser les limites de son corps, encore moins celles du cosmos (Losev 1985:134). Ne pouvant donc sortir ni de son corps ni de celui du cosmos, il reste à l'homme une seule issue: tourner en rond à l'intérieur du cosmos, revenir au même endroit ou, au mieux, se réincarner éternellement dans d'autres corps (Empédocle *frag.* 126, 127). C'est ainsi que l'Éternel retour cosmique s'imposa comme vision centrale dans la doctrine de ce penseur, où l'univers balance éternellement entre le jeu alternatif de l'Amour et de la Haine. Pessimiste, Empédocle saisit l'humanité actuelle sous le règne de la Discorde. Ce pessimisme justifie, semble-t-il, non seulement cet *Éternel retour* – qui constitue également une composante essentielle du *Phèdre* (Platon 1964:249a) – mais aussi cette hantise de la décadence sociale et politique qu'exprime en termes réalistes, mais combien actuels, *La République* (Platon 1966:Livre 8).

Exorciser le temps, échapper à la catastrophe et à la destruction: telle était l'obsession des anciens. La conscience de la « perfection » des institutions grecques pouvait justifier la confiance dans un système où, paradoxalement, la liberté des citoyens passait nécessairement par le maintien de l'esclavage et des inégalités. Platon ne croyait vraiment pas à l'égalité fondamentale des hommes. Son système implique en effet une division naturelle entre eux et une hiérarchie stricte parmi les travailleurs, chaque individu étant naturellement destiné pour certaines fonctions. C'est ainsi que les moins intelligents parmi les hommes sont voués aux travaux serviles, tandis que la classe intellectuelle est destinée au commandement. D'où, l'idée fort justifiée d'un « totalitarisme intellectuel » (Nkrumah 1976:56).

On retrouve ce totalitarisme dans le structuralisme, qui se veut la philosophie de la technique mondialisée et de la technocratie. Ici comme chez les anciens, l'on observe le même dédain du mouvement, le même refus de l'histoire et du progrès, en dépit des contradictions évidentes qui nécessitent des transformations radicales ou, mieux, le passage d'un état du monde à un autre. Dans le système capitaliste comme jadis dans l'univers grec, des individus ou des groupes peuvent discuter, se quereller, s'affronter dans des compétitions, guerroyer; leur univers peut même être traversé de drames, de tragédies, « néanmoins, en son fond ultime, le cosmos, avec toute la réalité animée et inanimée qu'il englobe, n'[est] qu'éternelle rotation interne sur soi et retournant éternellement au même état » (Losev 1985:134). Le Système est bon parce qu'il tourne rond, jamais parce qu'il évolue ou qu'il tend vers le

progrès. D'ailleurs, vers quoi d'autre, vers quel ordre nouveau évoluerait encore un Système complet, autosuffisant et parfait?

Le Système des systèmes

Nous sommes ici au point où Hegel postulait la fin de l'histoire. Celui-ci permet de voir comment le mouvement dialectique de l'histoire, l'utopie du progrès, se transforme en son contraire, c'est-à-dire, en idéologie de la stabilité. Ce propos s'applique bien à Hegel: « Dans la circonférence d'un cercle, le commencement et la fin se confondent » (Héraclite, *frag.* 103). Certes, l'hégélianisme rend-il justice à l'idée héraclitéenne d'évolution et de progrès, mais c'est le Système qui triompha finalement dans une doctrine qui prétendait clore près de trois mille ans d'histoire humaine.

Hegel peut difficilement se dédouaner de l'accusation de finalisme. Car, tout se passe comme si l'odyssée de la Raison n'avait qu'une finalité: la réalisation d'un État rationnel, démocratique et libéral. L'hégélianisme est le Système des systèmes qui couronne en les dépassant, tous les systèmes particuliers. Il suffit de se référer à La Logique pour mesurer la portée d'un tel Système qui embrasse la « science de la logique » (gnoséologie, ontologie), la « philosophie de la nature » (mécanique, physique), la « philosophie de l'esprit » (anthropologie, psychologie, droit, moralité, moralité sociale, art, religion et philosophie).

Le mouvement que couronne l'hégélianisme commence avec Bacon et More (1987). Professant sous la bannière du progrès, ils donnent à la Renaissance sa tonalité particulière. Si le sujet renaissant est glorifié, c'est parce qu'il incarne pleinement la virtus, la valeur, le courage, l'énergie créatrice, qu'il met au service tant de sa personnalité que de ses œuvres. Comme projet historique et culturel, la Renaissance veut réaliser un type d'homme nouveau, par le développement de ses qualités physiques, intellectuelles et morales; elle offre ainsi la signification la plus sublime de l'idée de progrès.

L'utopie est une composante essentielle de l'esprit renaissant. More et Bacon permettent de mesurer la puissance de l'utopie du progrès dans la construction de la modernité occidentale. Prométhéenne – « Prométhée est la véritable condition de l'homme » – l'utopie baconienne rêve d'une société idéale, fondée sur les progrès infinis de la science et un génie industriel avancé. L'« Institut de Salomon » célèbre ainsi les merveilles de la créativité humaine et préfigure la société industrielle, avec ses fontaines artificielles, ses maisons d'optique et de perspective, ses feux d'artifice pour la guerre comme pour le spectacle, ses avions, ses sous-marins, ses laboratoires de mathématique et d'astronomie. L'utopie de More, quant à elle, met l'accent sur le progrès social. Non seulement elle critique la propriété privée et les rapports sociaux capitalistes de l'Angleterre du XVIè siècle, mais aussi elle rêve d'une société communiste fondée sur la socialisation de la production, l'égalité de tous dans le travail, la fin des privilèges, la répartition équitable des richesses et une gestion démocratique des institutions de la république idéale.

Bacon et More préfigurent les deux principales utopies du progrès produites ultérieurement: l'utopie du progrès scientifique et technique et l'utopie du progrès social et politique. Condorcet (1970) les récapitule et postule la perfectibilité indéfinie de l'homme, celle-ci n'ayant d'autre terme que la durée du globe. Jamais, écrit-il, la marche générale de l'humanité ne sera rétrograde tant que les conditions physiques de la terre demeureront les mêmes.

Prenant le contre-pied des idéologues qui mystifient le sens de l'histoire, Condorcet montre que le progrès humain est pleinement intelligible. Ses causes, facilement identifiables, peuvent ainsi se résumer: sans cesse, l'humanité produit des connaissances nouvelles par combinaison des idées issues soit des sensations, soit des échanges entre les hommes, soit enfin des créations artificielles continues, à l'instar du langage, de l'écriture, des mathématiques. L'évaluation des progrès passés dispose l'humanité à assurer et à accélérer les progrès ultérieurs. Condorcet décrit les grandes étapes de l'évolution humaine, depuis la communauté primitive jusqu'à Descartes et à la Révolution française dont la mission est de préparer les progrès futurs. Instruite par l'histoire de ses progrès antérieurs, l'humanité présente saura éviter les superstitions de l'humanité primitive et assurer le triomphe définitif de la raison, de la vérité et de la tolérance. En esquissant un tableau historique général du progrès, cet auteur décrit une humanité en mouvement continu, ascendant, vers toujours plus de raison et de moralité; la seule condition est qu'elle récuse la religion et la superstition.

Mais qu'on ne s'y trompe pas. Ce point de vue sur la marche de l'histoire universelle comme produit de la raison humaine reste avant tout celui de la bourgeoisie elle-même. Le progrès infini de l'esprit humain est la métaphore du progrès infini de la société capitaliste comme telle. Hegel voit dans la Révolution bourgeoise le plus haut degré de réalisation de la raison humaine. Cette raison représente les déterminations de la conscience humaine, au regard des « lois de la nature et [du] contenu de ce qui est juste et bien » (Hegel 1970:337).

Si la philosophie, porteuse de l'utopie des Lumières, a été appelée « sagesse universelle », ce n'est pas sans raison valable; « elle n'est pas seulement la vérité en soi et pour soi, en tant que pure essence, elle est aussi la vérité en tant qu'elle devient vivante dans le monde réel » (p. 339). Avec la Révolution, « la liberté a trouvé le moyen propre à réaliser son concept ainsi que sa vérité » (p. 86). C'est la fin de l'histoire, allégorie du triomphe définitif du modèle libéral. Mais avec celle-là, l'homme vit-il l'éternel présent du progrès et de la raison? Ou alors, l'histoire lui réserve-t-elle d'autres surprises? Car, si l'homme vit l'éternel présent de la liberté et de la justice, cela induit automatiquement la réalisation d'un « État universel et homogène », qui suppose l'impossibilité d'une autre alternative idéologique ou culturelle, une fois la société bourgeoise réalisée. Ce qui signifie qu'après avoir expérimenté toutes sortes de régimes politiques, économiques et sociaux, l'humanité a atteint le point oméga, au-delà duquel il n'existe plus rien. En termes d'institutions humaines, l'homme devra désormais se contenter de broder indéfiniment sur le même thème libéral, démocratique et capitaliste, et gérer structuralement, sociologiquement et

pragmatiquement le Système. Tel est le problème posé par le positivisme et la sociologie de Comte.

Auguste Comte admettait une certaine idée de l'histoire et du progrès de l'humanité. Mais, dans sa théorie, il postulait un état positif, vu comme le stade suprême de la pensée et de l'évolution historique. Certes, le positivisme n'était pas si naïf, pour ne pas voir que l'état positif (état bourgeois et capitaliste par excellence) pouvait receler des contradictions en son sein. Mais ce parfait conservateur avait en horreur les grandes cassures de l'histoire; il pensait que les transformations révolutionnaires du système étaient, non seulement inutiles, mais aussi nuisibles. Pour Comte, le capitalisme clôturait définitivement l'évolution historique de l'humanité. Sur le plan social, il envisageait l'instauration de l'harmonie par la création d'une sociocratie, synthèse idéale de la démocratie et de l'aristocratie qui lui apparaissait comme la solution la plus appropriée au négatif, à l'opposition dans la société moderne. Contrairement au XVIII[e] siècle, le principal besoin du XIX[e] siècle était pour lui la « reconstruction générale » et non la révolution. « Notre situation occidentale » actuelle, écrit-il, exclut « le point de vue purement révolutionnaire » (Comte 1966:31).

Évidemment, la sociocratie était la solution qui convenait le moins à une gauche hégélienne attentive aux pulsions de l'histoire, Comte ne cachant pas son hostilité à la classe qui, chez Marx par exemple, incarnait le progrès, à savoir le prolétariat. Or, en mettant l'accent sur la lutte des classes, Marx choisit la dialectique pour relancer l'utopie du progrès, figée au stade de la révolution bourgeoise par Hegel et Comte. La révolution était pour lui, la condition de tout progrès futur.

Hegel avait écrit: « Le principe de la liberté de la volonté s'est fait valoir à l'encontre du droit existant », à savoir, le féodalisme et le despotisme (Hegel 1970:339). Le devenir étant loin d'avoir été épuisé par la Révolution bourgeoise, Marx estima qu'un si précieux outil pouvait encore servir pour la libération d'une humanité opprimée par le capital. L'aventure de l'histoire humaine n'était pas terminée.

Un ersatz de mouvement

D'un point de vue historico-social, le mouvement revêt généralement deux aspects essentiels. Il est soit ascendant, progressif – c'est la révolution – soit régressif – c'est la réaction, synonyme de stabilisation du monde. Dans la rhétorique stratégique de la Guerre froide, réaction et stabilité étaient isomorphes. C'est l'époque où l'Occident célébrait les pays « modérés », exemples d'équilibre et de stabilité. Les mouvements révolutionnaires étaient alors regardés avec effroi. C'est au nom de l'équilibre mondial que le mouvement qualitatif était répudié.

Car, d'après une vision structurale du monde, l'ordre au Nord est fonction de la stabilité au Sud. Après l'effondrement du bloc soviétique, le slogan d'un Nouvel ordre mondial fut lancé, sous la houlette des États-Unis. Il donna lieu à deux phénomènes convergents: 1. le renforcement de la mainmise de l'Amérique sur l'économie mondiale par la mondialisation, 2. le renforcement de l'hégémonie politique et militaire américaine dans le monde.

Stabiliser le monde par la victoire de l'impérialisme n'a rien de nouveau. Le projet rappelle Nietzsche, avec sa « grande politique », qui signifiait l'hégémonie mondiale de l'Occident, thème repris plus tard par Ortega Y Gasset dans un questionnement brutal: « Qui commande dans le monde? » (Ortega Y Gasset 1961:177-245).

La durée intérieure

Depuis Nietzsche et Spengler, le temps est discrédité, nié, car assimilé à la décadence, au mal. On nie le temps et le mouvement en les banalisant ou en les liquidant; l'essentiel est de leur ôter tout potentiel contestataire. Bergson invalide le temps et le mouvement en les décomposant, en les dissolvant dans le flux mouvant, la durée pure. Celle-ci est une entité mystique qu'il oppose au temps spatialisé. Pour lui, l'infirmité de la science et de la raison provient du fait que les doctrines modernes de la cognition opèrent comme s'il y avait plus à saisir dans le statique, l'immobile que dans le mouvant et le flux continuel de l'existence. La science moderne, qui a bâti son édifice sur le temps-longueur, ignore la vitalité de la durée dont le psychisme fait une expérience intégrale, et que seule la connaissance intuitive permet de saisir.

Pour Bergson, la connaissance par concepts croit pouvoir penser le flux mouvant de la durée par le stable; elle utilise une démarche de type cinématographique, en ce sens qu'elle s'appuie sur une succession d'images qui occulte mal l'essence figée des phénomènes, en dépit de leur mobilité apparente. Selon Bergson, la principale faiblesse de la science et de la raison réside dans le fait de prendre pour objet essentiel le solide inorganisé, lequel est, comme la matière elle-même, orienté en sens inverse de l'élan vital.

Le concept d'intuition résume bien l'idée de durée pure, synonyme de « durée intérieure » (Bergson 1985:27). L'intuition bergsonienne « saisit une succession qui n'est pas juxtaposition, une croissance par le dedans, le prolongement ininterrompu du passé dans le présent qui empiète sur le futur »; elle est avant tout « la vision directe de l'esprit par l'esprit ». « Au lieu d'états contigus à des états », souligne Bergson, « voici la continuité indivisible, et par-là substantielle, du flux de la vie intérieure ». Aussi, la durée pure se confond-elle avec la vie de la conscience elle-même (*ibidem*).

Bergson oppose l'intuition à l'intelligence. Pour lui, la différence entre les deux facultés viendrait du fait que « l'intelligence part ordinairement de l'immobile et reconstruit tant bien que mal le mouvement avec des immobilités juxtaposées »; l'intuition, elle, s'appuie sur « le mouvement, le pose ou plutôt l'aperçoit comme la réalité même, et ne voit dans l'immobilité qu'un moment abstrait, instantané pris par notre esprit sur la mobilité » (p. 30).

Une telle approche était de nature à satisfaire une clientèle frivole, prête à jouir du « mouvement » par pure coquetterie bourgeoise, mais à condition de ne faire aucune concession au matérialisme et à la dialectique. Il suffit de lire la conclusion des *Deux sources de la morale et de la religion*, pour voir vers quoi pointe en réalité cette intuition qui est « mouvement » ou plutôt, « vision directe de l'esprit par l'esprit ». Car, le théoricien de la mobilité et de la durée intérieure, qui fut par ailleurs le

Président de la Société métapsychique de Londres, avait également des dons pour communiquer avec les esprits. Car, Bergson avoue ne pas comprendre « la fin de non-recevoir que de vrais savants opposent à la "recherche psychique" ». Certes, regrette-t-il, « ils tiennent les faits rapportés pour "invraisemblables" ». Or, voici la nature de ces faits:

> Supposons, qu'une lueur de ce monde inconnu nous arrive, visible aux yeux du corps. Quelle transformation dans une humanité généralement habituée, quoi qu'elle dise, à n'accepter pour existant que ce qu'elle voit et ce qu'elle touche. L'information qui nous viendrait ainsi ne concernerait peut-être que ce qu'il y a d'inférieur dans les âmes, le dernier degré de la spiritualité. Mais il n'en faudrait pas davantage pour convertir en réalité vivante et agissante une croyance à l'au-delà qui semble se rencontrer chez la plupart des hommes, mais qui reste le plus souvent verbale, abstraite, inefficace (Bergson 1976:336-338).

Voilà donc en quoi consiste l'ersatz de mouvement que le spiritualisme substitue au matérialisme historique. Est-ce étonnant pour quelqu'un qui ne connaît que deux sortes de vies: la vie intérieure et la vie biologique? Chaque fois qu'il arrive à Bergson d'effleurer la question de la vie sociale, c'est « pour appliquer à la société des schémas empruntés à l'une ou à l'autre de ces deux "vies", – et pour en dire des généralités abstraites (Politzer 1968:124), ou encore, comme je le pense, pour faire surgir des spectres.

Histoire d'une Mémoire volatile

Il serait ici intéressant de revenir sur l'autre succédané du mouvement, la bougeotte, adéquate à la mondialisation. Encore appelée « bougisme » ou « mouvementisme » (Taguieff 2001), la bougeotte est typique de l'époque postmoderne. L'agitation perpétuelle, la mobilité, le désir irrépressible de changer de place, de lieu ou d'état, caractérisent l'univers de l'économie, de la finance, de l'industrie et du travail posthistoriques. La bougeotte constitue ainsi le prototype même du mouvement stable et non historique, quantitatif et non qualitatif.

Le postmodernisme et la mondialisation décomposent le mouvement, le temps et l'histoire jusqu'à dissolution et réification absolues. Le paradoxe est que, même réifié, le mouvement quantitatif continue de se mouvoir. Sa nature est de s'agiter, même sans but défini. Il «gambade » parce qu'aucun « horizon de sens » ne lui est assigné. C'est ainsi que disparaissent « la visée d'une émancipation, celles de la réalisation de la justice, du bonheur, etc. » (Taguieff 2001:181). La bougeotte n'a d'autre horizon politique, social ou éthique que celui prescrit par la technique globalisée elle-même et le marché des capitaux et de la main-d'œuvre. Telle est la loi de la structure, où le vrai sujet est la structure elle-même; les individus, qui n'ont ni identité ni personnalité, se contentant d'« occuper les places » créées par le Système (Deleuze 1973:305).

En dépit de la rhétorique postmoderniste, le mouvement brownien des atomes nous situe loin du postulat néo-progressiste que suggère Taguieff (2001). Il ne semble pas en effet que le mobilisme postmoderniste soit « une nouvelle variante de la

religion du Progrès ». C'est même le contraire qui semble probable. Le nomadisme post-historique ne s'est constitué que sur les décombres du Progrès et de l'Histoire, contre le Mouvement et contre le Temps. Mouvement résiduel ou réifié, le mobilisme traduit les avatars du capital et de ses pions dans un ordre mondial figé, en dépit de sa mobilité apparente. Tous les mouvements ne sont pas générateurs de progrès. Voilà pourquoi tant l'Amérique – comme système – que l'économie globalisée – en tant que hyper-système – renvoient directement ou indirectement au nouvel éléatisme.

Les aléas des marchés financiers contemporains indiquent la véritable nature de ce phénomène qui n'a ni passé ni avenir; il est négation de la tradition – c'est-à-dire de la culture – et rejet de l'histoire. L'instant est le lieu de l'éphémère, caractéristique du post-historique. Il est création permanente, surgissement d'un lieu sans lieu, manifestation d'une présence sans être. Le marché est un point lumineux, une trace sans cesse écrite, sans cesse effacée; il n'est pas accumulation, mais au contraire, volatilité; il n'est pas histoire cumulative, mais évanescence. Le marché est l'impossible projet global des hommes: il est seulement le point où se mêlent et s'entrecroisent des destins individuels, singuliers, centrifuges, éphémères. Voilà pourquoi, tout projet cohérent d'avenir lui est formellement interdit.

Le discrédit frappant l'histoire n'épargne pas la mémoire dont la fragilité et la défaillance caractérisent l'univers structural. Celui-ci est sans mémoire. Les êtres qui le peuplent sont schizoïdes, amnésiques, incapables de dire quoi que ce soit sur leur passé. La mémoire est ici regardée comme la représentation la plus suspecte du passé. Du reste, cette faculté échoue dans ses tentatives de faire revivre fidèlement l'expérience du passé (Hoff 1996:396), qui ne peut faire l'objet d'aucune reproduction adéquate. Aussi le présent se suffit-il à lui-même comme manifestation de la temporalité. Sans doute, les interférences du passé dans cette temporalité fortuite peuvent-elles brouiller la représentation du présent comme partie d'une totalité. Mais l'impossibilité d'établir quelque déterminisme dans ce kaléidoscope des souvenirs et des mémoires est sans cesse affirmée. Aussi la mémoire n'échappe-t-elle ni à l'incohérence ni à la contradiction.

La volatilité de la mémoire et des marchés financiers sont adéquates. Que signifierait donc la mémoire du Nasdaq ou du Dow Jones? La bourse n'a pas de mémoire, elle est volatilité. Dans les marchés financiers, la « mémoire » est unique. C'est un point transitoire. Elle n'est pas un état; la « mémoire » du jour ne conservant rien de la « mémoire » de la veille. Chaque jour est donc un jour nouveau, et chaque instant, un instant nouveau. À la bourse, Sisyphe lui-même est à l'œuvre. Mais il y a aussi l'aléa de l'« indice ». Dans sa déréliction, celui-ci peut bondir ou au contraire cramer, sans aucun espoir de s'approprier les atouts du passé. L'indice ignore l'histoire cumulative, car, entre deux kaléidoscopes, il n'existe aucun déterminisme, aucune histoire.

Le discrédit des méta-récits a ouvert la voie au règne de ces « processus imprévisibles et irrationnels », adéquats à la dynamique même du capital boursier. C'est à l'extension de ces « processus » au Tiers-Monde que pense Hakim Ben Hammouda, lorsqu'il voit dans la crise du grand récit nationaliste et de son « déter-

minisme modernisateur » une opportunité susceptible d'ouvrir la voie à l'imprévu, à l'aléatoire, au contingent, au hasard et à l'indéterminisme (Ben Hammouda 1998:23). Mais il est difficile de dissocier la théorie du hasard, de l'aléatoire et de l'imprévu de la lutte planétaire contre les tentatives d'inscription de la valeur d'usage dans la durée.

Le postmodernisme veut rompre avec les grandes tendances de l'historicisme. Pour lui, en effet, l'histoire universelle n'est pas orientée (d'où un certain scepticisme à l'égard de l'histoire); elle n'est pas intelligible et n'est régie par aucune loi. Aussi toute idée de plan et de téléologie lui répugne-t-elle.

Le FMI et la BM rejettent aussi le plan, la prévision économique et historique. Dès les années 1940, Popper, qui entretenait des liens avec le néo-conservatisme libéral (Habermas 1981:958), s'était déjà employé à ruiner les paradigmes de la loi et de la prévision historiques (Popper 1956). Or, ces paradigmes supposent l'action consciente de l'homme dans l'histoire, l'application de sa volonté sur la matière sociale, économique, culturelle et politique. Les grands hommes, qui veulent sortir leurs peuples de l'impuissance, recourent fréquemment à eux. Il en est ainsi des inspirateurs de la modernité: Bacon, Descartes, les Lumières. Les pères de la puissance soviétique ou chinoise et les artisans de la décolonisation du Tiers-Monde en firent de même.

En installant l'homme dans l'instant, le singulier, l'aléatoire, le relatif et le divers; en rejetant la loi et la prévision historiques, le postmodernisme affiche son côté réactionnaire. Comme voile idéologique, il empêche tout questionnement sur la finalité et la légitimité de l'ordre social nouveau. Le capitalisme réduit le monde à l'état moléculaire. Son idéologie prend alors l'effet pour la cause. Dans la célébration du divers et du contingent, celle-ci rend opaque le projet global en cours. Mais conscient que seul un contre-projet global est opposable au projet libéral total, et qu'un tel contre-projet est porteur d'intelligibilité, l'idéologie ridiculise les méta-récits et décrète la « fin de l'histoire », l'histoire idéologique de l'humanité s'achevant avec l'État universel et homogène.

L'Éternel retour et le pathos des distances

À partir de ce qui précède, les théories anti-progrès et anti-prométhéennes deviennent intelligibles. Elles le sont plus encore si l'on considère l'adéquation du panstructuralisme avec le renouveau nietzschéen. Combinés dans les doctrines de la posthistoire, ces derniers coïncident avec la légitimation de la nouvelle polarisation du monde, après l'euphorie « égalitaire » des années 1960-1970. Ces mutations sont très perceptibles chez Fukuyama (1992), qui, non seulement convoque Nietzsche, mais s'approprie les aspects les plus réactionnaires du platonisme. D'où sa théorie de la mégalothymia.

Cette démarche n'est pas inédite dans l'histoire moderne. Elle caractérise déjà Balzac et Flaubert, dans leur entreprise de légitimation du conservatisme social et politique. Balzac ridiculise l'« homme de progrès », militant pour « les chemins de fer, les pénitenciers, le pavage en bois, l'indépendance des Noirs, les caisses d'épar-

gne, les souliers sans couture, l'éclairage au gaz, les trottoirs en asphalte, le vote universel, la réduction de la liste civile » (Taguieff 2001:154). Cette ironie qui n'épargne pas « l'indépendance des Noirs », ne peut pas nous faire oublier qu'à la même époque, des hommes de passion (comme Schœlcher) se battaient pour l'émancipation des esclaves, suivant en cela les nobles pas de Condorcet, auteur d'un des ouvrages les plus sagaces de cette époque: *Réflexions sur l'esclavage des Nègres*. Cet ouvrage est plein de foi et de vérité. Sans doute, le noble de Balzac n'avait-il pas assez de sens pour goûter une telle évidence; sinon, Condorcet l'eût édifié :

> Doux apologistes de l'esclavage des Noirs, supposez-vous pour un instant aux galères, et que vous y soyez injustement; supposez ensuite que votre bien m'ait été donné; que penseriez-vous de moi, si j'allais mettre en principe que vous devez rester toujours à la chaîne, quoi que innocents, parce qu'on ne peut vous en faire sortir sans me ruiner? (Condorcet 2001:72).

Avec un peu de bonne volonté, Balzac eût également apprécié la littérature des Nègres, rassemblée par l'Abbé Grégoire; il se serait alors fait une idée juste de leurs facultés intellectuelles et de leurs qualités morales (Grégoire 1991). L'arrêt sur l'esclavage des Noirs veut montrer que le progrès, l'émancipation, la liberté, ne sont pas des mots sans contenu. Pour les opprimés, le progrès constitue effectivement un mouvement ascendant et émancipateur; il révèle à l'homme sa pleine humanité.

Or la vague anti-progrès est généralement contemporaine de « l'irruption des masses dans la scène politique et dans la haute culture » (Taguieff 2001:154); la « vulgarité », la « médiocrité » et la « bassesse» étant la conséquence supposée de cette irruption. Sans le profond mépris du peuple, sans sa haine, l'ardeur anti-progrès de Flaubert resterait inintelligible. Enragé, il stigmatise l'égalitarisme des « progressistes », accusés de favoriser la médiocrité triomphante. « Ce serait la glorification de tout ce qu'on approuve », avertit-il solennellement, sur un ton mi-ironique, mi-sarcastique. Il poursuit :

> J'y démontrerais que les majorités ont toujours raison, les minorités toujours tort. J'immolerais les grands hommes à tous les imbéciles... Ainsi, pour la littérature, j'établirais, ce qui serait facile, que le médiocre, étant à la portée de tous, est le seul légitime, et qu'il faut donc honnir toute espèce d'originalité comme dangereuse, sotte, etc. Je rentrerais par-là dans l'idée démocratique moderne, d'égalité dans le mot de Fourier que les grands hommes deviendront inutiles (cité par Taguieff 2001:154).

Ainsi donc, Nietzsche avait des devanciers. Chez tous, la répudiation de l'histoire et du progrès coïncide avec la sécession sociale opérée pour éloigner la foule de la sphère de la culture et de la politique. Nietzsche (1985) est sceptique sur le progrès moral de l'humanité parce qu'à son goût, la modernité adoucit les instincts de l'homme, favorisant ainsi la tolérance à l'égard du peuple. « Sommes-nous vraiment devenus plus moraux? », s'interroge-t-il (p. 153). Cette question étrange appelle une réponse tout aussi étrange: que tout le monde croie que nous sommes devenus plus moraux, « c'est déjà une preuve du contraire » (*ibidem*). Car, suggère-t-il,

> nous autres, hommes modernes, très délicats, très susceptibles, obéissant à cent considérations différentes, nous nous figurons en effet que ces tendres sentiments d'humanité que nous représentons, cette unanimité acquise dans l'indulgence, dans la disposition à secourir, dans la confiance réciproque est un progrès réel et que nous sommes par-là bien au-dessus des hommes de la Renaissance... (*ibidem*).

Et Nietzsche de proposer encore: « Écartons en pensée notre délicatesse et notre tardiveté, notre sénilité physiologique, et notre morale d'"humanisation" perd aussitôt sa valeur – en soi aucune morale n'a de valeur: – en sorte qu'elle nous inspirerait à nous-mêmes du dédain » (p. 154). De là, l'avertissement suivant:

Ne doutons pas, d'autre part que nous autres modernes, avec notre humanitarisme épaissement ouaté qui craindrait même de se heurter à une pierre, nous offririons aux contemporains de César Borgia une comédie qui les ferait mourir de rire. En effet, avec nos "vertus" modernes, nous sommes ridicules au-delà de toute mesure (*ibidem*).

À partir d'ici, ce penseur propose une curieuse définition du "progrès" et de la "vertu":

> La diminution des instincts hostiles et qui tiennent la défiance en éveil – et ce serait là notre "progrès" – ne représente qu'une des conséquences de la diminution générale de la vitalité; cela coûte cent fois plus de peine, plus de précautions de faire aboutir une existence si dépendante et si tardive. Alors, on se secourt réciproquement, alors chacun est, plus ou moins, malade et garde-malade. Cela s'appelle "vertu": parmi les hommes qui connurent une vie différente, une vie plus abondante, plus prodigue, plus débordante on aurait appelé cela autrement, "lâcheté" peut-être, "bassesse", "morale" de vieille femme (*ibidem*).

Nietzsche est persuadé que l'« adoucissement des mœurs » n'est rien d'autre qu'une conséquence de l'affaiblissement de l'homme moderne. Le penseur vise ici les sybarites de son temps. Il est incontestable, selon lui, que « la dureté et l'atrocité des mœurs peuvent être au contraire, la suite surabondante de vie » (*ibidem*). Or, note-t-il, ce qui autrefois était le sel de la vie constituerait pour l'homme moderne un poison. La vérité, proclame Nietzsche, est que la morale de compassion, « cet état d'esprit que l'on pourrait appeler impressionnisme moral », est au contraire « une expression de la surexcitabilité physiologique » propre à tous les êtres décadents (*ibidem*). Le penseur allemand assure que « l'"égalité", une certaine assimilation effective, qui ne fait que s'exprimer dans la théorie des "droits égaux", appartient essentiellement à une civilisation descendante » (p. 155). Et le philosophe d'exalter avec superbe les inégalités sociales, les différences de statut, la hiérarchie parmi les hommes.

Nietzsche est convaincu que « l'abîme entre homme et homme, entre une classe et une autre, la multiplicité des types, la volonté d'être soi, de se distinguer », ce qu'il appelle en d'autres termes « le pathos des distances », est le caractère spécifique des « époques fortes » (*ibidem).* Il peut donc regretter que « l'expansivité de la tension entre les extrêmes » soit « chaque jour plus petite ». Et le penseur de gémir: « Les extrêmes même s'effacent jusqu'à l'analogie » (*ibidem*). Quoi donc d'étonnant,

remarque-t-il, que « toutes nos théories politiques, et les constitutions de nos États, sans en excepter "l'Empire allemand" », soient « des conséquences, des nécessités logiques de la dégénérescence »? (*ibidem*). La sentence du théoricien de l'inégalité est sans appel:

> La vie en déclin, la diminution de toutes les forces organisantes, c'est-à-dire de toutes les forces qui séparent, qui creusent des abîmes, qui subordonnent et sur-ordonnent, voilà ce qui se formule aujourd'hui comme idéal en sociologie... Nos socialistes sont des décadents, mais M. Herbert Spencer lui aussi est un décadent, – il voit dans le triomphe de l'altruisme quelque chose de désirable ! (pp. 156-156).

À l'époque impérialiste, l'avarice de la bourgeoisie n'avait plus besoin de périphrases ou de formules civilisées pour justifier son existence et sa nécessité. Voilà pourquoi, même en philosophie, l'on pouvait se permettre d'être arrogant, grossier et cynique, sans courir le risque d'un blâme. Pourtant, la simple proclamation du refus de l'égalité ne semblait pas suffisante.

Confrontée à la montée irrésistible des mouvements sociaux et démocratiques, et engagée dans les conquêtes coloniales et les luttes inter-impérialistes qui devaient aboutir au partage du monde, la bourgeoisie, bien représentée par Nietzsche,[2] éprouvait encore le besoin de créer des mythes anti-historiques, comme pour accréditer l'éternité et la supériorité de ses choix moraux. Il fallait donc magiquement abolir le temps réel, historique, le figer, et ainsi, cristalliser le pathos des distances, l'abîme entre homme et homme, entre une classe et une autre, la multiplicité des types, etc. C'est ainsi qu'il redécouvrit le mythe antique de l'Éternel retour (Nietzsche 1950:148-149). Ce mythe présente comme illusoire toute idée d'évolution, de progrès et de temporalité. L'histoire apparaît ainsi comme un fantôme. Par l'Éternel retour, Nietzsche nie la possibilité du progrès historique et du temps lui-même. Ainsi, le portique qui est là, devant nous, présente deux visages, deux chemins, et « personne encore ne les a suivis jusqu'au bout ». En effet, Nietzsche voit, d'un côté, « une longue rue qui mène en arrière »; cette rue « dure une éternité », de l'autre côté, « une longue rue qui va en avant »; « c'est une autre éternité ». Les deux chemins « se contredisent »; plus exactement, « ils se heurtent de front », et par conséquent, s'annulent. C'est pourquoi, ils installent dans le présent éternel, l'«Instant ».

Du reste, souligne Nietzsche, « le nom du portique est écrit en haut: "Instant" ». C'est l'Instant de l'éternité. De cet Instant, nul ne peut sortir. Car, courbes, les chemins ne peuvent arrêter de se contredire. Veut-on aller tout droit, devant soi, suivre le chemin qui mène en avant? Ce chemin ne mène nulle part, puisqu'il retrouve le chemin contraire. Le chemin est essentiellement courbe. Et dans sa courbure, il inspire sa forme à la vérité, au temps et à l'histoire: « Tout ce qui est droit ment »; « toute vérité est courbe, le temps lui-même est un cercle » qui se referme sur lui-même pour déterminer la modalité de l'Instant éternel.

Nietzsche invite à contempler cet Instant d'éternité, matérialisé par le portique. « De ce portique de l'Instant », insiste-t-il, « une longue rue retourne en arrière ». Elle signifie que « derrière nous il y a une éternité ». Cette longue rue, et cette

éternité derrière, indiquent que tout ce qui existe, a déjà parcouru le temps cyclique: « Il n'y a rien de nouveau sous le soleil ! » Selon Nietzsche, de toutes choses, celle qui sait courir doit déjà avoir parcouru cette rue. De même, de toutes choses, celle qui peut arriver doit « être arrivée, accomplie, passée une fois déjà ». Pour lui, « si tout a déjà été », cela signifie que même cet instant doit déjà avoir été. Il en est de même de ce portique qui porte le nom de l'instant. De la sorte, souligne-t-il, « toutes les choses sont si solidement nouées que cet instant entraîne toutes les choses à venir », et, « par conséquent aussi lui-même ». Ainsi, va le long cycle de l'existence, lassante répétition, sans fin de l'instant, dans la courbure absolue d'un temps cyclique et homogène. Or:

> Cette araignée lente qui rampe au clair de lune et cette lune elle-même, et moi et toi qui chuchotons ensemble sous le portique, qui parlons des choses éternelles en chuchotant – ne faut-il pas que nous tous ayons déjà été? – et que nous revenions et courions dans cette autre rue, droit devant nous dans cette longue rue affreuse – ne faut-il pas qu'éternellement nous revenions?

C'est sur ce terrain profondément travaillé par le mythe de l'*Éternel retour* que devait surgir le fantasme d'une « morphologie de l'histoire universelle ». Celui-ci impliquait chez Spengler (1948), un relativisme historique absolu. *Le Déclin de l'Occident* rejette en effet l'unité du développement logique du monde dans sa globalité. Dans la perspective spenglérienne, l'histoire universelle s'articule en plusieurs civilisations, toutes cycliques et indépendantes les unes des autres. Chacune de ces civilisations évolue selon un cycle immuable: la naissance, le développement et la mort. D'après Spengler, l'Occident serait en train d'amorcer la phase terminale de son évolution, celle qui, fatalement, le conduira à la mort.

Dans l'histoire occidentale, le déclin, le pessimisme historique et le refus de l'histoire ont une signification politique profonde. De Gobineau (1967) à Huntington (1997), en passant par Spengler (1948), une idée permanente s'exprime à travers ces concepts: le rejet de l'histoire, la répudiation de l'idée de progrès moral. La finalité de cette démarche est de légitimer les inégalités entre les hommes et de durcir autant que possible les rapports sociaux et internationaux. Les rapports de force doivent toujours être favorables aux plus forts. C'est dire que la critique du progrès vise d'abord et avant tout la démocratie et l'égalité au sein de la nation et dans le monde.

Si les forts rejettent l'égalité, c'est, prétend Nietzsche, au nom de l'excellence. Par ce rejet, ils refusent de récompenser la bassesse et la médiocrité. Mais l'on peut se demander avec Taguieff si le « progrès », la « modernisation » et la « démocratisation » ne peuvent seulement se réduire qu'à la « médiocrisation » (Taguieff 2001:156). Il est vrai que l'équation démocratie comme équivalente à la médiocrité avait déjà été posée par Platon lui-même, dans son rêve d'une aristocratie de l'intelligence.

Les rêveries aristocratiques de Nietzsche sont à inscrire dans un vaste projet schismatique visant à isoler les riches des pauvres. Depuis qu'elle a consolidé son pouvoir, la bourgeoisie souffre d'un mal incurable: la nostalgie des ordres, exprimée avec aplomb par Spengler (1948:307 sq.). Dans cette nostalgie dynastique, elle invoque l'ordre médiéval comme pour échapper au prosaïsme ambiant. La fuite de la

médiocrité implique la polarisation sociale et la cristallisation des différences. Par ce biais, on croit sauver l'ordre bourgeois de la décadence et de la mort.

Des symbiotes au service de l'ordre mondial nouveau

En rapport avec le problème des inégalités dans la société contemporaine, le structuralisme prolonge incontestablement le nietzschéisme. Il est significatif qu'il revendique son héritage. Expliquons le sens de cette symbiose.

Le nietzschéisme et le structuralisme représentent les deux figures idéologiques complémentaires du capitalisme contemporain, idéalisé sous le paradigme post-métaphysique. Nietzsche inaugure cette époque qui réclame la libération des instincts. De cette ère post-métaphysique, émerge la figure du surhomme, super-individu affranchi de la morale commune et enclin à la prédation. Spengler radicalise la perspective, car, au surhomme, il trouve un archétype dans le règne biologique: l'animal de proie. Celui-ci possède une assez large autonomie de volonté et d'indépendance par rapport à l'ensemble de la nature; son « existence libre de l'animal est une lutte, rien qu'une lutte: c'est sa tactique vitale, sa supériorité ou son infériorité face à l'autre… » (Spengler 1958:43). Animal de proie donc, l'individu de Spengler « incarne la forme la plus haute de vie librement mouvante »; cette vie impliquant « un maximum d'autonomie personnelle opposée aux autres, de responsabilités envers soi, d'unité de soi, un paroxysme de nécessité dans laquelle ce soi ne peut sauvegarder son intégrité que par le combat, par la victoire et par la destruction » (p. 60). Plus il est solitaire, plus se précise sa résolution de construire un monde à sa mesure. Ennemi de tous, « jamais, il ne peut tolérer un égal dans son antre » (p. 66). Spengler ne cache pas ses desseins capitalistes: La propriété qui conclut le procès de prédation, constitue « le domaine dans lequel on exerce un pouvoir sans partage et sans limites, pouvoir gagné en combattant, défendu contre les pairs, victorieusement sauvegardé » (*ibidem*).

Voilà donc à quoi servait la libération des instincts prônée par les doctrines post-métaphysiques. En barbarisant les instincts, la bourgeoisie s'armait ainsi idéologiquement pour défendre son ordre socioéconomique. Avec la postmodernité, les objectifs ne semblent pas avoir varié. Nietzsche et Spengler légitimaient idéologiquement les grands intérêts en jeu dans un univers marqué par la concurrence sauvage et la prédation. Les heurts inter-impérialistes apparaissent en filigrane dans leur bellicisme. Cette philosophie teintée de pessimisme, est parfaitement adaptée à l'époque; elle annonce les inévitables conflagrations qui meurtrirent la première moitié du XXè siècle.

La convocation de Nietzsche par le structuralisme, moins d'une décennie après la défaite historique du fascisme, a souvent étonné. L'étonnement se justifiait tant qu'il était admis que le fascisme était un pur accident de l'histoire. Le fait d'associer fascisme et communisme ou de les renvoyer dos à dos visait non seulement à banaliser le monstre – « Après tout, il y a pire que le fascisme: le Goulag ! » – mais aussi à montrer que le projet qu'incarnaient Hitler et Mussolini était étranger aux véritables desseins du capitalisme. Rien n'était plus faux. La vérité historique elle-même obligea

les idéologues bourgeois à se rendre à l'évidence: l'État fasciste était un pur rejeton de l'État capitaliste (Guérin 1973). Bien avant sa réalisation, c'est d'abord à Nietzsche qu'il échut la mission historique de préciser ses objectifs. Car, c'est seulement un État délibérément agressif, profondément réactionnaire, mais tout entier « au service de la bourgeoisie impérialiste qui fournit, aux yeux de Nietzsche, une défense suffisante contre le socialisme » (Lukacs 1958:297).

C'est donc sous la bannière du nietzschéisme que, dans les années 1930, le fascisme leva, au nom de la bourgeoisie, une armée de forces sauvages, prêtes à être utilisées contre les ennemis du Système. Hitler, pour ce qui le concerne en tout cas, « s'en tenait inébranlablement à la conviction qu'il faudrait tout d'abord écraser l'adversaire marxiste » (Nolte 1973:69). Voici une autre vérité inébranlable énoncée par cet auteur: « La destruction des formes d'expression les plus caractéristiques en matière politique et idéologique du mouvement ouvrier, du socialisme et du communisme, voilà ce qui avait été la raison d'être du fascisme » (p. 116). L'État corporatif fasciste annoncé par Nietzsche, apparaît comme le prototype même de l'État des monopoles. D'après la « Charte du Travail » fasciste de 1927, « L'État corporatif considère l'initiative privée dans le domaine de la production comme l'instrument le plus efficace et le plus utile pour l'intérêt de la nation » (pp. 119; 149). C'est donc par la construction d'un État réactionnaire et agressif qu'Hitler entendait sortir de la torpeur, les sybarites bornés de son monde. Nous sommes ainsi loin de la fable hayekienne des fondements socialistes du fascisme (Hayek 1985:121-131).

L'union du structuralisme et du nietzschéisme signifie que le capitalisme de l'époque technocratique dispose d'une importante réserve de forces brutes prêtes à servir. Aucune « théorie pure » ne peut justifier leur vogue actuelle. Celle-ci correspond à une époque où les puissances capitalistes relancent – contre la volonté de leurs propres peuples – la course aux armements, question de soutenir les guerres postmodernes sous les prétextes les plus divers. Il n'y a pas d'hérésie à parler de « fascisme libéral ». Incontestablement, cette droite libérale, qui n'a plus que les mots de « terrorisme », de « sécurité publique » et d'« immigration » à la bouche, couve un « oeuf du serpent », d'où peut encore sortir le reptile fasciste » (Marcos 2000:14-15).

Le nietzschéisme est spécifiquement la philosophie de la guerre brute – d'où son militarisme farouche – tandis que le structuralisme reflète les besoins idéologiques d'une bourgeoisie bureaucratique confrontée aux problèmes posés par la mondialisation de la technique et de l'économie. Ces deux idéologies complémentaires et dirigées contre l'histoire et le progrès sont incontestablement des philosophies de la stagnation et de la réaction.

Avec la bureaucratie et la mondialisation de la technique, il était difficile d'éviter « une réduction et même une liquidation de l'historique, considéré comme poids mort, résidu, encore plus gênant que pittoresque » (Lefebvre 1971/1975:25). Une telle perspective signifie simplement qu'avec le règne mondial de la pure technicité et de la technocratie, avec la cybernétisation croissante de la société contemporaine, l'homme n'aura plus d'avenir, au sens historique du terme; il n'aura plus de temporalité différente du présentisme, où prédomine l'ici-maintenant (Lipovetsky 2004:82).

L'humanité entrerait dans le monde harmonisé de l'« éternel présent », celui « des machines, des combinaisons, arrangements et permutations d'éléments donnés ».

La naissance d'un tel monde signifie, selon le structuralisme, que l'occurrence des « événements » nouveaux dans l'« histoire » est sans doute encore possible; mais seulement, de tels événements se confondront uniquement avec l'introduction de « techniques nouvelles », bien que l'autodestruction du monde et l'action perturbatrice ou destructrice de quelque « déviant » ne soient pas exclues. Mais le système sait faire face à ces menaces, car, au nom de l'harmonie universelle, les « déviants » seront traqués, avec une « farouche cruauté » (Lefebvre 1971/1975:25). Ainsi s'explique la cruauté contre les anciens chefs d'État S. Milosevic et S. Hussein. Dans cet ordre, Nietzsche joue le rôle d'un officier idéologique de réserve, toujours prêt à servir. C'est au nom de ces guerres du futur qu'il rêvait de la « grande politique » mondiale. Les choses étant ainsi présentées, écrit Petit, nous ne serons plus condamnés « à choisir entre des philosophes comme Michel Foucault, qui déclarait sans ambages que le vrai sens historique est de reconnaître que nous vivons "sans reprise ni coordonnées originelles, dans des myriades d'événements perdus" et les partisans d'une rationalité scientifico-bureaucratique de plus en plus impersonnelle » (Petit 2005:97-98). Le poststructuralisme est la combinaison parfaite de ces deux logiques.

L'heuristique de la peur

Conjurer les menaces du futur

Le concept de « menaces du futur » est très diffus dans l'idéologie bourgeoise actuelle. Le constat fait par Henri Lefebvre, il y a plus de 30 ans, demeure valable. Depuis l'époque de la Guerre froide et la contestation de l'ordre asymétrique du monde par la Périphérie, ces « menaces » signifient que si l'histoire suit son cours, l'humanité peut sombrer dans le chaos sanglant, sous forme de guerre nucléaire ou encore, de révolte mondiale des pauvres contre les nantis (Lefebvre 1971/1975:61). Ainsi s'explique la fonction stabilisatrice des idéologies d'inspiration structuraliste. Elles postulent en effet la stagnation plutôt que la transformation qualitative du monde, le *statu quo* plutôt que la contestation de l'ordre établi. Alors, plutôt que de résoudre les contradictions entre le travail et le capital, le Nord et le Sud, on préfère les gommer magiquement au nom de l'équilibre du Système.

Avec ses avatars, le structuralisme suppose que comme Système, le capitalisme mondial a atteint un état tel qu'il ne peut que se développer « harmonieusement ». Cela signifie qu'il doit croître, mais, cette croissance ne doit pas perturber l'ordre et la disposition des éléments de l'univers qu'il contrôle. C'est cet ordre qu'il faut protéger. Toute tentative de sa remise en cause ou de sa contestation sera sévèrement réprimée. Les campagnes dans les Balkans et en Asie s'expliquent ainsi, tout comme l'acharnement à punir les perturbateurs de l'ordre mondial. Le Tribunal pénal international (TPI) apparaît ainsi comme une juridiction d'exception[3] créée pour juger les vaincus de la Guerre froide et les adversaires les plus irréductibles de la mondialisation.

Le capitalisme défend son ordre socio-historique en professant l'immobilisme, la stagnation, le *statu quo* et en agitant la peur du futur. L'« heuristique de la peur » de

Hans Jonas annonce la catastrophe en cas de mouvement et décrit l'effroi réel qu'éprouve le capitalisme devant cette inconnue pourtant bien connue que constitue l'utopie, sous la forme de l'Alternative. Le refus de l'histoire et de l'utopie signifie qu'en dehors du capitalisme, il n'y a pas d'alternative historique crédible.

Le prétexte de Jonas est la menace représentée par le développement excessif de la techno-science. Sans doute a-t-il raison de s'inquiéter du destin d'une humanité dopée par l'« exubérance technologique » (Jonas 1992:255). Or, par un malin sophisme, Jonas fait du marxisme l'« exécuteur testamentaire de l'idéal baconien » (p. 195). Par contre, il ne cherche même pas à dissimuler sa complaisance à l'égard du modèle libéral et démocratique (pp. 230; 231).

Que le marxisme constitue le compendium des grandes utopies contemporaines, c'est pour lui une évidence. Jonas le saisit sous les traits terrifiants et infernaux d'une « eschatologie active » (p. 196). Ainsi, au « Principe espérance » (Bloch 1982, 1977), associé aux grandes promesses d'abondance, de prospérité, de progrès, d'avenir, de libération et de Rédemption, Jonas substitue le « Principe Crainte » (Jonas 1992:217-225, 197) ou encore l'« heuristique de la peur ». Pour lui, l'homme ne peut tenter d'aller au-delà de ce que propose actuellement la société bourgeoise, sans courir un risque mortel. D'où son pessimisme. Notons que le pessimisme historique est propre aux philosophies de cette tendance. Ce qu'elles redoutent par-dessus tout, c'est la rupture de l'équilibre structural et la construction d'un ordre binaire, dialectique, en contradiction avec la marche réelle de l'histoire. Le problème c'est que l'éternel présent envisagé ressemble fort étrangement au présent médiéval, dans l'ignorance parfaite des précieux acquis de la civilisation depuis la Renaissance.

L'époque dite moderne diffère fondamentalement de l'époque médiévale en ceci que la Renaissance réalise consciemment un type d'homme libéré des entraves spirituelles du passé, grâce à l'accroissement de ses potentialités intellectuelles, morales et physiques; l'autonomie de sa volonté et la conscience de sa liberté. Sans doute, l'idéal chevaleresque était-il aussi en mesure « de mener à une exaltation de l'homme, mais il fut rapidement intégré par l'Église dans son idéal chrétien; force et pouvoir proviennent d'une grâce divine et doivent être mis au service de l'Église et de Dieu » (Schaeffner 1968:91). Or, avec la Renaissance, « le héros n'est plus seulement au service de Dieu, mais de son prince et de sa ville » (*Ibidem*), bref de sa communauté. C'est dire que depuis la Renaissance, l'homme crée sa propre histoire; il crée l'Histoire, en tant qu'il est le moteur de son propre progrès. Voilà donc l'héritage que les idéologies poststructuralistes veulent supprimer.

La fin de l'utopie

Le postmodernisme voit dans le scepticisme à l'égard des « grands récits » l'une des conséquences non seulement de l'essor scientifique et technologique contemporain, mais aussi de l'élimination de l'alternative communiste. C'est durant cette période que l'accent fut déplacé « sur les moyens d'action plutôt que sur ses fins » (Lyotard 1979:63). Évidemment, ce phénomène s'accompagna du redéploiement du capitalisme avancé, après son repli durant les années Keynes (1930-1960). En même

temps que le renouveau du capitalisme ruinait l'alternative communiste, il réhabilita également l'idéal hédoniste, par la valorisation de « la jouissance individuelle des biens et des services » (p. 63). Concomitamment, le discrédit des « grands récits » modifia profondément la place de la science et de la raison dans la société. Ainsi, le postulat scientifique et philosophique aurait perdu sa vocation axiologique essentielle; science et philosophie n'étant plus à même de réglementer le jeu éthique et esthétique ou de se prononcer sur le juste et l'injuste, le bien et le mal, le beau et le laid. La science se contenterait désormais de « jouer son propre jeu », se révélant du coup incapable de « légitimer les autres jeux de langages » (p. 66).

L'impression de pessimisme au sujet de la connaissance n'échappe pas à Lyotard. Partout, il ne voit qu'illusion, échec, déchéance, discrédit, déréliction: illusion d'une « métalangue universelle », échec du « projet du système-sujet », discrédit des savants du fait de la molécularisation des tâches, déréliction du sujet, capitulation de la philosophie spéculative devant ses tâches essentielles et son impuissance à rassembler l'étude des logiques ou des histoires des idées sous son autorité propre (pp. 67-68).

Peut être, faut-il mettre le projet de dé-légitimation en rapport avec la finitude et la « mort » de l'homme, contemporaines de la contestation de la souveraineté du « Je pense» (Foucault 1966:352). Que la question de l'homme soit au cœur même de la pensée moderne, ne signifie nullement, pour ce dernier, que nous assistions au « règne de l'homme » (ibidem). La vérité est qu'il « s'agit (prosaïquement) d'un redoublement empirico-critique par lequel on essaie de faire valoir l'homme de la nature, de l'échange ou du discours comme le fondement de sa propre finitude » (*ibidem*). C'est bien cette finitude de l'homme qui nous interdit toute évasion du présent, sur le mode soit de la nostalgie d'un âge d'or passé – qui n'a jamais existé – soit d'une projection utopique vers un avenir inaccessible. D'où l'avertissement de Foucault (1966), qui interdit à l'homme toute illusion. La promesse évangélique d'un avenir meilleur – fait de liberté, de prospérité et de bonheur – ne constitue qu'un mythe dont il faut se libérer. Ainsi, Foucault oppose-t-il franchement un « rire philosophique »

> à tous ceux qui veulent encore parler de l'homme, de son règne ou de sa libération, à tous ceux qui posent encore des questions sur ce qu'est l'homme en son essence, à tous ceux qui veulent partir de lui pour avoir accès à la vérité, à tous ceux qui en revanche reconduisent toute connaissance aux vérités de l'homme lui-même, à tous ceux qui ne veulent pas formaliser sans anthropologiser, qui ne veulent pas mythologiser sans démystifier, qui ne veulent pas penser sans penser aussitôt que c'est l'homme qui pense, à toutes ces formes de réflexion gauches et gauchies (pp. 353-354).

Tel est le sens du projet anti-humaniste au cœur du structuralisme. Foucault rejette l'utopie humaniste qui se donnait pour tâche l'instauration du règne de l'homme et la réalisation de sa libération; il réfute la prétention de ceux qui s'interrogent sur l'essence même de l'homme ou qui tentent de bâtir une théorie de la connaissance et de l'avenir à partir de cette essence. Pour lui, une telle connaissance n'est pas possible. Ce que nous rencontrons chaque fois que nous tentons de fonder une théorie

de l'homme, ce n'est ni l'être ni son essence, mais bien l'impensé et l'inconscient, c'est-à-dire, tout le contraire du cogito, de la conscience, de la vérité et de l'utopie. L'affirmation de la finitude de l'homme et la mise en relief d'un impensé se logeant au cœur même de la pensée moderne, ont suffi à légitimer le discrédit des méta-récits.

Notons encore que le rejet de l'humanisme chez Foucault se double d'un refus péremptoire de l'Histoire; cette histoire qui a cessé d'exercer ses fonctions traditionnelles de « sens », de « mémoire », de « mythe », de « transmission de la Parole et de l'Exemple », de « véhicule de la tradition », de « conscience critique du présent », de « déchiffrement du destin de l'humanité », d'« anticipation sur le futur » ou encore, de « promesse d'un retour » (p. 378). En ordonnant le temps des hommes au devenir du cosmos ou, au contraire, en étendant à tous les étages de la nature le principe et le mouvement d'une destination humaine – à la manière par exemple de la Providence chrétienne –, on pouvait concevoir « une grande histoire lisse, uniforme en chacun de ses points »; une histoire « qui aurait entraîné dans une même dérive, une même chute ou une même ascension, un même cycle, tous les hommes et avec les choses, les animaux, chaque être vivant ou inerte, et jusqu'aux visages les plus calmes de la terre » (p. 379).

À la grande Histoire, Foucault substitue donc des historicités particulières, autonomes. En clair, ceci veut dire qu'il existe par exemple « une historicité propre à la nature »; une historicité propre à chaque activité, etc. Dans sa fragmentation, une telle historicité ne peut « trouver sa place dans le grand récit commun aux choses et aux hommes ». C'est dire que les choses possèdent chacune leurs lois internes de fonctionnement, leur dynamique propre. La conséquence est donc que la chronologie de chaque chose, de chaque être « se développe selon un temps qui relève d'abord de leur cohérence singulière » (*ibidem*).

On peut légitimement se demander si cette dissociation de l'histoire ne correspond pas à la fin de cet objet. D'ailleurs, Foucault admet sans peine que « l'être humain n'a plus d'histoire » (p. 380). Plus exactement, l'homme se trouve « enchevêtré à des histoires qui ne lui sont ni subordonnées ni homogènes » (*ibidem*). Ce que Foucault veut dire en fin de compte, c'est que l'homme de notre époque est un être complètement « dés-historicisé » (*ibidem*).

Les choses étant ainsi, comment formuler un projet global de l'humanité ou encore de la société? Dans un monde atomisé, dominé par les nouvelles technologies et l'hédonisme, un tel projet est-il simplement désirable? Que Foucault rejette une telle utopie, c'est l'évidence même. D'ailleurs, la désarticulation de l'histoire montre bien l'impuissance de l'homme face aux circonstances. Celui-ci ne peut formuler aucun projet cohérent, puisque l'histoire elle-même a perdu de sa cohérence et de sa légitimité. Par exemple, il ne peut avoir aucune emprise sur l'économie, puisque cette instance, à l'instar du marché, surgit de façon spontanée avec ses lois, sa dynamique et sa finalité propres. Les concepts de hasard et de discontinuité revêtent ainsi tout leur sens. Ils signifient que l'histoire a cessé d'être l'expression d'une accumulation progressive, d'une tension vers le futur, le progrès.

Comme « institution », le marché dissout les autres grandes institutions de la modernité, l'État-nation en particulier. Il apparaît ainsi comme le plus puissant de tous les dissolvants existants, la force « historique » – bien qu'il prétende lui-même échapper aux lois de l'histoire – la plus implacable du monde moderne. Il n'est donc pas étonnant que, soumise à l'empire du marché, la philosophie – pas plus que la pensée politique ou qu'aucune science sociale contemporaine – « ne formule aucune morale » (Foucault 1966:338). Puisqu'il est la retraite de la pensée, l'impensé ou, si l'on veut, l'inconscient lui-même, interdit la formulation de tout choix politique ou éthique, ou encore, de tout projet d'avenir: utopie d'humanité, de liberté ou d'émancipation. Aussi Foucault invite-t-il à abandonner à leurs illusions les rêveurs qui croient encore pouvoir forcer la pensée à sortir de sa retraite et à formuler des choix axiologiques ou politiques. Car, « pour la pensée moderne, il n'y a pas de morale possible » (p. 339); et l'on ne saurait prétendre qu'ils « l'ignorent, en leur profonde niaiserie, ceux qui affirment qu'il n'y a point de philosophie sans choix politique, que toute pensée est "progressiste » ou réactionnaire" » (*ibidem*). Pour Foucault, aucune nécessité n'impose à la pensée d'exprimer l'idéologie d'une classe ou même le rêve d'un avenir meilleur (*ibidem*). Pourquoi en serait-il autrement? Le capitalisme n'a-t-il pas instauré le régime de l'éternel présent? L'éternel paradis lui-même. Le capitalisme, c'est, pour ainsi dire, « l'avenir meilleur réalisé ».

Il n'y a rien de nouveau dans le désengagement foucaldien. Ses thèmes font partie de l'air du temps. L'époque structuraliste correspond à l'empire du néo-scientisme. La formalisation pseudo-mathématique y est devenue la tarte à la crème de tout savant Tartempion aspirant à la notoriété. Les sciences humaines ne sont pas épargnées par la mode formaliste où le quantitatif supplante le qualitatif. La dictature néo-scientiste tente ainsi d'imposer l'épistémologie comme prototype du savoir philosophique, car considérée comme la théorie de la théorie. Le savoir n'est pur, précis, serein que s'il est éloigné de l'empirie. Pas plus la philosophie que n'importe quelle autre science de l'homme ne doit apparaître comme « le commentaire idéologique d'un projet fondamentalement politique » (Hountondji 1977:245). En postulant « l'autonomie des instances » à la manière d'Althusser, Hountondji exige que chaque domaine – le philosophique d'une part, le politique d'autre part – soit rendu « à sa cohérence propre » (*ibidem*). La philosophie doit être pure de toute souillure idéologique. Mais que se passe-t-il lorsque certaines tendances du structuralisme et du postmodernisme exigent que soient établies des passerelles entre la philosophe et les instances parmi les plus éloignées d'elle: le mythe, la religion, etc.? En réalité, la coupure de la philosophie et de la vie n'est valable que lorsque la pensée est invitée à l'activité. Il lui est interdit de remplir sa mission messianique de régénération du monde et de création d'un ordre social nouveau. Mais ne soyons pas dupes. Car, depuis Heidegger, chacun sait que les choses commencent habituellement par un nihilisme passif avant de se terminer par une philosophie activiste, en tant que légitimation des forces sociales et politiques les plus rétrogrades.

Revenons à Foucault. Ce n'est pas l'« engagement politique » de la philosophie en soi qui lui pose problème. Lui-même consacre à cette question fondamentale les

pages parmi les meilleures de ses écrits des années 1970-1980. Issus de ses enseignements au Collège de France, ces écrits lui permettent de tester un concept politique nouveau: la gouvernementalité.

C'est une fréquentation assidue des penseurs hellénistiques qui lui révèle quelque chose de décisif, à savoir que le « souci de soi », la « culture de soi », n'est pas contradictoire avec tout engagement politique pour une cause. Mais là réside le problème. Chez Foucault, le « souci de soi » débouche avant tout sur la promotion de ces nouvelles formes de subjectivité, à l'origine des « modes de vie », des « formes culturelles », des « styles de vie », qui n'excluent pas les aspects les plus aberrants de jouissance de soi, comme l'homosexualité.

C'est ainsi qu'on peut dire que le souci de soi ne constitue pas une quelconque alternative à l'activité politique ou à la vie familiale, civique et économique. Il s'agit simplement pour lui de circonscrire cette activité dans des limites raisonnables, celles prescrites par la vérité de soi et son désir de s'affranchir d'une morale trop contraignante. Foucault voit dans le soi un lieu d'asile, un havre de paix. Dans le cadre d'un État oppressif, le « rapport de soi à soi » constitue le « point premier et ultime de résistance au pouvoir politique » (Foucault 2001:241), tout en restant profondément « traversé par la présence de l'Autre: l'Autre comme directeur de conscience, l'autre comme correspondant à qui l'on écrit et devant qui l'on se mesure à soi, l'autre comme ami secourable, parent bienveillant » (Gros in Foucault 2001:517 « Postface »).

Foucault distingue trois formes de luttes: les luttes contre les dominations politiques, les luttes contre les exploitations économiques et enfin, les luttes contre les assujettissements éthiques. S'il privilégie ces dernières qui auraient marqué le XXè siècle, c'est parce que, selon lui, ces luttes ne visent ni institution de pouvoir, ni groupe, ni classe mais simplement, une forme particulière de pouvoir qui s'exerce dans la vie de tous les jours et qui classe les individus en catégories, les attache à leur identité et leur impose une loi de vérité qu'il faut reconnaître en eux. Seule cette forme de pouvoir peut transformer les individus en sujets.

Loin de chercher à libérer l'individu face à un État oppressif, les nouvelles luttes se fixent d'autres objectifs, en rapport avec les nouvelles formes de subjectivité. Car, le problème à la fois politique, éthique, social et philosophique qui se pose avec nécessité et urgence, ce n'est pas tant de libérer l'individu de l'État et de ses institutions que « de nous libérer, nous, de l'État et du type d'individualisation qui s'y rattache » (Foucault 2001:524). C'est à la promotion de nouvelles formes de subjectivité qu'il faut donc travailler.

Notons que cette forme d' « engagement politique » a eu sa part dans la reconnaissance de l'homosexualité ou, plus exactement, d'un « nouveau mode de vie homosexuel ». Néanmoins, Foucault reste fidèle à ses vues de départ: sa philosophie est une pensée de la dé-légitimation du politique, au sens classique du terme, en proclamant son scepticisme à l'égard des grandes utopies qui ont façonné l'esprit, non seulement de l'Occident, mais aussi du monde moderne dans son ensemble: progrès, émancipation, liberté. Dans ce contexte, les sciences humaines n'ont aucune

vocation sociale ou humaniste fondamentale; leur finalité n'est donc pas la libération ou la Rédemption de l'humanité, le progrès ou le bonheur de l'homme.

Du reste, le progrès, la liberté, l'humanisme et le bonheur ne sont que des mythes qui ne valent pas mieux que ceux qui les ont précédés et qu'ils tentent de supplanter. Pour remplacer un phénomène, il faut bien partir d'un modèle. Or, chez Foucault comme chez ses épigones postmodernes, il n'y a ni modèle ni référence, ni grands noms ni héros de l'histoire (Lyotard 1979:30). Ensuite, aux yeux de ces idéologues, les philosophes ont jusqu'ici transformé le monde, il s'agit maintenant de l'interpréter et trouver les mécanismes nouveaux permettant à un moi traversé par la présence de l'Autre de s'auto-construire. Là s'arrête l'engagement d'un soi tout entier tourné vers sa propre culture, en dépit de la présence de l'Autre, avec qui il ne peut former que des liens de plaisir, d'utilité et de préférence, dans un contexte général de jouissance homosexuelle… C'est dire qu'une fois évacuée la croyance au Sujet, à l'Histoire, à la pensée active, à l'Utopie et au Bonheur, il ne reste plus qu'une chose à l'individu: assumer pleinement sa « condition postmoderne »; expérimenter la vie dans tous ses états; s'ouvrir à l'aléatoire, à l'éphémère, à la flexibilité et aux plaisirs instinctifs (Ela 1998:9).

Suite à la destitution de la raison dialectique dont la fonction essentielle était de porter le négatif au cœur du réel, les Maîtres du monde peuvent désormais dormir tranquillement. Jusque-là témoin de la pensée critique, la philosophie vient de prononcer ses vœux perpétuels d'obéissance, de soumission et de fidélité… Solennellement, elle a renoncé à se poser en conscience critique du monde; et ne se sentant plus investie d'aucune mission particulière pour transformer le réel – notamment celui qui coïncide avec le monde des Maîtres –, elle brûle son vieux credo messianique. L'ère postmoderne ne commence-t-elle pas avec le constat d'échec de la raison et des messianismes? D'ailleurs, commerçant de façon ignoble avec la terreur – la raison n'est-elle pas d'essence terroriste? –, les messianismes « ont provoqué des millions de morts ! » Conséquence logique: Toucher au monde des Maîtres, le critiquer en vue de le subvertir, c'est courir le risque inouï de provoquer des millions de morts ! Rien de ce que la société des Maîtres génère ne sera critiqué: les inégalités, la prédation, la précarité, le communautarisme agressif, la lubricité et l'affairisme des sectes intégristes logées au cœur de l'État, l'illégitimité de l'occupation et du saccage de pays étrangers, la violation des droits de l'homme, le terrorisme, etc. Dans son positivisme, le postmodernisme a une devise: « Ne touchez pas à l'ordre du monde ! » Or, nous savons que dans les faits, ce monde correspond à un immense chaos (Amin 2002).

Le sous-commandant Marcos l'a bien vu: la destitution de la raison dialectique est le fait d'une puissante secte regroupant des intellectuels de droite parmi les plus réactionnaires. Larbin du capital, c'est lui, l'intellectuel réactionnaire, qui voit dans la castration de la pensée un signe de la postmodernité (Ela 1998:9); c'est lui qui, oublieux de sa dette insolvable à l'égard de la société, accepte de vendre son âme à l'encan aux Maîtres du monde; c'est lui qui, de son « audace couarde » et de sa « banalité profonde », refuse de penser: il veut plaire aux Maîtres du monde. Si sa

« mémoire s'amenuise pour qu'il n'y ait plus de passé ni de futur », c'est parce qu'il vit dans un monde où les maîtres de la « pensée unique » ont tout figé: les choses comme les êtres. L'intellectuel réactionnaire se convainc donc que l'origine, le passé et le futur sont inaccessibles. Sous la dictée des Maîtres, même l'immédiat et le présent lui semblent inintelligibles.

S'abreuvant à la même source, les intellectuels postmodernes peinent à être créatifs. La preuve en est que les discours qu'ils prononcent souvent avec emphase ont tous des airs de famille. Ces perroquets ne passent pas seulement le temps à se copier les uns les autres: ils répètent tous inlassablement le lexique, la grammaire et le style de la copie originale, préparée pour eux par les Maîtres du monde, les seuls à détenir le sésame donnant accès aux énigmes de notre monde, si complexe. Ici, nulle place pour ce qui ressemble, de près ou de loin, à la critique, que ce soit la réflexion, l'argumentation ou la réfutation. Comment réfuterait-on la mondialisation heureuse, horizon indépassable de notre temps? Les intellectuels réactionnaires excellent dans le psittacisme: ils sont payés pour répéter ce que les Maîtres ont décrété.

Ce que les Maîtres du monde décrètent avec emphase, c'est principalement que le grand cycle de l'Histoire est clos. La fin de l'histoire tant célébrée signifie au moins deux choses: d'une part, l'installation définitive de l'homme dans la société de consommation – cette dernière étant considérée comme le « moteur de la société postmoderne » (Herpin 1997:25) – et d'autre part l'avènement d'une société sans classes, mais ethniquement, culturellement et religieusement fragmentée. Morcelée en petites cellules consuméristes, narcissiques et fermées, une telle société exclut définitivement la notion de classe. Or, dans les sciences sociales modernes, ce concept opératoire traduit la contradiction profonde entre le capital et le travail et rend compte de la dynamique dans les sociétés modernes. Aussi cette notion s'oppose-t-elle aux groupes quasi naturels: ethnies, communautés religieuses...

La fin de l'Histoire signifie donc l'absence de futur (Michalet 2004). Or, cette absence renvoie à un univers sévère mais flexible, où il n'existe plus ni plan de carrière fixe, ni fidélité à son entreprise ou à son amour. Ce qui tient lieu d'emploi se réduit à des jobs à durée déterminée. Même les liaisons affectives ou sociales sont essentiellement éphémères, sans lendemain. Ainsi donc, « quand le futur se résume à une succession aléatoire de petits boulots, de "coups" et de rencontres éphémères », il va sans dire que la seule règle de survie possible réside dans le non-engagement qui invite à ne pas s'investir, à faire en sorte de « rester liquide », en arbitrant « sans relâche en fonction des opportunités qui s'offrent dans tous les domaines » (p. 167). La flexibilité n'est donc pas incompatible avec l'opérationnalisme.

Notes

1. Lénine (1973:333-334) voit dans ce fragment un « très bon exposé des principes du matérialisme dialectique ».
2. Nietzsche doit être considéré comme le grand idéologue de l'hégémonie capitaliste, tant dans la nation que dans le monde. S'il s'en prend à la représentation populaire et parle-

mentaire, c'est essentiellement parce que sa préférence va à la « représentation des grands intérêts. » Sur le plan mondial, Nietzsche considérait que l'époque de la petite politique était définitivement révolue. Il voyait dans le XXè siècle le début d'un combat pour l'hégémonie mondiale.

3. Notons la détermination avec laquelle l'Amérique a réussi à s'opposer à la création d'une cour de justice internationale, sous la juridiction des Nations Unies (Guyat 2002:85-129). La fonction politique et idéologique du Tribunal pénal international (TPI) mérite donc d'être soulignée. On l'a vu dans le cas des Balkans: les armes de prédilection de cette juridiction sont: le chantage alimentaire, l'imprécation, la menace, etc. La condition de la « reconstruction » de la Yougoslavie – méthodiquement détruite par les bombes de l'OTAN – fut la livraison de M. Milosevic au TPI, avant le 29 juin 2001, date à laquelle les « donateurs » occidentaux devaient se réunir, pour étudier l'« aide » économique et financière à accorder au régime fantoche de M. Djindjic. C'est par un violent coup de force de ce dernier contre les institutions légales de l'État yougoslave – notamment, la Cour constitutionnelle et le Président démocratiquement élu de Yougoslavie, M. Kostuniça – que la déportation de M. Milosevic fut rendue possible.

4

Le nouvel esprit du capitalisme

La main de la fortune: un monde irrationnel et imprévisible

L'idéalisme subjectif postmoderne et sa fonction ancillaire

Nous savons déjà en quoi le postmodernisme s'oppose à la causalité historique, qui, rappelons-le, repose sur les trois dimensions du temps que constituent le passé, le présent et l'avenir. Le postmodernisme prétend abolir cette linéarité constitutive de toute histoire et suggérant un appel à la mémoire et à l'utopie.

L'épistémologie historique discerne dans la matérialité du monde et de l'histoire l'existence d'une évolution linéaire du temps fondé sur la causalité. Or, d'un point de vue postmoderne, chaque moment de la temporalité ou de l'historicité est autonome, unique. En aucune façon, il ne peut être relié aux autres moments – eux aussi autonomes et singuliers – par la coordonnée du temps. Contre la causalité historique, le postmodernisme postule la série des hasards, qui font de l'histoire un continuum ininterrompu. Le monde qu'il décrit est un gigantesque chaos soumis aux événements les plus fortuits. Les événements qui se déroulent dans le monde n'entretiennent les uns avec les autres aucun déterminisme. Ainsi donc, rien de ce qui arrive aux hommes n'est déterminé à l'avance, ni par la volonté humaine, ni par les déterminismes sociaux et historiques ni par la planification étatique.

Admettons un possible déterminisme entre deux segments de la temporalité ou encore, entre deux séries de souvenirs. Ceci ne peut relever que du pur hasard, exactement comme dans le principe de l'indéterminisme qui décrit la vie chaotique au sein des atomes.

Notre expérience pratique prouve bien le paradigme statistique, à la base de nombre d'actions humaines. Prenons cet exemple souvent cité. Je lance sur le marché une quantité plus ou moins grande de produits. Dans mon entreprise, il est incontestable que je compte sur une quantité moyenne de clients susceptibles de s'intéresser à mes marchandises, bien qu'en toute logique, je sois incapable de prévoir quel client particulier visitera mes étals et quand il le fera. La plupart de nos actions s'opèrent ainsi, comme au jeu de dés. C'est dire que les phénomènes de la nature comme ceux de la vie elle-même fonctionnent avec une grande marge d'incertitude.

Sans l'idéologie, les lois statistiques auraient conservé leur intérêt épistémologique. Celle-ci tire des avancées de la science des conclusions qui, dépassant les limites de la méthodologie scientifique, servent d'étais aux théories les plus réactionnaires. Ainsi, Lyotard prétend que les lois révélées par la « recherche des instabilités » dans la nature s'appliquent aux faits historico-sociaux. Soulignant l'importance de la connaissance incomplète, il invalide non seulement la prévision, mais aussi l'illusion de stabilité, l'enjeu étant le destin des systèmes complexes. L'auteur illustre la faiblesse du totalitarisme par une note de Borgès: « Un empereur veut faire établir une carte parfaitement précise de l'empire. Le résultat est la ruine du pays: la population tout entière consacre toute son énergie à la cartographie » (Lyotard 1979:90-91).

La prétention consistant à contrôler parfaitement le système pour, soi-disant améliorer ses performances, aboutit fatalement au résultat inverse: la baisse de la performativité qu'elle prétend élever. Ainsi donc, les bureaucraties « étouffent les systèmes ou les sous-systèmes qu'elles contrôlent (feedback négatif) » (Lyotard 1979:91).

Voyons avec Hayek comment l'idéalisme subjectif étaie ces vues pour exercer sa fonction ancillaire par rapport au néolibéralisme. Idéologue pré-postmoderne avec Milton Friedman (Barber 1996:241), Hayek incarne au plus haut point l'idéologie néolibérale, tant et si bien que Margaret Thatcher dut recommander la lecture de son œuvre aux parlementaires britanniques.[1] Ses zélateurs prétendent même qu'il sera pour le XXIè siècle ce que Smith fut pour le XVIIIè siècle, Marx pour le XIXè siècle et Keynes pour le XXè siècle. Pourfendeur de la planification socialiste et de l'État providence, Hayek s'appuie sur l'empiriocriticisme pour invalider non seulement la connaissance objective de l'univers, mais aussi la possibilité théorique et pratique de la prévision et de la planification socialistes.

La lecture d'Hayek rend plus actuelle encore la remarque de Lénine sur l'idéalisme subjectif. En critiquant ce courant de pensée, ce dernier sut discerner « derrière la scolastique gnoséologique de l'empiriocriticisme, la lutte des partis en philosophie »; il précisait que « le rôle de classe de l'empiriocriticisme se réduit entièrement à servir le fidéisme dans sa lutte contre le matérialisme en général et le matérialisme historique en particulier (Lénine 1979:362). L'œuvre d'Hayek montre bien que l'idéalisme subjectif est entièrement au service de la réaction bourgeoise. Son objectif est de fournir des preuves scientifiques sur sa conception de l'évolution d'un ordre spontané, les limites de nos efforts pour expliquer les phénomènes complexes de la vie, etc.

Cette théorie a pour fondement les sensations. Celles-ci constituent le point de départ de tous nos témoignages sur le monde extérieur. Les sensations et les complexes de sensations sont les seuls objets de ces témoignages. Il est inutile donc de supposer une réalité inconnue, cachée soi-disant derrière les sensations. Aussi évacue-t-on l'existence des choses en soi. L'idéalisme subjectif voit dans les corps et les objets physiques un complexe de sensations: sensations de couleurs, de sons, de chaleur et de pression. Cette théorie est sceptique à l'égard de la raison et de la connaissance objective. Sa thèse est que si tous les faits individuels dont l'homme

désire la connaissance lui étaient immédiatement accessibles, la science ne serait jamais née. L'unique tâche incombant à cette dernière consiste donc à décrire le plus simplement possible les relations entre les éléments. En effet, l'objectif premier assigné à la connaissance scientifique est de maîtriser ces faits grâce au moindre effort de pensée possible. Tel est le principe dit d'économie de la pensée qu'Einstein (cité par Holton 1967:128) réfuta en soulignant que les systèmes de cette nature se contentent d'étudier les relations entre les données de l'expérience; or, si la science est la totalité de ces relations, ce point de vue est faux: l'empiriocriticisme établit un catalogue au lieu de créer un système.

Ces vues remontent à Berkeley lui-même. Celui-ci prétend supprimer le dualisme corps-esprit, physique-psychique, au nom de l'expérience qui, dans l'empirisme et le sensualisme, renvoie à l'activité d'un esprit percevant les complexes de sensations, les idées. L'expérience suggère donc la réduction du monde physique aux sensations, à la conscience du sujet qui perçoit d'une part, et à l'activité même de cette conscience d'autre part. Soyons précis: l'expérience se rapporte à l'activité du sujet qui « crée » le monde « physique » et organise les sensations.

Cette conception s'oppose à celle de la physique moderne. Berkeley nie les principes de base du mécanisme, notamment ceux liés aux lois mathématiques, à la physique, aux concepts d'espace et de temps. Par exemple, l'erreur des mathématiciens est de ne pas juger des perceptions sensibles à l'aide des sens; de même, les prétendues réalités fixes de la géométrie ne constituent que des phénomènes changeants, mêlés aux flux de la conscience. Ainsi, si le temps a vraiment cette mesure fixe que suppose la mécanique, alors, pourquoi apparaît-il plus lent dans la douleur que dans le plaisir ? Chez Berkeley, le temps et l'espace ne sont que des sensations, et ils existent seulement dans l'esprit. Voilà pourquoi ils sont toujours fonction de la conscience qui les perçoit. L'expérience signifie donc l'activité de la conscience aux prises avec les sensations. Aussi l'expérience contredit-elle les notions de causalité et de substance. C'est ainsi qu'elle règle le problème du dualisme esprit-matière, corps-âme, monde objectif-monde subjectif, vérité subjective-vérité objective. Tel est le point de départ de la théorie hayekienne de la connaissance.

Pour l'étayer, Hayek dut se ravitailler dans les tendances subjectivistes de la psychologie moderne. Ainsi, dans la théorie de la perception, point de départ de sa psychologie, il affirme qu'aucune réalité extérieure ne détermine la nature de la perception qu'en a l'individu. Au contraire, enseigne-t-il, la perception est déterminée à l'intérieur même de l'esprit qui perçoit. Une telle conception n'est possible que si l'on doute de l'existence même du monde extérieur ou encore, si l'on dénie aux choses perçues une essence propre, un en-soi.

Hayek ne cache pas sa dette à l'égard de Kant qui lui inspire ses vues sur les cadres a priori de la sensibilité ou encore, sur le caractère inconnaissable de l'en-soi. En plus, il loue l'esprit libéral de ce dernier, opposé au totalitarisme hégélien. Obligé de choisir entre l'idéalisme objectif et l'idéalisme subjectif, il choisit le parti de Kant.

L'idéalisme subjectif ramène le savoir sur le monde au contenu de la conscience du sujet lui-même, nie l'existence du monde extérieur et, par conséquent, réfute le

concept de vérité absolue. La vérité est relative au sujet connaissant. Si la connaissance scientifique du monde est problématique, cela implique que la perception est et sera toujours une interprétation. D'ailleurs, tout ce que l'homme sait du monde extérieur est de la nature des théories ou encore des doctrines. La tâche de l'expérience est donc de changer ces théories, suivant les critères de différenciation, de classement et d'organisation, bref d'adaptation à l'environnement. Car, l'individu s'adapte à son environnement en réagissant à la pression des stimuli extérieurs, en les différenciant, en les classant et en les organisant. C'est ainsi que l'homme crée ce qu'Hayek appelle, un ordre sensoriel (ou encore phénoménal, mental), suivant les processus psychiques les plus inconscients.

Chez Hayek comme chez Rorty, les processus de pensée conceptuelle et abstraite prolongent les processus de perception sensorielle. D'après l'économiste autrichien, cité par Dostaler (2001:30), les opérations « de l'intellect sont également fondées sur des opérations de classification (ou de re-classification) exécutées par le système nerveux central ». Ainsi, la connaissance du monde extérieur – pour autant que le mot connaissance ait encore un sens – se réduit à une simple opération de classification, de différenciation et d'organisation. Dès lors, le but ultime de la connaissance n'est pas la vérité en soi, mais l'ajustement aux sollicitations du monde extérieur. Selon Hayek, les idées abstraites, les perceptions des sens, les images mentales, etc., doivent être vues comme des actes de classification par l'esprit lui-même. Il écrit:

> Non seulement les entités mentales, comme les « conceptions » ou les « idées », qui sont communément reconnues comme des « abstractions », mais tous les phénomènes mentaux, les perceptions de sens et images aussi bien que les concepts les plus abstraits et les « idées », doivent être regardés comme des actes de classification accomplis par le cerveau. Ceci est évidemment une autre manière de dire que nos perceptions ne sont pas des propriétés des objets, mais des moyens par lesquels nous avons (individuellement ou collectivement) appris à grouper ou à classer les stimuli extérieurs. Percevoir, c'est affecter à une catégorie ou à des catégories familières; nous ne pourrions percevoir quelque chose de complètement différent de quelque chose d'autre que nous avons auparavant toujours perçu (Hayek 1953:70-71).

On ne pouvait mieux faire pour discréditer la conscience en tant que raison, pensée. D'ailleurs, Hayek souligne l'impossibilité pour l'homme de proposer une explication complète de ses propres processus de pensée. L'être humain n'est pas en mesure d'expliquer comment l'esprit conduit les processus de classification des stimuli extérieurs qui le sollicitent. Conséquence: l'homme doit renoncer aussi bien à la connaissance absolue du monde extérieur qu'à celle de ses propres sens et de son esprit. On rejoint ainsi le scepticisme que Hume opposait au « rationalisme métaphysique ». Hayek oppose cette conscience des limites de la raison aux doctrines qui croient possible une explication totale et unitaire du monde, y compris du cerveau humain et de la société.

Hayek présente la société comme un organisme dont le degré de complexité est plus élevé que celui du cerveau humain. L'esprit ne peut donc donner une explica-

tion de sa nature et de son fonctionnement. C'est ce qui, sur le plan économique et social, rend aléatoires aussi bien la planification socialiste que l'ensemble des projets de reconstruction rationnelle des sociétés utopiques: Cité idéale de Platon, société communiste de Marx.

Nous retrouvons ici la théorie de la connaissance incomplète. Celle-ci renvoie à la conscience des limites du savoir humain et à son imperfection essentielle. D'ailleurs, Hayek voit dans la division de la connaissance un problème aussi important que celui de la division du travail (Smith 1776:Liv. 1, chap. 1). La question que se pose Hayek est celle de savoir comment la combinaison des connaissances fragmentées, éparpillées dans différents esprits, peut produire des résultats qui, délibérément menés, auraient nécessité de la part de l'esprit dirigeant des connaissances au-dessus des possibilités d'un seul individu.

L'idée d'Hayek est que la société est un ensemble de consciences subjectives, inaccessibles à la raison et à la science. Dans un tel contexte, la raison ne peut constituer un lien objectif valable entre les hommes, dès lors que la subjectivité de chaque individu interdit d'accéder à ses sentiments, à ses pensées et à ses perceptions, à moins de se mettre carrément à sa place. Hayek réfute la scientificité et l'objectivité du savoir humain que Hegel établit. Phénomène essentiellement subjectif, la connaissance n'est viable que dans la subjectivité des différentes consciences composant la société. Comme conséquence, nul ne peut connaître ni autrui – subjectivité étrangère, autonome et fermée au savoir objectif –, ni la société, vaste ensemble de subjectivités autonomes où les unes sont totalement étrangères par rapport aux autres. À moins d'être un ingénieur ou un planiste, aucun cerveau, si puissant soit-il, ne peut concentrer à aucun moment de la dynamique sociale, l'ensemble des connaissances, des besoins, des désirs dispersés entre des millions de subjectivités autonomes (Hayek 1953:151-157). Cet auteur montre ainsi les limites du rationalisme constructiviste.

Ce concept désigne l'ensemble des théories pointant vers la réalisation d'une société soumise aux lois de la planification rationnelle. Malgré sa prétention à être meilleure, une telle société apparaît à Hayek comme quelque chose d'artificiel et d'illusoire. Radicalisant les vues d'Adam Smith, il voit dans la « société » un produit d'actions humaines non intentionnelles, un processus d'auto-organisation essentiellement inconscient et générant des ordres hautement complexes, dont la particularité est de s'auto-perpétuer sans fin.

C'est dire qu'aucune institution humaine, que ce soit la culture, le droit, la morale, le langage, le marché ou la monnaie, ne constitue le résultat d'une délibération consciente et concertée. L'homme n'a pas été capable de produire de la culture parce qu'il était doué de raison. Sans doute, a-t-il appris le plus souvent à faire ce qu'il fallait, mais sans comprendre pourquoi c'était cela qu'il fallait faire. Il est donc plus avantageux pour lui de suivre la coutume que de chercher à la comprendre (Hayek 1989:187-188).

Voyons maintenant comment Hayek applique cette règle au marché. Grâce à la division du travail, des partenaires anonymes en quantité indéfinie entrent en

coopération les uns avec les autres. Les lois régissant ce nouvel ordre social sont essentiellement générales, abstraites et spontanées, comme du reste l'ordre lui-même.[2] C'est ainsi qu'il saisit le marché ou plus exactement, la catallaxie, cet ordre engendré par l'ajustement mutuel de différentes économies individuelles sur un marché. Le marché constitue la forme la plus achevée de l'ordre social spontané et même de l'évolution culturelle de l'humanité.

Puisant ses arguments dans la psychologie et la philosophie, Hayek exclut le marché de la sphère de la raison. En cela, il est en phase avec tous les croisés du néolibéralisme actuel. Car cet ordre social spontané n'est jamais le résultat d'une création intentionnelle par une quelconque raison humaine individuelle ou collective. Processus impersonnel et essentiellement inconscient, le marché apparaît comme un système ouvert, en rééquilibrage permanent. Il autorégule, de façon spontanée, les multiples savoirs individuels indépendants des sujets finis, dont la connaissance subjective résulte des limites mêmes de la raison humaine. Conscient des limites de celle-ci face à un monde où l'ignorance, l'incertitude et le hasard règnent, il reste une seule chose à l'individu: interpréter les différents signaux (les prix) qui lui viennent du marché, et adapter sa conduite en conséquence. C'est ainsi qu'Hayek voit dans le marché, les prix, etc., un processus d'émission de signaux grâce à quoi l'économie s'autorégule. C'est donc la concurrence qui permet une meilleure utilisation de la connaissance des talents humains et des occasions d'apprendre, toutes choses dispersées parmi une multitude de gens, mais inconnues de tous dans leur totalité. En conséquence, aucune société ni aucun État n'a de compétence en matière d'industrie ni de commerce. En suivant ses penchants naturels et en poursuivant son intérêt propre, l'individu est mieux éclairé sur les buts à atteindre en matière d'investissement qu'aucun homme d'État ou qu'aucun législateur. C'est ainsi que l'idéalisme subjectif remplit sa fonction ancillaire par rapport au marché. Avec cette philosophie, nous comprenons mieux les enjeux idéologiques de l'irrationalisme sous la mondialisation. L'incertitude, l'aléatoire, le hasard et la chance constituent les fondements des économies et des politiques ouvertes. Avec eux, l'on peut désormais renoncer à l'idée que « gouverner, c'est prévoir », la seule conduite sage consistant à: avancer des hypothèses sur l'avenir, pratiquer un essai, examiner les conséquences qui en découlent, corriger les erreurs et tenter un nouvel essai (Brunsvick et Danzin 1998:39).

On n'insiste pas assez sur les errements mystiques de ces doctrines. En postulant la « marge stochastique du progrès », Gilder accrédite l'idée suivant laquelle la chance constitue un facteur essentiel de la fortune. Si le bénéficiaire décroche le gros lot, c'est qu'il « était au bon moment au bon endroit »; chose impossible dans un « système rationnel », où il est « interdit de convertir cette chance en puissance économique effective » (Gilder 1981:276). L'auteur voit dans le risque, le ressort intrinsèque et ultime du capitalisme. Pourtant, seule la chance reste la force la plus éminente pour la conduite de la destinée de ce système, tant pour la vie des entreprises que pour la distribution des richesses. Or, pour lui, il n'y a pas de honte à affirmer le droit d'une classe à accumuler des privilèges pour sa jouissance exclusive; le béné-

fice de ces privilèges doit être rapporté aux « processus imprévisibles et irrationnels » qui s'apparentent à une loterie (pp. 276-277).

Invoquer le paradigme stochastique, c'est donc mettre le capitalisme en accord avec « l'ordre sous-jacent et transcendant de l'univers » lui-même (p. 277); c'est, en définitive, le légitimer. Le capitalisme est un produit de l'ordre cosmique, une émanation de dieu, notait ironiquement Marx (1976:544).

Étroitement associé à la chance, il va sans dire que le capitalisme constitue un défi permanent aux « processus rationnels ordonnés ». S'il réussit, c'est parce qu'il constitue le seul système économique et social capable de composer avec les lois les plus mystérieuses de l'univers; s'il triomphe, c'est simplement parce qu'il utilise la chance et la loterie comme supports, s'accordant ainsi avec la réalité de la situation humaine elle-même, dans un « univers fondamentalement incompréhensible », mais « providentiel ». Gilder (1981) pense que les économistes qui s'efforcent de bannir la chance par des méthodes rationnelles de gestion, compromettent en même temps les « seules sources du triomphe humain » (p. 277).

D'après ces vues, reconnaître dans l'extorsion de la plus-value et le surtravail le secret de l'accumulation capitaliste, c'est, incontestablement, nager dans l'erreur. Disqualifiant les théories qui tentent de rendre compte du capitalisme en tant qu'institution humaine – et donc transitoire –, l'idéologue américain n'hésite pas à prédire la pire des infortunes à l'humanité, si jamais elle venait à renoncer à la chance et à la providence, pour s'engager dans la voie du calcul rationnel et du contrôle de nos destinées. Gilder pense que lorsque l'esprit de l'homme « se confond avec la conscience vivante qui est la substance secrète du cosmos, il atteint de nouvelles vérités, entrevoit de nouvelles idées – des rayons de lumière vers l'avenir – par lesquelles se réalise le progrès intellectuel » (p. 286) de l'humanité.

Œdipe et la bête

Classe postmoderne par excellence, les « manipulateurs de symboles » (Reich 1993) symbolisent les robustes exaltés par James. Ils sont l'âme pensante de la mondialisation dont ils lubrifient les réseaux. Leur horizon est « l'économie haute » (Kurth 1993:12). Cette classe coexiste cependant avec d'autres groupes, prisonniers de l'autochtonie, de la sédentarité et de l'atavisme. Ces travailleurs postindustriels de l'économie de service basse rappellent à Kurth les travailleurs préindustriels dans l'économie de subsistance, leur contribution ne dépassant guère le voisinage immédiat. L'allégorie de la tortue, du lion et de la gazelle prend ici toute sa signification. Selon Thomas Friedman, cette allégorie illustre la difficulté de certains groupes à affronter le Monde hyper-rapide de la mondialisation. Il s'agit donc de savoir comment affranchir ces groupes de leur univers périmé pour les projeter dans la nouvelle économie du savoir, exigeante en compétences multiples. Avec les progrès de la mondialisation en effet, nombre « de tâches manuelles répétitives sont assurées par les machines et les emplois restants réclament de plus en plus de compétences, si bien que le nombre des postes intéressants accessibles aux tortues ne cesse de diminuer » (Friedman 1999:291). Friedman interdit le rêve américain aux tortues. Seuls

le lion et la gazelle sont préparés à affronter le roc du monde nouveau. Car, « chaque soir, le lion s'endort en sachant que, s'il n'est pas capable, le lendemain, quand le soleil se lèvera, de courir plus vite que la moins rapide des gazelles, il mourra de faim. Et chaque soir, la gazelle s'endort en sachant que, si elle n'est pas capable le lendemain, quand le soleil se lèvera, de courir plus vite que le plus rapide des lions, elle servira de petit déjeuner à quelque fauve » (p. 289).

Comme Œdipe, prototype du héros indo-européen, courageux et avisé, le manipulateur de symboles est celui qui résout les énigmes dans l'univers complexe du néocapitalisme. En comparaison, le travailleur de l'époque historique rappelle le Sphinx, prototype même de l'indigène, dans sa torpeur et sa bêtise. Parlant du sphinx, Hegel écrit: « La tête humaine qui se dégage du corps de la bête représente l'esprit commençant à s'élever hors de l'élément naturel, à s'arracher à lui, à regarder autour de soi plus librement sans toutefois se libérer entièrement de ses entraves » (Hegel 1963:153). Le « travailleur historique » pose au capital des énigmes insolubles. L'homme colle à son site comme une patelle. Comme la tortue, il peut sortir la tête de sa coquille et regarder autour de lui, plus librement, mais jamais, il ne réussira à s'affranchir complètement des entraves qui le fixent à sa terre. Antithèse du nomade à l'esprit vif ou du héros étranger à la quête de la Toison d'or, l'indigène est la bête.

Formés pour identifier et résoudre les problèmes complexes de la mondialisation, les manipulateurs de symboles viennent des différents secteurs de la science, de la technique, des services, des finances et de la culture. Ils ajoutent « de la valeur à l'économie mondiale grâce à leurs cerveaux et grâce aux systèmes de transport et de communication qui relient ces cerveaux entre eux et avec le reste de la planète » (Reich 1993:10).

Traduisant la réalité du nouveau marché international du travail, cette élite s'est résolument écartée des professions manuelles. En s'emparant victorieusement du monde intelligible, elle est apte à produire des idées et à animer les secteurs les plus dématérialisés de l'économie postmoderne. Jamais auparavant, le cerveau et les idées n'ont occupé autant de place dans la vie des hommes que de nos jours.

La différence entre la culture post-historique et la culture des époques antérieures réside dans la gigantesque accumulation de découvertes accomplies en mathématique, physique quantique, biologie, cybernétique, informatique. Du coup, les matières premières, le travail et le capital cessent de constituer en soi les facteurs économiques déterminants; seule importe désormais la relation optimale entre eux.

Ce monde où tout se traduit par la primauté des ressources incorporelles – y compris le secteur de la politique internationale – séduit les postmodernes (Nye 1990:7). Naguère apanage des pays riches en capitaux, le pouvoir serait passé aux pays « riches en informations ». « La souplesse qui permet d'agir le premier en se servant d'informations nouvelles » serait ainsi la nouvelle « denrée rare » de notre époque (*Ibidem*). En termes ricardiens, la production des idées et des informations constituerait le nouvel « avantage comparatif des pays riches » (Cohen 1997:60).

Le monde postmoderne a pris la forme d'un « Intellect intégré » (Cheïnine 1982) ou encore d'un « Intellect général » (Negri 2001:112). Ces concepts traduisent les

efforts visant non seulement « à créer un système de liaison global à travers des satellites artificiels », mais aussi « à réunir les systèmes régionaux de télévision (Eurovision, Intervision, Nordvision, etc.) en une Mondiovision globale, à mettre sur pied un réseau téléphonique universel, également raccordé à l'ordinateur » (Cheïnine 1982:245-246). L'intellect intégré raconte « Demain », cette ère post-historique où « la Grèce » cessera de désigner un espace géographique déterminé, « mais le réseau grec reliant les Hellènes autour du monde » (Dertouzos 1999:286); « Demain », c'est le royaume céleste sur terre. Car, naguère attributs des êtres divins, l'instantanéité, l'omnivision et l'ubiquité passent au service de l'homme. Comme Mardouk, « il dépasse l'entendement; à peine peut-on le regarder. Quadruple est son regard et quadruple son ouïe. Quadruple en lui croît l'entendement. Et ses yeux pareillement discernent toutes choses » (Garelli et Leibovici 1959:135). Aussi l'action à distance est-elle en son pouvoir, comme téléactivité: télétravail, télévision, télémédecine, téléchirurgie. La téléactivité a profondément bouleversé la notion classique d'activité humaine productive. Le déplacement vers l'immatériel entendu comme monde intelligible (Brunsvick et Danzin 1998:26) a consacré l'abolition de la frontière entre le virtuel, le matériel et l'intelligible. C'est une nouvelle conception de la matière qui se profile ainsi, disposant aux formes les plus scientificisées de la mystique, à l'origine de graves distorsions dans la perception de l'accumulation, en particulier, dans les Périphéries. Pour une meilleure compréhension de cette question, revenons aux catégories de Reich.

Ce qui distingue les manipulateurs de symboles, c'est leur capacité à produire des idées, à simplifier la réalité qu'ils réduisent en images abstraites, réarrangent, testent, communiquent à d'autres spécialistes, et finalement, transforment à nouveau en réalité. Ces manipulations « sont effectuées à l'aide d'outils analytiques affûtés par l'expérience, suivant le modèle des algorithmes mathématiques, des arguments légaux, des astuces financières, des principes scientifiques, des connaissances psychologiques sur la façon de persuader ou de distraire, des systèmes d'induction ou de déduction, et tous les autres ensembles de techniques permettant de venir à bout de difficultés conceptuelles (Reich 1990:163). Reich montre que certaines de ces manipulations instruisent sur les techniques pour un meilleur déploiement des ressources ou de transfert des actifs financiers; d'autres encore apprennent l'économie du temps et de l'énergie; d'autres enfin facilitent la création des « merveilles technologiques, des arguments légaux nouveaux, de nouveaux stratagèmes publicitaires, pour convaincre les consommateurs que certaines distractions sont devenues des nécessités vitales » (*ibidem*). Il y a ensuite un type particulier de production des symboles touchant à la culture, à la morale et à la philosophie. Cette production concerne les sons, les images, les mots et sert « à divertir ceux qui en reçoivent le produit ou à les faire réfléchir plus profondément à leurs vies ou à la condition humaine » (p. 164). Citons enfin les manipulations ayant trait aux activités parasitaires de prédation et de pure filouterie. Elles impliquent des individus habiles à soutirer « de l'argent à des gens trop lents ou trop naïfs pour se protéger par des contre-manipulations » (pp. 163-164).

A l'époque historique, jongler avec des mots, des sons, des spectres et des symboles (pour susciter des réalités nouvelles) relevait de la magie pure. Or, l'on s'étonne qu'en Afrique, l'argent soit parfois vu « comme quelque chose de magique, de mystérieux, sans rapport avec le travail et l'effort » (Hibou 1997:157). Il existe en effet « une propension à transformer les paroles et les mots en argent » (*ibidem)*, intelligible par l'économie des "vilains tours" et la stratégie ludique (p. 152). Certes, dans des pays sous ajustement structurel, des pans entiers de l'économie fonctionnent d'après le « registre du jeu et de la ruse ».

Cette économie parasitaire ôte toute intelligibilité à l'accumulation. Béatrice Hibou souligne justement l'imprévisibilité de ce processus. Mais convenons avec Reich que le statut, l'influence ou le revenu d'un manipulateur de symboles n'ont souvent aucun rapport avec la possession d'un diplôme,[3] d'un rang ou d'un titre formel; son activité peut même sembler mystérieuse aux « professionnels » habitués à la routine de l'« économie de production ». Effectivement, le contenu de l'emploi postmoderne est difficile à expliquer, car, le travail symbolique « implique des processus de pensée et de communication, plutôt que des réalisations concrètes, tangibles » (Reich 1990:167). L'irrationnel qui envahit le champ économique contemporain, notamment dans les périphéries capitalistes, trouve ici l'une de ses origines.

L'irrationnel tente d'expliquer, à sa manière, le destin exceptionnel d'individus que rien ne prédisposait à la fortune, ni l'héritage, ni la compétence. Le mythe du serpent magique, dispensateur d'argent, est bien connu en Afrique; les mythes néo-traditionnels du vaudou également. Précisément, la *feymanie* « évoque la capacité à faire fortune par la sorcellerie et par l'intelligence diabolique, à entrer dans des peaux différentes, à disparaître » (Hibou 1997:155). *Feymanie* vient de l'anglais *fey* qui désigne un individu doué de seconde vue ou encore un être condamné à mourir. Par extension, il définit un feu follet, un lutin. Tel est le *feyman*. Or, étant familier, et au regard du côté héroïco-ludique de ses exploits, ce démon suscite dans l'opinion des sentiments mêlés: une douce crainte – le *fey* est un authentique forban – que tempèrent fortement une réelle admiration et un brin de sympathie – après tout, le *fey* n'est qu'un sac à malice. Le lutin suscite rarement l'épouvante: c'est un joueur. Aussi son côté espiègle et malicieux le rend-il sympathique aux yeux du peuple dont il est issu. Avec l'espièglerie des chevaliers d'industrie, l'accumulation/prédation perd son côté grave, sérieux: c'est un jeu d'adresse, opposant des acteurs en compétition sur le terrain de l'économie et de la finance.

On aurait tort de relier l'économie symbolique et de la ruse à l'expérience historique et anthropologique de l'Afrique. La vérité en revanche est que la ruse des *feymen* restera inintelligible aussi longtemps qu'on ne reliera pas leurs activités à la manipulation des symboles, à l'habileté de certains esprits particulièrement vifs et rusés, pour soutirer « de l'argent à des gens trop lents ou trop naïfs pour se protéger par des contre-manipulations ». Rappelons que parallèlement à la mondialisation, il s'est construit un « espace mondialisé de la corruption et du trafic » (Chesneaux 1993:10), à l'ombre de ces « États-fantômes, sur-efficaces et proprement capitalistes que sont la mafia, le consortium de la drogue sur tous les continents » (Derrida

1993:137). Le néocapitalisme libéralise le mouvement des capitaux et dématérialise les transactions financières; mais il lui faut un lubrifiant, sous la forme de « sanctuaires du crime », de paradis fiscaux échappant à la législation internationale.[4] C'est ainsi que Donatien Koagné[5] et Richard Ngassa – alias Garas[6] – lubrifient l'économie mondialisée. Manipulateurs de symboles, ils maîtrisent les réseaux mondiaux de circulation d'argent, de drogue, d'armes, de sexe. Le monde est leur village. L'Arabie saoudite ou le Yémen et la France constituant des quartiers de ce village global. Le *feyman* est un sophiste. Car, le chevalier d'industrie doit posséder non seulement une certaine forme d'intelligence lui permettant d'ourdir des coups qui réussiront d'autant mieux qu'ils seront originaux, mais aussi et surtout un aspect extérieur inspirant la confiance et un don de persuasion – on serait tenté de dire le charme qu'il n'est pas donné à quiconque d'acquérir. Le *feyman* peut vous faire prendre des vessies pour des lanternes, vous faire acheter une bouteille d'urine à des millions de francs CFA. Son acte consiste à faire usage de faux noms ou de fausses qualités, en recourant aux manœuvres frauduleuses pour persuader la proie de l'existence de fausses entreprises, d'un pouvoir ou d'un crédit imaginaire ou pour faire naître l'espérance d'un succès (Nguemo 2001:8).

Selon Ngassa, que cite Nguemo (2001:8), « le *feyman* est noble. Il ne tue pas. Il ne vole pas. Il n'agresse pas. Il ne tord pas le cou. Je suis noble. Je te compose [= je te mystifie] et tu prends toi-même ton argent pour me donner ». Ce n'est donc que par ignorance qu'on « prête aux *feymen* des pouvoirs dits surnaturels »; la vérité est que « c'est la bouche qui est notre magie. C'est le langage. Il faut savoir parler, savoir convaincre, sinon tu n'es pas feyman. C'est la bouche » (*ibidem*).

L'intelligence vive et la ruse assurent au manipulateur de symboles une incontestable supériorité sur l'homme ordinaire. Car, « le summum de la finesse pour le *feyman* est de trouver une combinaison malhonnête qui ne tombe pas sous le coup de la loi, ou en tout cas, pour laquelle les enquêteurs mettent si longtemps à réunir les éléments de preuve que le malfaiteur aura eu le temps de s'envoler et de disparaître » (*ibidem*). C'est ainsi qu'on prête aux manipulateurs de symboles des dons surnaturels. Doués du don d'ubiquité, ils sont protéiformes.

Notre intérêt pour cette catégorie de manipulateurs de symboles, qui clôt la typologie de Reich (1990), s'explique par le fait que, contrairement au reste du monde, l'Afrique sous ajustement s'est aussi reliée à la mondialisation par le biais des « États fantômes ». La mafia est la seule activité lucrative qui reste quand l'Etat et l'économie se sont effondrés.

Mais la mobilité sociale dont cette « classe » est porteuse reste illusoire; la règle dans l'univers de la mondialisation étant la ségrégation économique et sociale. Et, c'est le refus de société avec le peuple qui distingue le manipulateur de symboles. Comme le Surhomme nietzschéen, il veut réaliser un profond schisme dans le cosmos, avec d'un côté, le paradis brutal et joyeux des « robustes » et de l'autre, l'enfer froid des « délicats », hostiles à la mobilité et à flexibilité. Univers viril, la mondialisation n'accepte que des « robustes ». Or, le manipulateur de symboles ne cultive pas l'appartenance à une nation particulière. Citoyen du monde, la firme œcuménique

façonne son identité. Ceci lui impose une double sécession, économico-sociale et politico-culturelle.

Du fait de la compétitivité de la main-d'œuvre, une faible fraction de la nation (scientifiques, ingénieurs, sociologues, avocats…) rejoint aisément les réseaux mondiaux, « leurs contributions à l'économie mondiale étant valorisées sur les marchés internationaux » (Reich 1990:159). Le reste (ouvriers, employés de commerce, infirmiers, hôtesses de l'air, femmes de ménage…), échoue, car, sa contribution est jugée médiocre (p. 161). Le compromis national visant à intégrer de larges fractions de la société à l'*establishment*, révèle une fois encore ses limites, après son caractère discriminatoire à l'égard des femmes et des Noirs.

Le manipulateur de symboles se distingue par les risques pris pour affronter la mobilité et la flexibilité. Mobile lui-même, le monde postmoderne est exposé aux restructurations, aux délocalisations, à l'errance des capitaux, à la flexibilité de la main-d'œuvre. L'univers de la mondialisation ressemble ainsi aux « idées » aériennes, qui avaient la particularité de n'appartenir à personne. D'origine divine, elles se plaisaient au contact des humains. Ainsi, selon leur bon plaisir, soit, elles flottaient et dansaient librement dans l'air tels des oiseaux, soit, elles se laissaient lentement glisser sur terre... Parfois, à peine posée, la pensée s'envolait et allait, légère, prendre abri temporaire chez quelque autre habitant (Perrot, Rist et Sabelli 1992:7).

Comme Protée, les multinationales et les capitaux se métamorphosent à volonté, le don d'ubiquité faisant partie de leur essence intime. Avec de tels volatiles, il est compréhensible que toute décision relevant de la sphère économique ou financière échappe, en tout ou partie, au contrôle « pesant » des États-nations.

Le capital postmoderne est condamné au risque et à l'aventure. Cette errance sans fin précarise tout ce qu'il touche: l'homme et ses activités, la nation et son identité, l'État et ses institutions, la culture et sa substance. Aussi, au nom de la flexibilité, le travailleur doit-il migrer en permanence, passer d'un statut à un autre; au nom de l'adaptation, il n'est plus l'homme d'un seul métier. Dans ses vagabondages, le capital exige une main-d'œuvre errante. Aussi stigmatise-t-il les sédentaires et les nativistes (nationalistes), accusés de passéisme. Il faut donc arracher ces patelles à leur site, et, par le nomadisme, les rendre flexibles.

L'idéologie dominante voit dans la mobilité et la flexibilité un facteur de libération, ce qui explique leur célébration dans la rhétorique postmoderne. Le postmodernisme est incapable d'appréhender les méfaits de cette mobilité, synonyme de précarité. C'est seulement dans le contexte de la mondialisation qu'on a pu apprécier les bienfaits de la sédentarité et de la tradition. Accusées d'entraver la circulation du capital et la flexibilité, celles-ci ont pu ainsi révéler tout leur potentiel libérateur.

Les nomades symbolistes et la petite élite bohème qui voient leurs revenus croître sont les principaux bénéficiaires d'une flexibilité trop coûteuse pour les patelles, dont les revenus décroissent à vue d'œil. C'est donc dans le contexte de la mondialisation que les hommes doivent s'habituer à l'idée qu'ils ne sont pas tous dans le même bateau; qu'ils « ne progresseront ni ne régresseront plus tous, ensemble » – comme

si leurs destins étaient inexorablement liés (Reich 1990:159); ils doivent accepter l'idée que la fraction privilégiée de la société est résolue à rompre les liens politiques et légaux la soudant à ses congénères encombrants. D'où l'idée de « l'autre Amérique » (Rifkin 2006:242-243), récemment révélée par l'ouragan Katrina (août 2005). Nietzsche lui-même ne recommandait-il pas au Surhomme les chemins de la solitude et de l'isolement ? Il fallait se débarrasser du « reste », les « plus nombreux », les « gens communs », les « superflus », « ceux qui sont de trop » (Nietzsche 1950:169). Comme au début du siècle passé, la vague actuelle de réhabilitation de ce philosophe indique clairement la direction dans laquelle s'engage le capitalisme. Que l'on évoque le « mirage de la justice sociale » (Hayek 1989) ou que l'on se plaigne du coût exorbitant du social, nous sommes sûrs d'une chose: le capitalisme a fait son choix, qui consiste à supprimer les pauvres et les inégaux plutôt que de supprimer la pauvreté.

Notes

1 « Je suis une grande admiratrice du Professeur Hayek. Il serait bien que les honorables membres de cette chambre lisent certains de ses livres... » (Thatcher, citée par Dostaler (2001:24).

2 C'est ici que les vues d'Hayek rencontrent celles de Popper qui écrit: « Le technologue ou l'ingénieur opportuniste reconnaît qu'une minorité seulement d'institutions sociales est consciemment élaborée, alors qu'une grande majorité a "poussé", comme résultats non prémédités des actions humaines » (Popper 1956:68). La note (3) qui accompagne cette affirmation ne manque pas d'intérêt, puisqu'elle renvoie explicitement au darwinisme lui-même, que Popper considère avec quelque sympathie, semble-t-il (p. 161).

3 D'après Reich, la possession d'un diplôme ne garantit pas forcément les capacités innovatrices des manipulateurs de symboles; il peut même constituer un obstacle majeur pour l'innovation, la maîtrise des anciens domaines de connaissances rassemblées « dans des volumes poussiéreux », ou codifiées « par des règles ou des formules précises » étant le point faible de l'ancienne économie de production (pp. 166-167).

4 Christian de Brie, dans « Descente aux enfers des paradis fiscaux » (*Le Monde diplomatique*, N°553 avril 2000:8) s'étonne, face à cette situation surréaliste, en ces termes*:* « En mesure d'imposer des plans d'ajustement draconiens à des dizaines de pays passés sous le joug du Fond monétaire international (FMI) et de la Banque mondiale, de placer, des années durant, des États sous embargo (Irak, Iran, Libye, Cuba), de négocier en permanence des abandons de souveraineté, les grandes puissances et la « communauté internationale » seraient incapables de contraindre une poignée de pseudo-États confettis, souvent restés sous protectorat, à se conformer à un ensemble de normes communes... Au nom du respect de leur souveraineté et de l'indépendance nationale! Si prompte à s'immiscer dans tous les secteurs d'activité, l'Organisation mondiale du commerce (OMC) ainsi que l'Union européenne trouveraient dans le démantèlement de ces sanctuaires du crime, une tâche à la hauteur de leurs immenses prétentions à supprimer toutes les discriminations et à imposer partout la "transparence" ».

5 Escroc international camerounais, protégé par les services secrets de certains États occidentaux et africains. Il serait actuellement détenu dans un pays du Golfe arabo-persique. Koagné Donatien est considéré comme l'un des parrains de la *feymanie* camerounaise.

6 Non sans forfanterie, ce parfait forban se présente lui-même comme le patron de la *feymanie* au Cameroun. Dans sa biographie, il signale ses liens avec certains milieux du pouvoir, notamment ceux de la police. Garas aurait été ainsi "couvert" par Jean Fochivé, le redoutable patron de la police au Cameroun pendant près de quarante ans. Accusé de liens avec la pègre, Jean Fochivé est mort au milieu des années 1990, dans des circonstances jamais élucidées.

Monitoring and Investigating Death in Custody

Amnesty International and CODESRIA

Amnesty International

Council for the Development of Social Science Research in Africa

Amnesty International Dutch Section, Keizersgracht 620, PO Box 1968,1000 BZ Amsterdam, The Netherlands

Council for the Development of Social Science Research in Africa
Avenue Cheikh Anta Diop Angle Canal IV, BP 3304 Dakar, Senegal

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Contents

I. Definitions and examples of death in custody

1. When is death in custody a human rights violation?

Death in custody may constitute a human rights violation: [1]

- **When it results from a summary execution:**

Example: On 13 March 1998, a political activist, a member of the opposition party, was arrested by the police and brought shortly afterwards to the main prison of the capital. According to the testimonies of fellow prisoners, he was shot dead the following day by prison guards.

- **When it results from torture:**

Example: Ms Moyo, a market trader, was arrested by police officers in the market where she was working on 16 April 1998. She was arrested following accusations by a customer that she had robbed him. Three days later, her family was informed that her dead body had been found in the town mortuary. According to the autopsy requested by the family, she had been severely tortured and died as a result of the torture.

- **When it results from ill-treatment, including medical neglect and bad prison conditions:**

Example: Mr Abdou, an activist working on behalf of street children, was arrested by police officers in November 1997, accused of spreading false rumours on the killings of children by the police. He was imprisoned, while awaiting trial, in the prison of the capital. The prison conditions are well known to be very bad, with prisoners being denied access to food and safe water, overcrowded jails, lack of medical treatment, etc. Shortly after being imprisoned, Mr Abdou developed a bad cough and malaria. Despite repeated appeals

1
For the purpose of this booklet, custody refers to any place where individuals are being held by law enforcement officers or people acting with the agreement of law enforcement officers. These places of detention, restriction, or imprisonment by the state may include: prisons, police stations, gaols, military camps, illegal and/or secret places of detention, the back of a police car, an airport lounge, etc.
In many situations, death in custody may also constitute a political killing, for instance, when the victim died as a result of a summary execution or of torture. (See separate booklet on *Monitoring and Investigating Political Killings*).

from his family that he be given adequate treatment, he never saw a doctor. He died on 4 April 1998.

- **When it results from excessive use of force:**

Example: Ms Malaseya, a rejected asylum seeker, was deported back to her country of origin three months ago. At the airport, when attempting to force her into the plane, the two policemen responsible for her deportation used methods of restraint that resulted in her death by asphyxia. A Commission of Inquiry set up after the incident concluded that this was a case of death in custody resulting from excessive use of force.

2. When is death in custody not a human rights violation?

- **When prisoners or detainees die from natural causes or fatal illness**

Example: Mr Babaseke, a long-term prisoner serving a 20-year sentence for robbery and murder, died yesterday of lung cancer in the hospital of the prison.

- **When prisoners are killed by security officials acting in self-defence, for instance if the prisoner threatens a guard with a weapon**

Example: Three inmates were killed by prison guards yesterday. Prisoners had rioted earlier in the day, taken three guards hostage, and got access to firearms. A shoot-out occurred later, during which one prison guard and three prisoners were killed.

But remains suspicious:

- **Natural causes, illnesses or accidents may hide human rights violations**

Many so-called "natural" deaths in custody result from poor conditions of detention, lack of access to medical care, lack of appropriate diet or safe water,

overcrowding, etc. Such poor conditions of detention may be described as cruel, inhuman or degrading treatment. Under these circumstances, death in custody constitutes a human rights violation.

- **Killings resulting from attempted escape may hide human rights violations.**

  It is common for the authorities to claim that prisoners have died while trying to escape or in armed encounters. Forensic evidence and the testimony of witnesses can be used to counter such claims. Similarly, claims of an accident might be made after a prisoner dies from injuries which a post-mortem investigation shows are consistent with torture.

II. Example of an investigation:

The Mozambican League for Human Rights

The following example is the investigation conducted by the Mozambican League for Human Rights into the death in custody of a 31-year-old man wrongly accused of stealing a mini-bus.

Since it was created, the Mozambican League of Human Rights has documented various cases of death in custody and, in many, the perpetrators have gone unpunished. The following case was investigated by X, a staff member of the Mozambican League for Human Rights.

The story of a prisoner tortured to death by police officers at a Police Station is a common one in Mozambique. As an example, let's look at the following case.

Description of the case

The victim, a 31-year-old man by the name of FT, died at Hospital Central de Maputo on 9 June 1996, where he was taken in a near death state after being put through 13 straight hours of intense torture by a group of police officers.

FT had been charged with stealing a mini-bus owned by his employer. Later, after thorough investigations, it was discovered that the culprit had been someone else. What happened is that, after seeing that the vehicle was missing, FT alerted the owner's wife who refused to accept his story and simply demanded the mini-bus back. Worried about the situation, FT went home and discussed it with his wife and they decided to go to the police station. There, to their surprise, they found that the lady (his employer) had already filed a complaint. Without bothering to inquire into the case, the police simply arrested FT.

FT's wife witnessed her husband's torture which started around 9 p.m. on 2 June. The torture lasted until 11 a.m., with FT's wife and three-month-old baby standing by.

The investigation

A member of the League describes for us what he did after hearing about the case.

*I headed to the **police station** on a fact-finding mission accompanied by two colleagues from our Legal Assistance Department, intent on filing a complaint against the perpetrators. Aware of their colleagues' actions, the other officers obstructed our inquiries.*

First, the Head of the PIC (Criminal Investigation Unit) denied any knowledge of a prisoner by the name of FT and of any torture. My attempts to see the gaol cells were thwarted and I was threatened with prison for abuse of authority. Not intimidated, I persisted and finally the Head of the Unit relented and ordered his men to check on FT. He was found to be in grievous state. I was assured that the victim would be taken to the hospital.

Still perturbed with the case, I went back to the police station at around 2 p.m. and was told that FT had been taken to the hospital and that an arrest warrant for the officers on duty on the night of the torture had been issued. No mention was made of the other four perpetrators.

*At 6 p.m. that day, I went to the **hospital**. FT's body had been completely wrecked. He could not speak so I was not able to get a word out of him. I knew that if he died, I wasn't going to be able to get all the proof I needed. At 3 p.m. the following day, I was informed of FT's death.*

An officer later informed me that the bus owner's wife had offered to give money to the police if they could force him to confess to having stolen the vehicle. Another source assured me that they had already received the money. According to other leads, which I was not able to follow through owing to police obstruction, the main crime suspect in the mini-bus theft was already in police custody.

Search for justice

The death of FT as a result of the torture he endured at the hands of police officers could not be questioned: there had been a witness (FT's wife), the Mozambican League itself saw

the state the man was in the police cell, and the Head of the Criminal Investigation Unit itself has acknowledged wrong-doing on the part of the officers in charge. Furthermore, the Mozambican League had been able to get information on bribery. But it would take a long time before justice was done, and even then, it was an incomplete justice.

I set off a chain of events I thought would eventually lead to the perpetrators being punished.

I wrote on behalf of the League to the President, the Prime Minister, the Justice and Home Affairs Ministers, and to the General Prosecutor, asking them to act. But none of them reacted.

Nonetheless, the League pressed ahead and lodged a complaint with the City Prosecutor's Office and one of the Prosecutors was charged with looking into the case. Unfortunately, the case got shelved when the Prosecutor started receiving threatening phone calls, with death threats even being made to the people from the League pressing for the case to go on.

The investigation was later reopened. Six months later, the perpetrators were tried and sentenced. They each got a seven-year prison sentence and will have to pay a 39 million meticais compensation to the victim's wife and children.

But impunity persists . . .

However, mysteriously and inexplicably, the person in charge during the torture is still free. He was transferred and has recently been promoted to a senior post in the Ministry of Home Affairs. Furthermore, by making the four condemned officers liable for compensation, the court in fact freed the State from its obligations. In normal circumstances, it should be the State compensating the victims relatives, because the officers committed the crime while on duty. To this day, the widow has not received a penny and the League is still battling to see justice done.

III. How to monitor death in custody?

Monitoring is the long-term observation and analysis of the human rights situation in a country or region.

- It consists of collecting **systematically and consistently** information that may be related to human rights violations, from a variety of sources.

- This information, collected over a certain period of time, should allow you to **put the cases under investigation into a political and legal context**, as well as to **identify patterns** in terms of death in custody. They should also allow you to develop an in-depth knowledge of the security forces and opposition groups, their methods of operations, their chains of command, etc.

- Please refer to the main book *Monitoring and Documenting Human Rights Violations in Africa*, see part one, "General Principles and Activities".

As highlighted in the case above, death in custody is unfortunately a common state of affairs in many prisons throughout the world, hence the importance of thorough monitoring to assess the extent of the violations and to identify the likely set of events that triggers and characterises such deaths.

Three main steps for monitoring death in custody

- Step 1: **Collect** information on the law, political climate, social climate, criminality, etc.

- Step 2: **Record and follow-up** individual allegations of death in custody

- Step 3: **Analyse** information and allegations and identify **patterns**

1. Collect general information

1. Legal and institutional data

- What is the legislation governing the protection of prisoners under any form of detention and rules for the treatment of prisoners?
- Are there any codes of conduct for police or military forces regarding the treatment of prisoners? What does the code say exactly?
- Do the police or military forces receive any training? What type of training?
- What are the chains of command?

2. Political information

- Keep track of statements made by government officials regarding torture and death in custody.
- Keep records of all official positions on individual cases, allegations or general comments about prisoners in general.

3. Social information

- Through the monitoring of the media, you should be able to find out about the general public's feelings regarding prisoners and criminality.
- Does the public or media call for harsher treatment of prisoners?

4. Criminality

- Keep track of information regarding criminality: is it on the increase or decrease? What are the main criminal activities? What are the main charges? Sentences?

2. Record and follow up individual cases

Let's return for one moment to the investigation by the Mozambican League for Human Rights. You may recall what was said at the beginning of the testimony:

> *The story of prisoners tortured to death by police officers is a common one in Mozambique. Since it was created, the Mozambican League for Human Rights has documented various such cases and, in many, the perpetrators have gone unpunished.*

The League knew, from experience, that (i) death in custody is common, and (ii) impunity is prevalent.

Human rights organisations or monitors are able to reach such conclusions by identifying and following up all cases that come to their attention. To facilitate such a task, it is recommended that you **design a form** to record individual cases of alleged deaths in custody.

Opposite is an example of a form to record individual cases. You may need to adapt it to the specific circumstances of your country or region.

Sample form for recording information on death in custody

Date: ..... Registration number: ..... Information compiled by: .....
Visit to the scene: No ☐ Yes ☐ by ..... on .....
Interviews of witnesses: No ☐ Yes ☐ by ..... on .....

1. Victim identification information

Name (Last and first name, nickname): .....
Date of Birth or Age: ..... Gender: .....
Profession/Occupation: ..... Family Status: .....
Address: .....
Nationality: ..... Religion: ..... Ethnicity: .....
Physical description or picture: .....

2. Location of the death in custody

Date, time and year of the alleged death in custody: .....
Name of prison or other custody location: .....
Province: ..... District ..... City/village (or nearest): .....
Street address (if applicable): .....

3. Circumstances of the arrest

Date, place, time, witnesses, etc.: .....
.....
Reasons for the arrest: .....
Who conducted the arrest: .....
Were other people arrested: .....
Previous arrest?: .....
Legislation under which the prisoner was being held: .....
Did he/she appear before a court judge? No ☐ Yes ☐ If yes, give details .....
.....
Was he/she formally charged? No ☐ Yes ☐
If not charged, did the authorities give reasons for the arrest?
.....
Did he/she have access to a defence lawyer? No ☐ Yes ☐
If yes, name and address of the lawyer .....
Who chose the defence lawyer? .....

4. Cause of death

Cause of death (e.g. gunshot): .....

Brief description of the state of the victim: .....

.....

Circumstances of the death: .....

.....

5. Alleged perpetrators

Names: .....

Officers in charge: .....

Chain of command: .....

6. Evidence

Witnesses: .....

Forensic evidence: .....

Court record: .....

Other: .....

7. Complaints

Was a complaint lodged? No ☐ Yes ☐

If yes, when? ..... where? .....

by whom? .....

8. Government responses

Was an investigation launched? No ☐ Yes ☐

If yes, by whom? ..... when? .....

Did the case reach court? No ☐ Yes ☐

If yes, which court? ..... when? .....

Were any statements made by public officials; if so, what? .....

.....

.....

3. Identify patterns

Through monitoring and investigating individual cases, you should be able to identify patterns. These will allow you to draw an overall picture of the situation as far as death in custody is concerned and will assist you in future investigations.

Patterns most relevant to death in custody may include:

Patterns in the identity of the victims

Are most victims of death in custody to be found among members of:

- specific political parties
- certain social sectors
- ethnic groups
- religious groups
- alleged criminals

Patterns in the circumstances resulting in death in custody

Are the majority of cases of death in custody preceded by similar sets of events, such as:

- new legislation
- declaration of a state of emergency
- elections
- announcements of meetings or requests for authorisation
- meetings
- demonstrations, riots
- intimidation and/or death threats

Patterns in the location of the cases

Did the majority of the cases take place in specific locations, such as:

- specific gaols
- specific prisons
- specific military barracks
- secret detention centres

Patterns in the identity of the alleged perpetrators

In the majority of the cases, are the alleged perpetrators to be found among:

- a specific security force
- specific prisons, gaols, etc.
- specific individuals within a security branch
- individuals of similar ranks

Patterns in the cause and manner of death

Are the majority of the cases of death in custody resulting from the same cause, e.g.

- gunshot wounds
- garroting
- torture
- lack of medicine and medical treatment

Patterns in the month/season of death

- do many cases of death in custody appear to take place during the same season or month of the year (e.g. hot season or rainy season which may be characterised by hunger, an increase in malaria or tuberculosis throughout the country, etc.)

Patterns in government responses to alleged cases of death in custody?

In the majority of cases, did the government response follow a similar pattern, e.g.

- refusal to retun the body to the family
- absence of independent and impartial investigations
- absence of autopsy
- procedures falling short of international standards regarding autopsy or investigation
- no arrest, trials, or judgement

IV. How to conduct fact-finding

Fact-finding consists of investigating a specific incident or allegation of human rights violations, collecting or finding a set of facts that proves or disproves that the incident occurred and how it occurred, and verifying allegations or rumours.

1. Gather material evidence which will confirm (or not) the allegations

Very rarely will the security officials admit that death in custody took place. Instead, the authorities may argue that the detainee died of natural causes or during an attempted escape.

It will be up to you to gather sufficient evidence to corroborate the government's version or, alternatively, to prove that the detainee did not die of natural causes but was executed, or that heart failure resulted from torture or cruel, inhuman or degrading treatment.

Material evidence may include: forensic evidence, medical records, photographs, physical signs or marks, official documents or acknowledgement.

Forensic evidence will often be crucial to counter the authorities' claims, along with knowledge about the deceased's medical history, and testimonies from witnesses.

2. Conduct interviews

Ask yourself who is more likely to give you access to this evidence.

Individuals to be interviewed may include: victims, family members, other inmates, prison guards, police officials, eyewitnesses or other witnesses, security officials, local officials, etc.

3. Assess the information and evidence

Having gathered material evidence and interviewed the victims or witnesses, you will need to **assess** the information and evidence provided in order to determine whether death in custody took place.

1. Preparing for the investigation: Get the facts

Be knowledgeable

- Be knowledgeable about the law related to death in custody: find out exactly what is prohibited under domestic laws and international human rights standards; seek information from experts.

- Be knowledgeable about the patterns related to deaths in custody and impunity

- List everything you already know about the case

  For instance, in the case above, the researcher already knew that the prisoner had been tortured. He went to the prison in order to be fully certain about the allegation of torture and in order to seek remedies: e.g. to make sure that the prisoner got access to medical care as soon as possible.

- List everything you already know about this particular prison or police station, as well as about death in custody

Seek expert advice

- Get all the necessary information or expert advice, e.g. consult with forensic pathologists, lawyers, etc.

Prepare your interview format

- Write down a check-list of the data and facts necessary to assess the allegations.

- If this is your first investigation of a death in custody, show the check-list to local contacts who have worked on such cases to get their input: they will often be able to add questions.

- Please refer to the booklet, *Monitoring and Documenting Human Rights Violations in Africa,* General Principles and Activities.

2. Going to the scene and other locations

Identify the places you may need to go to in order to conduct your investigation

- For instance, let's return to the investigation conducted by X into the alleged death in custody of FT. X went to:
  - the police station
  - the actual cell of the prisoner
  - the hospital
  - the mortuary
  - the court

- In the majority of alleged cases of deaths in custody, these places may be crucial to your research. You may need to go to all places of detention, including a police station, prison(s), as well as to the hospital, and the mortuary. You will also need to go to court, in case the death in custody case has been officially recorded or some family members have filed a complaint.

Carry out a thorough risk-assessment

- List all possible security concerns (e.g. your own physical security and the security of your contacts) and develop contingency plans to deal with each one of them.

- If access to, and your presence at, the prison or police station carries many dangers, identify alternative means of carrying out the research, e.g. rely on a confidential contact who has access to the prison or the police station to get information and interview possible witnesses.

- Be ready: prepare responses regarding the reasons for your visit and what you are doing in case people ask you difficult questions or appear suspicious.

- If necessary, seek official written authorisation to go to these places.

Identify your delegation

- **Be strategic:** The investigative team should not be constituted of individuals who may be perceived as partial by the informants because of their ethnicity, religion, known political affiliation, etc. As far as it is possible, identify team members who are impartial but who will also be *perceived* as impartial by the informants.

- **Experts:** Identify which expertise will be most needed during the investigation: you may need forensic pathologists, a ballistic expert, a lawyer, etc. If possible, you should include such an expert in your delegation. If this is not possible, you should meet with experts before going on a fact-finding mission.

3. Identify the main sources of information

- List all possible contacts and sources of information you may need to interview and meet in order to investigate and corroborate the information

- You may need to interview police officers and the officers in charge, other prisoners who may have witnessed the killing, family members who may also have witnessed the killing or have seen the victim before or after his/her death; hospital workers, because they are likely to have seen the victim before his death and after; mortuary workers because they are likely to have seen the dead body.

- **Identify with whom it may be more appropriate to meet first**, provided, of course, that you have the luxury to set up and organise meetings. In any case, you should decide whether and at which point in the investigation you will meet with security officials.

A generic list of possible sources of information (individuals and/or groups)

- Eye witnesses
- Other witnesses
- Relatives
- Community leaders
- Lawyers
- Journalists
- Medical personnel
- Prosecutors
- Local human rights activists
- Members of religious institutions
- Members of political parties, civil rights groups, trade unions; ethnic groups, etc.
- Members and officials of the police force
- Other police/judicial representatives
- Members and officials of the army
- Members and officials of armed opposition groups

4. Identify and collect material evidence

- Ask yourself the following question: What do you already know about the case? What information is missing? What kind of evidence is lacking?

- **Remember:** You have to prove that the death was unlawful and deliberate and that state officials were involved.

Possible material evidence

- Hospital and/or autopsy records
- Court records
- Police reports
- Arms left behind, bullet shells
- Documents left behind by the deceased
- Videos, pictures, etc.
- Official statements

V. How to assess information

The following is a generic list of questions and issues for which you should seek answers or evidence in order to assess the facts and the cause of the suspicious death.

The questions guiding your investigation should be based on the your assessment of the official version explaining the suspicious death, e.g. natural causes, death during escape, killings at the hand of other detainees, etc.

1. Reliability of initial source

- **Are your initial sources or contacts reliable?**
  In your experience, have these sources been reliable and accurate before?

2. Consistency with patterns

- **Is the incident reported to you consistent with what you know about the patterns of incidents of death in custody in the country?**

  In many countries, the incidents of death in custody will present strong similarities from which patterns can be extracted.

- Compare the case under investigation with what you know about patterns of death in custody.

3. Consistency of medical evidence

- **Whenever possible, you should get the assistance of medical experts and forward them all medical evidence. You may have to demonstrate that the victim did not die of natural death or because of medical pre-conditions.**

Some of the questions guiding your assessment include:

The state of the victim's health before the arrest

- What was the state of the victim's health before his/her arrest?
- What was deceased's doctor's assessment of his/her health before the arrest.
- Had he/she undergone surgery?
- Was he/she an alcohol or drug user?
- Had he/she attempted to commit suicide in the past?

The state of the victim's health in detention

- Was he/she taking medicines?
- What was the state of his/her health during detention?
- Was he/she complaining about illnesses, ailments?
- Had he/she seen any medical doctors? Why?
- Did he/she have access to any medicine?

The post-mortem

- Was a post-mortem performed? If so, when? At what time? If not, why not?
- Did the post-mortem follow national and international protocols?
- What were the results of the post-mortem?
- What conclusions were drawn?
- How does this post-mortem report compare with others?
- Did the same doctor conduct other post-mortems on similar cases?
- Was the body of the victim eventually handed over to the family?
- Was the victim buried by the security forces?
- How does this fit with existing known patterns?

4. Reliability of the testimonies

- Do the witnesses' testimonies appear reliable and consistent with each other?
  In assessing the testimonies, keep in mind the points developed in the guidelines in *Monitoring and Documenting Human Rights Violations in Africa*.

Pay special attention to:

- The witnesses' account of the circumstances, location, procedures, individuals involved, etc. Are they consistent with what others who witnessed similar events at the same time and place say; or with the patterns of death in custody?

- The witnesses' account of the sequence and timing of the events.

- Consistency of the testimony: Does the testimony concur with others as well as with previous patterns of death in custody in the country/region? Do the witnesses contradict each other when asked the same or similar questions?

- Inconsistencies in the testimonies: Are they the result of the witnesses' dishonesty or of faults in memory, exaggerations, unsubstantiated rumours, cultural differences or misunderstandings between the interviewer (or interpreter) and the interviewee?

5. Assessing the responsibility of the government

- Did the government's response meet international and national standards relating to death in custody?

  Official responses include: official acknowledgements or unofficial statements by representatives of the government; court testimonies; conclusions of independent investigation bodies, or the absence of independent investigations; post-mortem report.

Below are some questions to assist you in further assessing the responsibility of the government.

The arrest

- Why was he/she arrested?
- What were the circumstances of arrests? Was violence used?
- Was the individual charged? What were the charges?

The detention centre

- In which detention centre(s) was he/she held?
- What are the conditions of detention there?
- Did death in custody occur in this place before? What were the causes or circumstances?

The cause of death

- Alleged day and time of death?
- What is the "official" version for the cause and circumstances of the death?
- Is there another version? What is it?
- Did the death happen during interrogation?
- How many police were allegedly involved?
- Were there witnesses?
- Were security officials present at the time?

The involvement of security forces

- Who was in charge of the police station, prison or detention centre?
- Who was responsible for the actions of the security officials?
- Did the security officials justify the death in custody in any way immediately after the event?

The response of the authorities

- Was a complaint made?
- Was an inquiry initiated?
- Who or which agency was responsible for the inquiry?
- Did the inquiry follow principles set down by domestic laws?
- Did the police harass the witnesses of the death in custody or the relatives of the victim?
- Was a post-mortem performed? How?
- Was a criminal procedure initiated?
- Was a civil suit initiated?
- Was the case settled out of court?
- Was an internal investigation initiated?
- Was disciplinary action taken against the alleged perpetrators?

Annexe One: Some international and regional standards

1948 Universal Declaration of Human Rights, Art. 3 "everyone has the right to life, liberty and security of persons"

1966 International Covenant on Civil and Political Rights, Art. 6 (1) "no one shall be arbitrarily deprived of his/her life". Art.4 states that no derogation from art.6 is possible even in an emergency.

1978 UN Code of Conduct for Law Enforcement Officials, art. 3:

- Force should be used only when strictly necessary. The official Commentary included in the Code says that the use of force should be exceptional, that force should be used only as is reasonably necessary under the circumstances and that it should be used for only two purposes: The prevention of crime and effecting or assisting in the lawful arrest of offenders or suspected offenders.

- The force used should be proportional to the objectives (it should be used only to the extent required for the performance of law enforcement officials' duty.) The Commentary acknowledges the principle of proportionality laid down in national laws and says that the Code should not be taken to authorise the use of force which is disproportionate to the legitimate objective to be achieved.

1955 UN Standard Minimum Rules for the Treatment of Prisoners, art. 31:

Corporal punishment, punishment by placing in a dark cell, and cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.

UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, principle 6:

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials:

General provisions

1. Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review.

2. Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

3. The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimise the risk of endangering uninvolved persons, and

the use of such weapons should be carefully controlled.
4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

(a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;

(b) Minimize damage and injury, and respect and preserve human life;

(c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;

(d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

Policing persons in custody or detention

15. Law enforcement officials, in their relations with persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.

16. Law enforcement officials, in their relations with persons in custody or detention, shall not use firearms, except in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention presenting the danger referred to in principle 9.

17. The preceding principles are without prejudice to the

rights, duties and responsibilities of prison officials, as set out in the Standard Minimum Rules for the Treatment of Prisoners, particularly rules 33, 34 and 54.

African Charter on Human and Peoples' Rights

Article 4: Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 5: Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 6: Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Annexe Two: Body of principles for the protection of all persons under any form of detention or imprisonment

Adopted by General Assembly resolution 43/173 of 9 December 1988

Scope of the Body of Principles

These principles apply for the protection of all persons under any form of detention or imprisonment.

Use of Terms

For the purposes of the Body of Principles:

(a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

(b) "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;

(c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;

(d) "Detention" means the condition of detained persons as defined above;

(e) "Imprisonment" means the condition of imprisoned persons as defined above;

(f) The words "a judicial or other authority" means a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 2

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorised for that purpose.

Principle 3

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognised or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognise such rights or that it recognises them to a lesser extent.

Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

Principle 5

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the

application of, such measures shall always be subject to review by a judicial or other authority.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[2] No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

Principle 7

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

Principle 8

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

Principle 9

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the

2 The term "cruel, inhuman or degrading treatment or punishment" should be interpreted to cover the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

Principle 10

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 12

1. There shall be duly recorded:

   (a) The reasons for the arrest;

   (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

   (c) The identity of the law enforcement officials concerned;

   (d) Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.

Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Principle 19

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

Principle 21

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose

of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.

Principle 22

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

Principle 23

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

Principle 24

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Principle 25

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the

right to request or petition a judicial or other authority for a second medical examination or opinion.

Principle 26

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.

Principle 27

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

Principle 28

A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

Principle 29

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

Principle 30

1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.

2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.

Principle 31

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left with out supervision.

Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman

or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

Principle 34

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardise an ongoing criminal investigation.

Principle 35

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.

2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

Principle 36

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

Principle 38

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Principle 39

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the adminisstration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

General clause

Nothing in this Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights.

Annexe Three: Possible recommendations and actions

- Lobby for systematic post-mortem examinations of all individuals who die in custody or shortly after release, from whatever cause.

- Request that all post-mortems be conducted by independent forensic pathologists in accordance with international standards (such as the ones put forward in the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions).

- Whenever cases of death in custody are brought to your attention:
  - request an independent and impartial investigation
  - request an autopsy performed by an independent pathologist
  - inform the family about their rights; convince them to ask for a post-mortem
  - avoid the fast burial of the body;
  - ensure that the body of the deceased is given back to the family
  - ensure that the family can pay last tributes
  - file complaints

- Issue press statements

- Seek authorisation for investigation in the places of detention

- Preventive strategies:
  - Get access to the prisoners; ask that they receive medicine and access to medical officers;
  - Campaign for the improvement of prison conditions (in accordance with the United Nations Standard Minimum Rules for the Treatment of Prisoners)
  - Request that detainees and prisoners be held only in official detention centres;

- Request that a list of all known detention centres be publicised;
- Lobby for the creation of an independent body responsible for regular, unrestricted and unannounced prison visits responsible for putting forward recommendations for improving prison conditions;

Please refer to the booklet on *Monitoring and Investigating Political Killings*.

The Publishers

Amnesty International (AI) is a worldwide voluntary activist movement working towards the observance of all human rights as enshrined in the Universal Declaration of Human Rights and other international standards. It promotes respect for human rights, which it considers interdependent and indivisible, through campaigning and public awareness activities, as well as through human rights education and pushing for ratification and implementation of human rights treaties. Amnesty International takes action against violations by governments of people's civil and political rights. It is independent of any government, political persuasion or religious creed. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect. It is concerned solely with the impartial protection of human rights.

Amnesty International Dutch Section Special Programme on Africa (SPA) was established in 1994. Initially, SPA developed a programme to assist Amnesty Sections worldwide to improve the effectiveness of their campaigning against human rights violations in Africa. Since 1996 SPA has moved towards providing support to the broader Human Rights Movement in Africa. Rather than funding projects, SPA is developing and co-ordinating long term projects for and and in cooperation with other human rights organisations and AI sections. In addition to copublishing *Ukweli*, SPA is also coordinating advocacy and training workshops in southern and West Africa, a project on policing and Human Rights, and a pilot project to raise human rights awareness in rural areas in Liberia.

CODESRIA is the Council for the Development of Social Science Research in Africa head-quartered in Dakar, Senegal. It is an independent organisation whose principal objectives are facilitating research, promoting research-based publishing and creating multiple forums geared towards the exchange of views and information among African researchers. It challenges the fragmentation of research through the creation of thematic research networks that cut across linguistic and regional boundaries.

CODESRIA publishes a quarterly journal, *Africa Development*, the longest standing Africa-based social science journal; *Afrika Zamani*, a journal of history; the *African Sociological Review*, and the *African Journal of International Affairs (AJIA).* Research results and other activities of the institution are disseminated through 'Working Papers', 'Monograph Series', 'New Path Series', 'State-of-the-Literature Series', 'CODESRIA Book Series', the *CODESRIA Bulletin*, *KIBARU* and *CIVIC AGENDA*.

Monitoring and Investigating Excessive Use of Force

Amnesty International and CODESRIA

Amnesty International

Council for the Development of Social Science Research in Africa

Amnesty International Dutch Section, Keizersgracht 620, PO Box 1968,1000 BZ Amsterdam, The Netherlands

Council for the Development of Social Science Research in Africa
Avenue Cheikh Anta Diop Angle Canal IV, BP 3304 Dakar, Senegal

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and

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Fax: 44-01865-793298 Email: abc@dial.pipex.com
web site: www.africanbookscollective.com

Contents

I. Definition and examples of excessive use of force

1. When can law enforcement officials use force?

Under exceptional circumstances only

Law enforcement officials throughout the world may have to use force in the course of their duties. But unlike many of the activities for which law enforcement officials are responsible (e.g. traffic control, conducting an arrest, etc.), the use of force should always remain **exceptional**.

As a matter of fact, the use of force by law enforcement officials is strictly regulated and limited, or ought to be, by domestic laws. Such laws may differ from one country to the next, and you should make yourself familiar with them.

The international community has also sought to establish general principles that should be observed by law enforcement officials throughout the world and that may guide the regulations established by domestic law. These principles are embodied in two documents: the United Nations Code of Conduct for Law Enforcement Officials (1978) and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

According to these international standards, force of any kind should only be used **exceptionally:** in other words, the use of force should not be the norm but the exception.

Law enforcement officials may use force only:

- when strictly necessary
- to the extent required for the performance of their duty, including
  - ⩾ to prevent crime
  - ⩾ to effect or assist in the lawful arrest of suspected offenders
- after all non-violent methods available have been used but have remained ineffective

The use of force beyond these limits is characterised as "excessive".

Let's look at the various elements composing this definition:

- **strictly necessary:** A possible way to interpret this expression is the following: it is reasonable to assume that, under the circumstances, law enforcement officials had no alternative but to use force. No force going beyond that may be used.

- **to the extent required for the performance of officers' duties:** These duties include: to prevent crimes, to effect a lawful arrest. Broadly speaking, a crime may be defined as all those activities prohibited by criminal law. It should be the responsibility of the law enforcement officials to demonstrate that the activities they were trying to prevent constituted a "crime" in accordance with the law in force in the country. Conducting an arrest will be lawful if the required procedure has been followed, such as, in many cases, obtaining an arrest warrant.

- **after all non-violent methods have been tried:** this is pretty straightforward. Non-violent methods may include: spending time trying to convince someone to surrender or to stop acting in an unlawful way, talking to individuals, etc. All such methods should be included in internal guidelines or regulations regarding policing or security operations.

Some national states and NGOs have sought to define the limits imposed on the use of force through the principle of proportionality. (See Annexe One for details.)

2. So what does “excessive” mean?

The use of force may be described as “excessive” when it will go beyond the limits identified by the above principles, that is:

When the law enforcement officials’ objectives were unlawful.

Example: In the course of the arrest of Mr Tambo, the three police officers involved broke his arm. The police officers had broken into Mr Tambo’s house. When he requested to see their warrant, he was thrown to the floor and kept there with his arms held behind his back. He suffered a broken arm as a result of the violence used. According to the human rights organisation that investigated the incident, the police officers had no basis for breaking into Mr Tambo’s house, arresting him and using force against him. Mr Tambo was later released without any charges. He filed a complaint against the police officers the same day, alleging unlawful arrest and excessive use of force. The case is currently pending in court.

When the offence committed was not serious enough to mandate such a strong reaction on the part of the authorities, or did not constitute an offence at all under national criminal law or international human rights principles.

For instance, the use of force will be characterised as excessive if a suspect is offering no or little resistance to the law enforcement officers, or if the force used by the police officers is “too much” in relation to the situation, the nature of the offence and the resistance encountered.

Example: On 8 July, Mr Flomo was arrested for a speeding offence. He was so badly beaten by the officers who arrested him that he had to spend several weeks at the hospital, suffering from concussion and a broken leg. The police maintained that Mr Flomo resisted arrest and

that they had no other ways available to proceed with the arrest. But Mr Flomo was unarmed, and he was alone. He also denied resisting arrest. His case was brought to court. The judge ruled that even if Mr Flomo had, indeed, resisted arrest, the extent and the nature of the beating was clearly unwarranted and disproportionate to the nature of the offence and the circumstances.

When law enforcement officials did not try to use all other non-violent or less-violent means available to them.

Example: On 6 September, Mr Omoni, heavily drunk, was behaving in an aggressive manner on the street. According to eyewitnesses, the two police officers called on the scene immediately wrestled Mr Omoni to the ground and held him by the neck for a long period of time. Mr Omoni died a couple of hours later, in the police station. According to the autopsy performed later, Mr Omoni's death resulted from the restraining technique used by the law enforcement officers.

When domestic laws, internal regulations, or superior's instructions have failed to identify the limits for the performance of law enforcement officials' duties.

Example: According to human rights organisations and medical doctors, the restraining technique used against Mr Omoni (see case above) should be outlawed because it causes unnecessary suffering and may result in the death of the offender. Following Mr Omoni's death and two previous ones in the last five years resulting from the use of this technique, several organisations have formally requested that the state intervene and impose strict limits on the use of this technique by law enforcement officers.

When law enforcement officials did not abide by the procedures established by domestic laws, internal regulations, or their superiors.

Example: Three police officers were suspended from duties yesterday, following allegations that they used pepper spray against Ms Odengu, whom they were trying to remove from a bar where she was causing a disturbance. The use of pepper spray has been outlawed by a court order because of the extent of the suffering it causes.

When domestic laws, internal regulations or instructions from superiors encourage or allow the use of force when it is reasonable to assume that it should not be used.

Example: By order of the Head of State, the police force has been instructed to use any means necessary to ensure that the mining workers, striking for safer work conditions, are removed from the road leading to their factory where they have been demonstrating for the last 24 hours.

Example: Many cases of excessive use of force are reported in circumstances involving security forces whose officers had not been trained, or had not received the appropriate training, or were not trained or meant to address certain situations: for instance, sending military forces to deal with civilians or crowd control.

3. When can law enforcement officials use firearms?

The use of firearms is among the most potentially deadly type of force. This is why, again, the international community has developed principles to regulate their use by law enforcement officials: the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

a. The principles

- The use of firearms is considered as an extreme measure and every effort should be made to exclude their use.

- Firearms should only be used after less extreme measures have been used but have not been successful

- Firearms should only be used for the following purposes
  - in *self-defence* or the *defence of others* against an imminent threat of death or serious injury
  - to *prevent particularly serious crime* involving grave threat to life
  - to *arrest a person* who poses a grave threat to life, who resists authority or attempts to escape

- The use of firearms should not be lethal: Law enforcement officers are required to use firearms in a manner which minimises injury and respects human life: *intentional lethal force* is only permitted *«when strictly unavoidable in order to protect life»*.

- The use of firearms beyond these limits is characterised as "excessive".

b. The investigation

Broadly speaking, investigation on the use of firearms may focus on two main issues: the methods used and the purposes.

The focus on **methods used** requires us to consider:

- what happened before the law enforcement officials used their firearms and whether they tried to use other (less lethal) methods

- the type of weapon used

- how it was used: i.e. did law enforcement officials appear to aim at the offenders' vital organs?

The focus on the **purposes** requires us to consider whether anyone's life was at risk, be they: the law enforcement

officials themselves, other individuals at the scene (e.g. passers-by), individuals who were not on the scene but whose life may have been at risk (for instance, if the suspects were to evade arrest).

Let's consider the case described below. While the use of firearms may have been legitimate from the perspective of the purpose (especially considering that many people had already died and more were likely to die because of the inter-communal conflict), the **methods** used by the law enforcement officials were clearly excessive and disproportionate as compared to the objectives of the security forces (maintaining peace and order). They do not appear to have attempted to use other methods or weapons, and they relied on weapons which are indiscriminate by their nature and effects.

Example: On 9 August 1996 violence resulting from an inter-communal conflict between the villages of Bambui and Fungie in Mezam division resulted in the deaths of several people and serious injuries to many others. The following day, gendarmes from Bamenda were reported to have intervened in Bambui, firing shots and grenades indiscriminately at a large crowd gathered at the palace of the Fon of Bambui, a traditional ruler. Three people were reported to have been killed: Juliana Munu, 60, who died instantly from a shot to the head; Anita Nyengweh, 25, who died later in hospital, and Ache Alah, 24, who died in hospital.

4. What about demonstrations?

a. The overall principle

You should first remember that everyone has the right of freedom of peaceful assembly and association. These are human rights guaranteed by international human rights law.

b. Lawful demonstration

Whether an assembly is lawful depends on the regulations in the country and on the steps undertaken by the organisers to abide by these regulations. If they have taken such steps and the authorisation has been given, then the assembly is lawful.

Under such circumstances, the limits imposed on the use of force are exactly the same as those identified above.

c. Unauthorised demonstration

A demonstration will be characterised as unlawful by state officials if the authorisation for assembly is required by law and has not been granted.

- The permission for an assembly may be denied by state officials on a number of grounds, such as that the assembly may constitute a threat to national security, or endanger the safety, or health, or freedoms of others.

- But, quite often, a permission to demonstrate may be rejected by state officials because of what the demonstrators are calling for. By rejecting the demand for assembly, the government may commit a human rights violation, i.e. it may violate the right to freedom of peaceful assembly and the right to freedom of expression.

- **In all cases**, whether the denial of the permission for assembly was legitimate or not, the use of force to disperse unlawful assemblies is limited. The international principle governing the use of force in such circumstances (Principle 13 of the Basic Principles on the Use of Force and Firearms) states:

  > *In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the strict minimum necessary.*

d. What about violent demonstrations?

Again, the principles identified in the above three sections still hold: the use of force and the use of firearms must be exceptional and strictly limited.

- However, law enforcement officials are more likely to be placed in a situation where they have to conduct arrests and use force than if they were dispersing a peaceful assembly or arresting an unarmed individual.

- The international principle (Principle 14 of the Basic Principles on the Use of Force and Firearms) states:

  > *In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such case, except under the circumstances highlighted above.*

Example: A policeman and a 12-year-old boy are reported to have been killed during a demonstration on 16 March 1991 and others are reported to have been injured. Members of the armed forces who dispersed the demonstrations are reported to have used unnecessary force against the demonstrators who were initially making calls for multi-party democracy without using violence. Rioting later broke out in various parts of Lomé. Two young men were killed by soldiers on 5 April when they tried to topple a statue of president Gnassingbé Eyadema, situated next to the headquarters of the Rassemblement du Peuple Togolais (RPF), the ruling party in Togo.

The case below highlights another common outcome of demonstrations, be they violent or not, but especially when they turn violent: people are arrested who were not personally involved in the violence.

Example: During February, there were two demonstrations against the government in Abidjan, Côte d'Ivoire. The demonstrations started peacefully, but later on, there were violent attacks by some marchers. In total, 26 people have been convicted under the procedure of flagrant délit, a procedure for those caught in the act. They were tried under the terms of Article 26 of the Penal Code which establishes the criminal responsibility of someone associated with a crime, even if they have not themselves carried out the criminal act. Yet, those convicted were not personally involved in using or calling for violence.

5. What should happen after an alleged case of excessive use of force?

According to international standards, governments should demonstrate that they will not tolerate the arbitrary or abusive use of force and firearms by law enforcement officers by making such abuse punishable as a criminal offence, and by ensuring that law enforcement officers responsible for such abuses are charged and tried.

States are obliged to

- carry out impartial and exhaustive investigations into all allegations of killings resulting from the use of firearms
- clarify the circumstances of the incident
- identify those responsible
- bring them to justice
- compensate the victims or their families
- make the results of the investigation public.

II. How to monitor excessive use of force

Monitoring is the long-term observation and analysis of the human rights situation in a country or region.

- It consists of collecting **systematically and consistently** information that may be related to human rights violations, from a variety of sources.

- This information, collected over a certain period of time, should allow you to **put the cases under investigation into a political and legal context**, as well as to **identify patterns** in terms of excessive use of force. They should also allow you to develop an in-depth knowledge of the security forces and opposition groups, their methods of operations, their chains of command, etc.

- Please refer to the handbook, *Monitoring and Documenting Human Rights Violations in Africa*.

Three main steps for monitoring excessive use of force

- Step 1: **Collect** information on the law, political climate, organisation of the security forces and armed groups.

- Step 2: **Record and follow-up** individual allegations of excessive use of force.

- Step 3: **Analyse** information and allegations and identify **patterns**

1. Collect legal information

The investigation of alleged cases of excessive use of force depends heavily on your knowledge and understanding of the legal texts or regulations defining the duties of the security forces and the limits imposed on their activities. It is therefore very important that you make yourself familiar with all the texts related to the issue of the use of force and the use of firearms. In particular, you need to find the answers to the following questions:

- What is the definition of the use of force under national laws?
- What are the limits imposed on the use of force and on the use of firearms?
- Are there laws or regulations that facilitate the carrying-out of excessive use of force with impunity, such as shoot-on-sight orders, curtailed post-mortem or inquest procedures, provisions for immunity from prosecution, or the use of presidential pardon?
- Are there any laws prohibiting the use of certain weapons by security forces?
- Are there any prescriptions or time limits for filing complaints against security forces?

2. Collect information on security forces

In addition to being knowledgeable about the domestic law and regulations, you should also seek to develop some understanding of the way security agencies operate and are organised. These include: the police force, special branches, military forces, internal security agencies, etc. Some of the information to be researched may include:

a. Organisation of the security forces

- Identify the different branches within the security forces and their respective chains of command;
- Are there any particular security forces that are

usually involved in repressive activities and controlling demonstrations?
- Find out whether the law provides for paramilitary militias, police reserves, civilian forces;
- Find out whether supposedly independent organisations who support the government are organised on a paramilitary basis, and whether they receive military training, transport or equipment.

b. Internal regulations

These are the codes of conduct or guidelines that govern the activities of the security forces in general, and the use of force in particular. They may be confidential documents and include:
- Codes of conduct governing the use of force and of lethal force by all security forces
- Lethal force regulations
- Regulations or internal guidelines regarding crowd control, arrest of criminals, etc.

You ought to find out how they regulate, limit or prohibit the use of force and of firearms.

c. Training

Knowledge about the training received by the various branches within the security forces will also be very important in assessing specific cases and especially in identifying recommendations. Some of the questions you may want to investigate include:
- What type of training is received by the security forces?
- How often?
- Who, within the security forces, is more likely to be trained (e.g. junior or senior officer)
- Who trains them?

d. Weapons

You also want to find out about the types of weapons that law enforcement officials are allowed to carry and use:

- Identify the various type of weapons carried by specific security branch or organisations

3. Record and follow up individual cases

In many circumstances, you will be able to reach some sort of conclusion regarding a particular case on the basis of what you know about previous cases of alleged excessive use of force. It is therefore very important that you follow up on all cases that come to your attention.

To facilitate monitoring, it is recommended that you develop a form to record individual cases of excessive use of force that are brought to your attention, either through the media, family members, witnesses, etc.

This form is meant to give you a quick look at a case and to identify possible common points among a number of cases. In all cases, you will need to refer to the broader file to get all the details regarding the case.

On the next page is an example of such a form. You need to adapt it to the specific circumstances of your country or region.

4. Identify patterns

Patterns constitute one or several typical features of human rights violations, in this case, excessive use of force.

You identify patterns on excessive use of force by:

(i) reviewing and analysing a number of cases over a given period of time; and
(ii) identifying the common elements among all cases, such as: location; date and time; cause of injuries; circumstances; etc.

Through monitoring the press and investigating individual cases, you should be able to identify patterns. These will allow you to draw an overall picture of the situation as far as

Sample form for recording information on excessive use of force

Date: ..... Registration number: ..... Information compiled by: .....

Visit to the scene: No ☐ Yes ☐ by ..... on .....

Interviews of witnesses: No ☐ Yes ☐ by ..... on .....

1. Victim identification information

Name (Last and first name, nickname): .....

Date of Birth or Age: ..... Gender: .....

Profession/Occupation: ..... Family Status: .....

Address: .....

Nationality: ..... Religion: ..... Ethnicity: .....

Physical description or picture: .....

2. Location

Date and time of the incident: .....

Exact location: .....

Province: ..... District ..... City/village (or nearest): .....

Street address: .....

3. Nature of the incident

Nature of the incident (i.e. arrest, demonstrations, etc.): .....

.....

Date, place, time:: .....

.....

Description: .....

Steps taken by demonstration organisers to avoid problems: .....

.....

4. Nature of the injuries

How was the victim injured?: .....

If a bullet wound, what type of bullets?: .....

.....

5. Alleged perpetrators

Names: .....

Officers in charge: .....

Chain of command: .....

6. Evidence

Witnesses: .....

Forensic evidence: .....

Court record: .....

Other (videotapes, photographs, etc.): .....

7. Complaints

Was a complaint lodged? No ☐ Yes ☐

If yes, when? ..... where? .....

by whom? .....

8. Government responses

Was an investigation conducted? No ☐ Yes ☐

If yes, by whom? ..... when? .....

Did the case reach court? No ☐ Yes ☐

If yes, which court? ..... when? .....

Were any statements made by public officials; if so, what? .....

.....

.....

.....

.....

.....

excessive use of force is concerned and will assist you in future investigations.

Patterns in the identity of the victims

The victims themselves may present a number of common characteristics. There may be individuals or groups of individuals specifically targeted for arrest or violence. These individuals may present the following common characteristics:

- type of political activities
- professional activities or occupations
- ethnicity
- religion
- age-group
- gender
- sexual orientation
- residents of clearly defined areas
- street-children, prostitutes, beggars

Patterns in the location of the incidents

Alleged incidents of excessive use of force may take place overwhelmingly in certain specific locations. This may indicate that, while in parts of the country or at other police stations, law enforcement officials follow the principles regarding the exceptional nature of the use of force, in other places they don't. Incidents of excessive use of force may be overwhelmingly located in:

- regions
- cities or localities
- neighbourhoods
- police stations
- secret detention centres
- intelligence units
- military barracks

Patterns in the identity of alleged perpetrators

Through monitoring, you may also be able to identify a pattern in terms of the identity of the alleged perpetrators.

For instance, all cases of excessive use of force may be committed by one police force – or, indeed, by certain individuals – or by police forces under one particular chain of command. So you need to look for patterns in

- specific security forces;
- specific individuals;
- ranks

Patterns in the methods used

Quite often, the methods used by the law enforcement officials are consistent, i.e. the same or similar methods may be used. Such methods may include:

- use of firearms: police shooting to kill
- use of a specific forms of restraining techniques, beatings, etc.
- violence commonly used to arrest or control
- violence commonly used *after* individuals have been overpowered
- use of *agents provocateurs*

Patterns in the circumstances

The circumstances immediately preceding or following the incidents may also be quite similar and as such present a pattern. For instance, such incidents may take place particularly during or after:

- new legislation
- declaration of a state of emergency
- elections
- announcements of meetings or requests for authorisation
- meetings
- demonstrations, riots
- intimidation and/or death threats

Patterns in the causes of injuries and/or deaths

The causes of the injuries and/or death resulting from alleged excessive use of force may often be similar, indicating a pattern:

- deaths or injuries resulting from gunshots
- deaths or injuries resulting from certain restraining techniques
- deaths or injuries resulting from beatings

Patterns in government responses to alleged cases

A pattern may also emerge over time in terms of the responses of the government to the accusations. Such a pattern may be characterised by:

- public statements following the incidents
- overall attitude to the accusations (arrogance, denial, defensive reactions, etc.)
- the absence of or nature of the investigations
- intimidation of witnesses
- the nature of the procedures
- the absence of or nature of prosecutions (including a time limit for prosecution)
- the types of courts responsible for the proceedings
- the absence of or nature of the verdict
- out-of-court compensation

III. How to conduct fact-finding

Fact-finding consists of investigating a specific incident or allegation of human rights violations, collecting or finding a set of facts that proves or disproves that the incident occurred and how it occurred, and verifying allegations or rumours.

For this purpose, you need to:

- Step 1: Gather **material evidence** that will confirm (or not) the allegations

  Material evidence may include medical records, photographs, physical signs or marks, official documents or acknowledgements.

- Step 2: Conduct **interviews**

  Individuals to be interviewed may include the victim, family members, eye-witnesses or other witnesses, security officials, local officials, etc.

- Step 3: **Assess** the information and evidence

  Having gathered material evidence and interviewed the victims or witnesses, you will need to **assess** the information and evidence provided in order to determine whether excessive use of force took place.

1. Preparing for the investigation: Get the facts

Be knowledgeable

- Be knowledgeable about the law related to the use of force and the use of firearms by law enforcement officials in your country: find out exactly what is prohibited.
- Be knowledgeable about the patterns related to incidents of excessive use of force.
- List everything you already know about the case
- Ask yourselves the following question: What information is missing? What kind of evidence is lacking?

Seek expert advice

- Get all necessary information or expert advice, e.g. consult with forensic pathologists, lawyers, etc.

2. Going to the scene and other locations

Identify the places you may need to go to in order to conduct your investigation, such as

- the scene of the incident, such as: the street, the house, the police station, etc.
- the hospital, if the victims, possibly including law enforcement officials, had been taken there;
- the mortuary;
- the police station(s) or security forces' locations;
- the courts, if complaints have been filed and if there is an investigation into the incident;

Carry out a thorough risk-assessment

If you decide to go to the scene of an incident involving

excessive use of force, or to any other places where you may find information about the incident (prisons, neighbourhoods, etc.), you must assess all the risks involved for you, your colleagues, and the people you will talk to.

- List all possible security concerns (e.g. your own physical security and security of your contacts) and develop contingency plans to deal with each one of them (e.g. evacuation: how?). If access to, and your presence at, the scene (or other locations) carries many dangers, identify alternative means of carrying out the research, e.g. rely on a confidential local contact to bring possible witnesses outside the area.

- Be ready: prepare responses regarding the reasons for your visit and what you are doing in case people ask you difficult questions or appear suspicious.

- If necessary, seek official written authorisation to go to these places.

Decide upon the composition of the delegation

- **Be strategic:** The investigative team should not be constituted of individuals who may be perceived as partial because of their ethnicity, religion, known political affiliation, etc. As far as it is possible, identify team members who will also be *perceived* as impartial by the informants.

- **Experts:** Identify which expertise will be most needed during the investigation: You may need forensic pathologists, a ballistic expert, a lawyer, etc. If possible, you should include such an expert in your delegation. If it is not possible, you should meet with experts before going on a fact-finding mission.

3. Preparing before monitoring a public demonstration or assembly

In addition to the above, if you decide to monitor a public demonstration or assembly, you will need to consider the following.

Find out whether it is an authorised or unauthorised assembly

- Contact the organisers of the demonstration; find out what steps they have taken to get authorisation; whether the authorisation was granted, and, if not, what reasons were given to them for the rejection of their application.

Determine how will it proceed

- Find out the following: Which route is the demonstration planning to take? How many people are expected? How long is it supposed to last? Are specific activities planned during the demonstration or the assembly? Will there be any speakers? Are any security measures being taken by the organisers? Are the organisers prepared for police intervention? What instructions were given to participants by the organisers?

Carry out your own thorough risk-assessment

- Demonstrations and assemblies may turn violent. Be ready for all eventualities.

- List all possible security concerns (e.g. your own physical security and the security of your contacts) and develop contingency plans to deal with each one of them (e.g. evacuation: how?).

- If time allows, familiarise yourself with the location of the assembly or the route of the demonstration; identify possible escape routes; identify places (e.g. balcony or windows of a nearby building) from which

you can observe the demonstration or the assembly in relative security.

- Conduct the monitoring with at least one colleague: one of you can check on the other, e.g. ensuring you are not hit by a bottle while taking pictures.

Get your equipment ready

- If you have a camera, video, tape recorder, make sure that they are all working. They all could be very useful later on to help assess what happened during the assembly or the demonstration.

- Carry more than one piece of equipment if possible.

4. Identify the main sources of information and evidence

Identify sources of information and prepare your interview format:

- List all the possible contacts and sources of information that you may need to interview and meet in order to investigate and corroborate the information

Possible sources of information

- The victims
- Witnesses
- Journalists, including cameramen if they were filming a demonstration
- Organisers of the demonstration or assembly present at the scene
- Other organisers who may not have been present but may have had to deal with the police
- Law enforcement officials present during the incident and their superiors
- hospital workers
- mortuary workers

- Identify who it may be more appropriate to meet first, provided, of course, that you have the luxury to set up and organise meetings. In any case, you should decide whether and at which point in the investigation you will meet with security officials.

Prepare your list of evidence

- Write down a check-list of the data and facts necessary to assess the allegations

The biggest challenge is to determine whether the use of force was, indeed, excessive. In many cases, the law enforcement officials will argue that they had no other option and that their lives or other lives were threatened.

It is often not possible to establish with certainty whether the use of force was excessive.

- Your knowledge of the methods of operation of law enforcement officials and of patterns as far as the use of force is concerned is crucial in terms of directing your investigation.

- As far as government responsibilities are concerned, if no regulations are in place to govern the use of force by law enforcement officials, if law or regulations allow for an unlimited use of force, or if no full and impartial

Possible material evidence

- Official statements
- Report of the official investigation
- Medical, hospital and/or post-mortem records
- Court records
- Videos or pictures of the incident
- Documents left behind by the victim(s)
- Arms left behind, bullet shells
- Police reports
- Bullets, types of guns, or any other weapons used by the police
- Bullets, type of guns, or any other weapons used by other individuals and/or the victims themselves

investigations have been conducted, and if impunity is allowed to prevail, any of these can be taken as a strong indicator that the government condones the excessive use of force by law enforcement officials.

- See below for possible material evidence and for some of the questions that may guide your investigation and assist in demonstrating excessive use of force.

IV. How to assess information

Please refer to Annexe One for a sample of questions guiding the investigation and your assessment

The following steps are meant to assist you in assessing the information and reaching conclusions regarding allegations of excessive use of force.

1 Reliability of initial sources

- Are your initial sources or contacts reliable?
  In your experience, have these sources been reliable and accurate before?

2 Consistency with patterns

- Is the incident reported to you consistent with what you know about the patterns of incidents of excessive use of force in the country?
  In many countries, the incidents of excessive use of force will present strong similarities from which patterns can be extracted.

- Compare the case under investigation with what you know about patterns in excessive use of force

3 Consistency of medical evidence

- Whenever possible, you should get the assistance of medical experts to assess whether medical evidence is consistent with the allegation.

4 Reliability of the testimonies

- Do the witnesses' testimonies appear reliable and consistent with each other?

- In assessing the testimony, keep in mind the points developed in the handbook *Monitoring and Documenting Human Rights Violations in Africa*.

Pay special attention to:

* The survivor's description of the **symptoms following the alleged torture**: what type of physical pains and mental reactions has the victim experienced following the alleged excessive use of force?

* The survivor's description of **current symptoms and illnesses**: what are her/his current health complaints, both physical and mental? What was his/her health before being submitted to excessive use of force?

* The survivor's account of the **circumstances, location, procedures, individuals involved**, etc. Are they consistent with what others who witnessed similar events at the same time and place say; or with the patterns in the excessive use of force?

* The survivor's account of the **sequence and timing of the events**

* **Consistency of the testimony:** Does the testimony concur with others as well as with any previous pattern of excessive use of force in the country/region? Does the survivor contradict himself/herself when asked the same or similar questions?

* **Inconsistencies of the testimonies**: Are they the result of the survivor's dishonesty or of faults in memory, exaggerations, unsubstantiated rumours, cultural differences and misunderstandings between the interviewer (or interpreter)s and the interviewee?

5 Assessing the responsibility of the government

- Did the government's response meet international and national standards as far as excessive use of force is concerned?

  Official responses include: official acknowledgements or unofficial statements by representatives of the government; court testimony; conclusions of independent investigation bodies or lack of independent investigations; post-mortem report.

Annexe One: Key questions guiding the investigation and assessment

1. The context: does it indicate strong government disapproval, interference or threat?

1.1 **Demonstrations:** What was the political context and what were the circumstances before the demonstration(s)? Were any statements issued by government officials regarding particular political parties or individuals or demonstrations? Was the authorisation granted and, if not, on what grounds? Did government officials issue any warnings beforehand?

1.2 **Arrests:** What was the political context and what were the circumstances before the arrests(s)? Were any statements issued by government officials regarding particular types of crimes or criminals, political parties or individuals?

2. Nature of the offence resulting in the incident: was it very serious?

The main issues here relate to the nature of the offence under domestic law: you need to assess how serious such an offence was to warrant the use of force by the law enforcement officials. While answers to this question may be found in legal texts, you should remember that the behaviour of the offenders may dramatically alter the nature of the offence itself.

3. Behaviour of the offender(s)

The main questions here are the following: (i) whether the behaviour of the crowd or of the suspects constituted such a threat that the only reaction possible for the law enforcement officials was to use force, including lethal force; (ii) whether the police force could have relied on other non-lethal means to control the crowd and/or arrest; (iii) if a killing did occur, whether it was an accident?

3.1 **Demonstrators:** Was violence used by the demonstrators or agents provocateurs? Were armed, intoxicated, or aggressive individuals present? Were gunshots fired from within the crowd?

3.2 **Other offenders:** Were the alleged offenders armed? Did they use force and firearms? What was the nature of the alleged crime? Did they shoot at the police?

4. Number and nature of law enforcement agencies on the scene: does it appear excessive or disproportionate in comparison to the situation?

4.1 **Demonstrations:** How many police were at the location? Which branches? Who had overall responsibility for the demonstration? What type of weapons and other instruments were at the disposal of the police? Did they use *agents provocateurs*?

4.2 **Arrests:** Was the encounter between the police and the alleged criminals "accidental"? Were the police at the site following a tip-off? Were the arrests planned? How many police were involved? Which branch?

5. Nature of the law enforcement officials' operations: do they indicate heavy-handed (disproportionate) reactions to the situation?

5.1 **Use of force, excluding firearms:**
What tactics were used by law enforcement officials? Were peaceful means used before resorting to force? Were demonstrators dispersed? How? Did the police pursue fleeing individuals? For how long? Was there a fight between the victim and the police force? Were the police seeking to arrest individuals? What type of restraining techniques (if any) were used?

5.2 **Use of firearms**
What kind of weapons were used? How were they used? Were there warning shots? Were other methods used before the reliance on firearms? Did the purpose behind the use of firearms fit the circumstances allowing for the use of firearms ?

Remember: **Firearms are to be used only in exceptional circumstances:**

(i) firearms should be used after less extreme measures have been used and proved insufficient

(ii) the use of firearms should not be lethal;

(iii) they should only be used in self-defence or the defence of others, to prevent particularly serious crimes, to arrest a person who poses a grave threat to life.

6. Victims and witnesses: did the extent and nature of the casualties indicate a disproportionate response on the part of the law enforcement officials?

6.1 **The victim(s):** How many victims were there? Did the victims have characteristics in common with previous victims or groups who have been targeted in the past (e.g. young people, ethnic or religious groups, members of political organisations, etc.) Were the victims well-known opponents or leaders? Was the victim armed?

6.2 **Law enforcement officials:** Were members of the police force injured or killed? How many? What was the nature of the injuries? Where did they occur? (e.g. near where alleged killing occurred?)

6.3 **Witnesses:** Were there any witnesses to the alleged excessive use of force: Were a large number of individuals arrested following the incident? Were there cases of alleged ill treatment? Were any charges brought? Did the police harass witnesses to the killings or relatives of the victims? Did the police charge witnesses?

7. Casualties: nature of the injuries or causes of death

7.1 What was the nature of the injuries or the causes of death? Did the nature of the injuries indicate that force (e.g. beating) was used for a long period of time, that several officials were involved in using force? If firearms were used, what was the nature of the wounds? Did they indicate shooting at close range?

7.2 Was an autopsy performed? Did the autopsy follow national and international protocols? What were the results of the autopsy? What conclusions were drawn?

Whenever possible, you should refer all available medical evidence (medical certificate, photographs, testimonies) to medical experts

8. Response of the authorities: does it indicate impunity?

Remember: Governments should demonstrate that they will not tolerate the arbitrary or abusive use of force and firearms by law enforcement officers by making such abuse punishable as a criminal offence, and by ensuring that law enforcement officers responsible for such abuses are charged and tried. Following a killing by a law enforcement officer there should be a prompt investigation to determine the cause, manner and time of death; to establish responsibility for the death; and to uncover any pattern or practice which may have led to the death. The report should be made public. Victims' relatives should receive compensation.

- Did public officials in any way "justify" the killing immediately after the event?
- Are there any laws or regulations allowing for the excessive use of force by law enforcement officials?
- Was an inquiry initiated and by whom? Did the inquiry follow principles set down by domestic law and international standards? Was a criminal procedure initiated? Was a civil suit initiated? Was internal investigation initiated?

Annexe Two: The principle of proportionality

Some national states and NGOs have sought to define "excessive use of force" through the concept of proportionality. Under this principle:

The use of force is allowed only when it is proportional to:
(i) legitimate objectives,
(ii) the seriousness of the offence, and
(iii) the extent required for the performance of the officers' duty.

Both the principles of "proportionality" and the one of "reasonably necessary" leave a large margin of discretion to the law enforcement officials. But you may find the rule of proportionality a bit easier to apply in practice. Let's first look at all three elements to which the rule of proportionality should be applied:

(i) **legitimate objectives**: these are those objectives that are lawful: conducting an arrest may be lawful if the required procedure has been followed, such as, in many cases, obtaining an arrest warrant. Ensuring the respect for law and order may be another lawful objective, although, here, the assessment of what is or is not legitimate may depend a great deal on the individuals involved, rather than on strict rules.

(ii) **the seriousness of the offence**: people may not always agree as to whether an offense is very serious, serious, or not serious at all.

In many cases, there are domestic laws or international human rights principles which can assist in assessing the seriousness of an offence, and in bringing some consensus among all parties involved.

In other cases, however, domestic regulations themselves may be unfair or discriminatory in their characterisation of offences (e.g. laws against freedom of expression or assembly, blasphemy laws, laws against homosexuals, laws discriminating against

women) or may be seen as unfair by many people (e.g. adultery). The individuals investigating alleged cases of excessive use of force may not be in a position to convince a national court that excessive force was used because of their assessment of the seriousness of the offence.

(iii) **the extent required for the performance of the officers' duty:** this is the most difficult element to investigate.

One has to first establish what the duties of the officers were in the particular case under investigation: it could be controlling a crowd, maintaining peace and order, arresting an individual, patrolling, traffic control, etc.

The second question relates to the officers' performance of their duties: what exactly is expected from them? The definition or list of the activities involved in the performance of particular functions or duties may be found in existing policing guidelines or regulations. But the duties may also have been defined by the officers' superiors, either orally in the course of a briefing or in writing.

The third issue relates to the word "extent": are there any limits imposed on the performance of a specific duty?

Answers to this question may be found in the regulations governing security forces or in the instructions that the officers' superiors may have given. For instance, many arrests, before they are conducted, will require an arrest warrant. If police officers violate this principle, that is, if they arrest an individual without the warrant required in this case, and use force in the course of the arrest, they may have committed two human rights violations: unlawful arrest and excessive use of force.

Failure to find an answer in existing regulations, or in the superiors' instructions—that is, if the

> regulations or the instructions are not imposing any limits on the performance of the duties – may indicate a failure on the part of the state to protect citizens against possible abuse of power by security forces. If, despite repeated calls for new regulations, the state still does not come forward with any new regulations or instructions, what was originally described as a state failure to protect may actually constitute state complicity.

If the regulations themselves or the instructions violate international standards —that is, if the regulations or the instructions openly allow for the use of force or reliance on certain weapons that have been characterised as dangerous or have been shown to be dangerous — it will appear that the state "invites" abuse of power by security forces.

Annexe Three: Some international and regional standards

1978 UN Code of Conduct for Law Enforcement Officials, art. 3:

Force should be used "only when strictly necessary. The official Commentary included in the Code says that the use of force should be exceptional, that force should be used only "as is reasonably necessary under the circumstances" and that it should be used for only two purposes: "the prevention of crime" and "effecting or assisting in the lawful arrest of offenders or suspected offenders."

The force used should be proportional to the objectives (it should be used only "to the extent required" for the performance of law enforcement officials' duty.) The Commentary acknowledges the "principle of proportionality" laid down in national laws and says that the Code should not be taken to authorise the use of force which is "disproportionate to the legitimate objective to be achieved."

1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials:

The use of firearms is restricted to a series of situations involving "the imminent threat of death or serious injury" or "grave threats to life", and "only when less extreme means are insufficient" to achieve the objectives specified. Furthermore, the "intentional lethal use of firearms" is to be made only "when strictly unavoidable in order to protect life." The phrase "strictly unavoidable" implies that lesser means should be used first and that firearms should not be used before lesser means have proved insufficient to protect life.[1]

2 Amnesty International, *Disappearances and Political Killings*, Amsterdam, 1994, p. 101.

African Charter on Human and People's Rights

Article 4: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

Article 5: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

Article 7 (1): "Every individual shall have the right to have his cause heard. This comprises: a)-The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force; b)-the right to be presumed innocent until proved guilty by a competent court or tribunal; c)-the right to defence, including the right to be defended by counsel of his choice; d)-the right to be tried within a reasonable time by an impartial court or tribunal."

Article 7 (2): "No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender. "

Article 8: "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."

Article 10 (1): "Every individual shall have the right to free association provided that he abides by the law."

Article 10 (2): "Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association."

Article 11: "Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."

Annexe Four: Basic principles on the use of force and firearms by law enforcement officials

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

Excerpt:

> "The basic principles set forth below, which have been formulated to assist Member States in their task of ensuring and promoting the proper role of law enforcement officials, should be taken into account and respected by Governments within the framework of their national legislation and practice, and be brought to the attention of law enforcement officials as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature, and the public."

General provisions

1. Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review.

2. Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets,

bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

3. The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimise the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.

4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

(a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
(b) Minimise damage and injury, and respect and preserve human life;
(c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
(d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

6. Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.

7. Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.

8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.

Special provisions

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

10. In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

11. Rules and regulations on the use of firearms by law enforcement officials should include guidelines that:

(a) Specify the circumstances under which law enforcement officials are authorised to carry firearms and prescribe the types of firearms and ammunition permitted;

(b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;

(c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;

(d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;

(e) Provide for warnings to be given, if appropriate, when firearms are to be discharged;

(f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.

Policing unlawful assemblies

12. As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in accordance with principles 13 and 14.

13. In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

14. In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9.

Policing persons in custody or detention

15. Law enforcement officials, in their relations with persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.

16. Law enforcement officials, in their relations with persons in custody or detention, shall not use firearms, except in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention presenting the danger referred to in principle 9.

17. The preceding principles are without prejudice to the rights, duties and responsibilities of prison officials, as set out in the Standard Minimum Rules for the Treatment of Prisoners, particularly rules 33, 34 and 54.

Qualifications, training and counselling

18. Governments and law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review.

19. Governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use.

20. In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.

21. Governments and law enforcement agencies shall make stress counselling available to law enforcement officials who are involved in situations where force and firearms are used.

Reporting and review procedures

22. Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11 (f). For incidents reported pursuant to these principles, Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.

23. Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly.

24. Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.

25. Governments and law enforcement agencies shall ensure that no criminal or disciplinary sanction is imposed on law enforcement officials who, in compliance with the Code of Conduct for Law Enforcement Officials and these basic principles, refuse to carry out an order to use force and firearms, or who report such use by other officials.

26. Obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it. In any case, responsibility also rests on the superiors who gave the unlawful orders.

Annexe Five: Possible recommendations and action

- Review domestic legislation relating to the police to check whether it incorporates explicit reference to international human rights standards. Lobby for such an incorporation.

- Lobby against police carrying specific weapons, particularly lethal (e.g. AK47 rifles), or using certain bullets.

- Lobby for proper training of all members of the security forces. Send your reports and recommendations to police training schools and foreign governments involved in the training of security forces.

- Lobby for the implementation of an independent and impartial body responsible for dealing with complaints against the police.

- Organise workshops for senior and junior law enforcement officials regarding the use of force.

- Institute constructive dialogue with senior police officers; officers responsible for various prisons or jails; etc.

- Monitor demonstrations and public meetings and their policing.

- Ask the police commissioner to come with you to verify information; ask for him or his officers to check the information put forward by the human rights officer.

- Suggest to the organisers of demonstrations that they invite judicial officials (or notaries) to go along to a demonstration to witness what happens and how the demonstration was organised.

- Present the report of your investigation to the government.

- Raise the issue of excessive use of force and be persistent: one letter is not enough.

- Assist the victims in filing complaints against police officers on well-documented cases. (Beware that there may be time limits to do so, in accordance with the law).

- Hold meetings with the authorities at the Ministry of Interior, for instance, to raise the issue and sensitise the authorities.

- Use all possible tools to alert national public and international community about the gross patterns of excessive use of force in the country; such as: launching a massive wave of appeals, public campaigns, collaboration with other NGOs, open letter to the President or Prime Minister, etc.

- Organise marches against police brutality.

The Publishers

Amnesty International (AI) is a worldwide voluntary activist movement working towards the observance of all human rights as enshrined in the Universal Declaration of Human Rights and other international standards. It promotes respect for human rights, which it considers interdependent and indivisible, through campaigning and public awareness activities, as well as through human rights education and pushing for ratification and implementation of human rights treaties. Amnesty International takes action against violations by governments of people's civil and political rights. It is independent of any government, political persuasion or religious creed. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect. It is concerned solely with the impartial protection of human rights.

Amnesty International Dutch Section Special Programme on Africa (SPA) was established in 1994. Initially, SPA developed a programme to assist Amnesty Sections worldwide to improve the effectiveness of their campaigning against human rights violations in Africa. Since 1996 SPA has moved towards providing support to the broader Human Rights Movement in Africa. Rather than funding projects, SPA is developing and co-ordinating long term projects for and and in cooperation with other human rights organisations and AI sections. In addition to copublishing *Ukweli*, SPA is also coordinating advocacy and training workshops in southern and West Africa, a project on policing and Human Rights, and a pilot project to raise human rights awareness in rural areas in Liberia.

CODESRIA is the Council for the Development of Social Science Research in Africa head-quartered in Dakar, Senegal. It is an independent organisation whose principal objectives are facilitating research, promoting research-based publishing and creating multiple forums geared towards the exchange of views and information among African researchers. It challenges the fragmentation of research through the creation of thematic research networks that cut across linguistic and regional boundaries.

CODESRIA publishes a quarterly journal, *Africa Development*, the longest standing Africa-based social science journal; *Afrika Zamani*, a journal of history; the *African Sociological Review*, and the *African Journal of International Affairs (AJIA)*. Research results and other activities of the institution are disseminated through 'Working Papers', 'Monograph Series', 'New Path Series', 'State-of-the-Literature Series', 'CODESRIA Book Series', the *CODESRIA Bulletin*, *KIBARU* and *CIVIC AGENDA*.

Monitoring and Investigating Political Killings

Amnesty International and CODESRIA

Amnesty International

Council for the Development of Social Science Research in Africa

Amnesty International Dutch Section, Keizersgracht 620, PO Box 1968,1000 BZ Amsterdam, The Netherlands

Council for the Development of Social Science Research in Africa
Avenue Cheikh Anta Diop Angle Canal IV, BP 3304 Dakar, Senegal

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Fax: 44-01865-793298 Email: abc@dial.pipex.com
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I. Definitions and examples of political killings

1. When does a killing constitute a human rights violation?

1. Killings constitute a human rights violation when they are murders directly committed by the authorities or condoned by the state authorities.[1]

Killings that constitute human rights violations are those prohibited by international human rights law. They are sometimes called "extralegal, summary and arbitrary executions" or "extrajudicial execution" or "unlawful killings." (See Annexe One for definitions.) There are differences between the three but, generally speaking, political killings have three main characteristics:

- They have taken place at the order, complicity or with the acquiescence of the authorities.
- They violate national laws such as those prohibiting murder, as well as international human rights and humanitarian standards forbidding arbitrary deprivation of life.
- They have not occurred by accident, in self-defence, or through ignorance.

Such killings may include:

- **Death in custody:** Deliberate killings of prisoners. Note that not all deaths in custody constitute human rights violations. Some deaths may result from natural causes, others may occur during attempted escape, etc. With regard to the latter, it is common for the authorities in some countries to claim that prisoners have died while trying to escape or in armed encounters; forensic evidence and the testimony of witnesses can be used to counter such claims. (See the booklet *Monitoring and Investigating Death in Custody*.)

1 See: Amnesty International, *Disappearances and Political Killings*, Amsterdam, 1994.

Example: Camillo Odongi Loyuk, a former soldier working as a senior civil servant, was arrested in Khartoum on 1 August 1992. He had arrived from Southern Sudan a few days earlier, apparently to put his daughters into school. Security men took him to an unknown destination in Khartoum. On 12 September he was brought to a "ghost house" in Khartoum where he was tortured, and denied food and water. He died on 15 September.

- **Killings by security forces outside a prison or police station:** Political killings may also take place in a home, street, road, etc. Victims of such killings include political opponents, petty criminals, prostitutes, street children, etc.

  Example: On 4 December 1997, the charred bodies of Samuel and Janet Dokie were found in their burned-out car on the outskirts of Gbarnga, Liberia. The bodies of two other people, believed to be Samuel Dokie's sister and a bodyguard, were found at another location nearby. The four people had been arrested on 20 November 1997, reportedly by plain-clothes members of the Special Security Services. Efforts to trace them in the custody of the police and other security forces had failed, despite requests regarding their whereabouts by local and international human rights organisations. Samuel Dokie had stood for election in July 1997 as the parliamentary candidate for the Unity Party, the main rival to the National Patriotic Party which had won the election.

- **Killings abroad:** Killings by security forces may also take place outside the country. Victims of such killings tend to be political opponents living in exile.

  Example: On 16 May 1998, Rwandese former government minister, Seth Sendashonga, was shot dead in the Kenyan capital, Nairobi, in what appears to be a blatant political assassination. Seth Sendashonga had survived an earlier assassination attempt in February 1996,

when he and his nephew were both injured after being shot in Nairobi. A diplomat from the Rwandese embassy in Nairobi was suspected by the Kenyan authorities of involvement in the attack; he was initially detained, but released without trial. Seth Sendashonga had frequently denounced human rights violations by the security forces in Rwanda.

- **Killings by excessive use of force:** This situation refers to the deliberate killings of individuals during a demonstration, a riot, an arrest, etc. by officers performing law enforcement functions when there is no legitimate justification for the use of lethal force. (See the booklet *Monitoring and Investigating Excessive Use of Force*..)

- **Killings by paramilitary or vigilante groups:** These include killings by unknown assailants that may be traced back to the government. Victims of such killings may include political opponents, entire groups or populations, defined by their religion, ethnic, cultural or racial group membership or by their location in a given area, petty criminals, street children, prostitutes, beggars, etc.

  Example: In Nakuru district, Kenya, political violence began on 24 January 1998 when Kalenjin raiders attacked unarmed Kikuyus in their homes. On 25 and 26 January the Kikuyu responded to the attacks on their community in an organised manner and attacked unarmed Kalenjin in their homes at Naishi. Over 35 Kalenjin were killed. Eye-witnesses described how the attacks by the Kalenjin were well organised and included both locals and men from outside the area dressed in “uniform”. The violent response of the Kikuyu, though also well organised, does not appear to have involved outsiders. Kalenjin witnesses recognised many of their attackers, often neighbours, who were wearing normal clothes and carrying pangas and rungus.

2. Killings constitute human rights violations when they violate the laws of armed conflicts

Some of the killings occurring during armed conflicts constitute human rights violations as well as violations under international humanitarian law which governs the conduct of war. Such killings may be committed by any parties to the conflicts, including government troops and non-government troops or armed groups.

- **Killings of prisoners of war:** The deliberate killing of prisoners of war by governmental troops or members of armed groups constitutes a human rights violation and a violation of international humanitarian law.

- **Killings of civilians during armed conflicts:** The deliberate or indiscriminate killing of civilians by any armed forces also constitutes a human rights violation as well as a violation of international humanitarian law. (Indiscriminate killings are those resulting from the failure of the armed forces to adequately distinguish between a military target and civilian population nearby.)

- **Note that not all killings in armed conflicts are illegal:** For instance, armed forces are not prohibited from killing individuals taking a direct part in hostilities, such as soldiers, members of armed opposition groups, etc. As long as those taking part in hostilities are not prisoners or have not put down their arms, they may be lawfully killed under the laws of war.

☒See the booklet *Monitoring and Investigating Violations in the Context of Armed Conflicts* .

2. What about killings by armed opposition groups? Do they also constitute human rights violations?

As highlighted above, during an armed conflict, armed opposition groups are bound by the same principles as government forces: all parties to the conflict must respect the laws of war, which means that they are all prohibited from killing prisoners of war and civilians.

What about situations which are **not** armed conflict situations, as commonly understood?

- Under such situations, killings perpetrated by armed opposition groups are increasingly considered to be human rights abuses (although there is no overall agreement over this among the human rights community).

- Some human rights lawyers and organisations, as well as human rights bodies within the United Nations system, consider that respect for human rights remains the responsibility of the states and they, therefore, limit their work to violations committed by governments.

- However, numerous international human rights organisations, such as Amnesty International and Human Rights Watch, as well as local human rights organisations such as RADDHO in Senegal and Voice of the Voiceless in the Democratic Republic of Congo, have decided to oppose killings perpetrated by armed opposition groups.

- Such a decision has often been taken on the grounds that killings committed by armed opposition groups violate:
  - the right to life and the right to security of persons,
  - national criminal laws prohibiting murders;
  - international humanitarian law, and in particular common article 3 of the Geneva Conventions.

- In order to distinguish between killings perpetrated by governments and killings perpetrated by armed opposition groups, Amnesty International refers to the killings perpetrated by armed opposition groups as **deliberate and arbitrary killings**, while killings perpetrated by governments are referred to as **extrajudicial executions**. It also uses the expression "human rights abuses" when dealing with armed groups (rather than "human rights violations", which are reserved for acts committed by states). Furthermore, Amnesty International applies international humanitarian law to killings committed by armed political groups. The use of international humanitarian law is not meant to imply that there is an actual armed conflict, as commonly understood, but to draw a distinction between the obligations that fall upon a state and the ones that fall upon an armed group.

According to Amnesty International, killings by armed opposition groups constitute human rights abuses when they present the following characteristics:[2]

- They are **deliberate**: that is, they are not committed in self-defence, or by accident.

- They **flout even minimum standards of human behaviour** applicable to governments and armed opposition groups alike.

- They are committed **on the authority of a political entity** or with its acquiescence. They are part of a policy to eliminate specific individuals or groups or categories, or they occur because such abuses are allowed to be committed or tolerated.

2 Amnesty International, *Disappearances and Political Killings*, Amsterdam, 1994.

Summary

1. Not all killings are human rights violations.

- **Many are crimes** that are handled under criminal law, e.g. when a robber kills a shop-owner.
- **Some** killings by the state **do not violate international human rights standards**: For example, if a person is killed as a result of police using the minimum force necessary to protect life, the killing is not unlawful.

2. Killings constitute human rights violations when they are murders directly committed by or condoned by the state authorities, that is, when they present the following three characteristics:

- They take place **at the order of, or with the complicity or acquiescence of, the authorities.** In other words, killings carried out by individual policemen or soldiers in violation of enforced orders do not constitute human rights violations.
- They are **deliberate:** they have *not* occurred by accident or because of ignorance or self-defence.
- They are **unlawful**: they violate national laws, such as those prohibiting murder, as well as international human rights and humanitarian standards forbidding arbitrary deprivation of life. They did not follow proper and adequate judicial or legal proceedings.

3. Killings constitute human rights violations when parties to a conflict have violated the laws of war prohibiting the killing of unarmed individuals and prisoners of war:

- Deliberate **killing of prisoners of war**
- Deliberate or indiscriminate **killing of civilians**

4. Killings constitute human rights abuses when they have been committed by armed opposition groups in violation of international norms prohibiting the arbitrary deprivation of life.

- They are **deliberate**: that is, they are not committed in self-defence, by accident or ignorance.
- They **flout even minimum standards of human behaviour** applicable to governments and armed opposition groups alike.
- They are committed **on the authority of a political entity** or with its acquiescence. They are part of a policy to eliminate specific individuals or groups or categories, or they occur because such abuses are allowed to be committed or tolerated.

Example of an investigation: Political killings in Lesotho

The following example is from Thabo Motlamelle, a journalist from Lesotho, investigating the killings of striking construction workers by the police.[3] In the course of the fact-finding, the journalist went to several places trying to find evidence and eye-witnesses, which he eventually did, but after encountering many obstacles. You will notice that his knowledge of the country and of killings was very important. He had monitored killings by the police or the army so he knew what to expect in terms of obstacles, and what to look for in terms of evidence. His persistence paid off.

It is often said that journalists are the first recorders of history: that is to mean that news reporters draft the events of history, publish them in newspapers and other media that can be accessible to historians at a later date for them to verify the facts surrounding an event.

As a working journalist involved with the British Broadcasting Corporation, some local newspapers in Lesotho and the World Vision International media, I continually have to get involved in situations in which human rights may be an issue, as was the case with the 14 September 1996 police massacre of striking Lesotho Highlands Water Project workers at Muela.

I left the capital city with a colleague two days after the event had taken place, with a view towards seeing for ourselves and recording that for local papers and the international media, which was then getting some confused reports out of officials who had never set foot in the area since the incident.

Finding eye-witnesses and evidence . . .

Our first port of call was the trauma unit at the ***government hospital,*** *some 20 km before we reached our final destination where the shooting had taken place. There we wanted to verify the numbers of those admitted to the hospital and their condition. We walked into a brick wall of hospital officials who shuttled us from one ward to the*

3 Thabo Motlamelle, presentation written for the Human Rights Defenders Conference, organised by Amnesty International, Harare, Zimbabwe, 26–28 March 1998.

next without ever really telling us what we were looking for.

Eventually we were able to talk to ***one worker*** *who had some bullet wounds in the leg and told us that he had come to the compound because he had intended to take some of his belongings so he could go home as he was on leave. He was on his way home when he unfortunately happened upon the police shooting his colleagues. He sustained injuries trying to run away from the mayhem.*

Our next station was the ***offices of the police*** *where we wanted to confirm the incident and the role of the police in its perpetration. We were met by a scene of heavily armed policemen and one of them laughed out loud when he heard what our mission was. His colleagues told us we would have to wait for the commander who had gone to Maseru. They did not know when he would return and his deputy was nowhere to be found.*

We then took off to the ***offices of the construction company*** *that employed the workers. The situation there was the same with the presence of heavily armed policemen and some security guards. We were directed to the office of a sour-looking tall and lanky Englishman who introduced himself as one of the directors of the company and said that he was willing to give us an interview. Once the interview was in progress, it became evident that this director was not willing to be interviewed as he started issuing threats that he could close down our papers if we ever reported anything negative about his company.*

We took off to the ***Catholic Mission where the workers were encamped*** *where we found over 600 men in fear of their lives telling us that they had to live at the church yard as they had sought protection from the sanctuary of a church and that they had nothing at all to bathe with, eat, etc.*

We were eventually able to find the ***bodies of the four people*** *who had been killed with the help of a friendly hospital worker who directed us straight to the* ***mortuary****. There, thanks to another friendly worker, we were also shown other bodies, some of them defenceless people brutally murdered by the police.*

The example highlights the various places to go to in terms of investigation of killings, including the hospital, the police station, the place where the killings took place, the mortuary, the eye-witnesses, etc. It also shows that you may just need *one* willing and brave person who will open some doors for you and will get you access to the evidence and eye-witnesses. Such a person may be called a "gate-opener" in the documentation jargon.

In the remainder of his testimony, the journalist expands some more on the obstacles and especially on the role played by his monitoring of the situation while he was conducting fact-finding.

> *The problems we encountered at the hospital trauma unit are commonplace in my country. People always tend to ignore the situation around them or act nonchalantly indifferent to the situation because they may get fired . . . A second attitude manifested itself in the policeman who laughed at us like we were some stupid foreigners who came on a space shuttle from Mars. This was either out of fear that the incident was being investigated so early, or just a case of "Go on, try to get the information and let's see where you will get in the end."*
>
> *The second attitude is due to the practice and what has been the situation in the country for some time. A lot of deaths have occurred in which the armed forces may have been implicated and the results have invariably been that no one would be arrested or the investigations have always ended up as paper tigers that never bring solutions as to who did it.*
>
> *A deputy prime minister had died in an incident that involved soldiers and to date his alleged killers have not been brought to book and there does not appear to be any will to do so; neither in future nor in the past has there been any intent to apprehend those involved in his killing . . .*
>
> *The other practice is that of senior officers vacating the scene so that journalists would find no one to interview or, if they are around, they may tie one in a series of long, red tape which will see one move from office to office and back to the first one where the event was first*

recorded anyway but the real story would always be hidden somewhere, the reporter may not find it easily.

So what did the journalist know about political killings before he started this specific investigation?

He knew that:

- people are fearful of talking about it;
- police always deny that anything wrong happened;
- killings by the police or the army are not seriously investigated and a pattern of impunity is the norm.

How did he know all that?

- Through experience, that is, through monitoring. This was not his first investigation of such killings: he had done fact-finding before and monitored cases.

In the remainder of this book, we will identify the various steps that may be taken to monitor political killings and to conduct fact-finding.

II. How to monitor political killings?

Monitoring is the long-term observation and analysis of the human rights situation in a country or region.

- It consists of collecting **systematically and consistently** information that may be related to human rights violations, from a variety of sources.

- This information, collected over a certain period of time, should allow you to **put the cases under investigation into a political and legal context**, as well as to **identify patterns** in terms of unlawful killings. They should also allow you to develop an in-depth knowledge of the security forces and opposition groups, their methods of operations, their chains of command, etc.

- Please refer to the handbook *Monitoring and Documenting Human Rights Violations in Africa*.

Question: What kind of information can assist you in investigating political killings?

1. Monitor the legal and political system

The more detailed and complete your knowledge of the local and regional political climate and changes, the legal procedures, the structure and composition of the security forces and the opposition groups, the better qualified and empowered will you be to establish responsibilities for the killings.

Regularly collect and analyse legal information on:

- National domestic laws regarding murders and capital punishment.
- Legislation governing the use of force by the police, the military or other security bodies.
- Procedures to be followed in cases of killings.
- Role of military courts.
- Paramilitary militias.
- Laws or regulations which facilitate the carrying-out of extrajudicial executions with impunity, such as

"shoot-on-sight" orders, curtailed post-mortem or inquest procedures, or provisions for immunity from prosecution.

Regularly collect and analyse information on the political climate, including:

- Information on political parties: whether they are allowed or not; their political agenda and possible changes; etc.
- Information on electoral laws.
- Statements by government and officials of armed opposition groups regarding political opponents, activists, particular political parties or individuals, etc.
- Responses of government officials or representatives of armed opposition groups to accusations of human rights violations?
- Warnings issued by officials of government, armed opposition groups, security forces.
- Statements by government officials regarding demonstrations, in general.
- Representation of certain individuals or groups, within the media.

Main sources of information on political killings

- statements and interviews of witnesses, family members, friends, colleagues
- media, radio
- official, governmental articles and reports
- court records
- reports from other NGOs or IGOs
- members of the security forces and armed opposition groups
- retired members of the security forces, etc.

2. Develop expertise on the organisation of security and armed forces

The more detailed and complete your knowledge of the structure and composition of the security forces and the opposition groups, the better qualified and empowered will you be to establish responsibilities for the killings.

a. Collect information on the organisation of the security forces and monitor changes

- Identify the different branches within the security forces and their respective chains of command.
- Get copies of, and read, various codes of conduct, regulations or internal guidelines regarding the use of lethal force, crowd control, arrest of criminals.
- Find out about the type of training received by security forces.
- Identify precisely the security forces usually involved in repressive activities and monitoring demonstrations.
- Find out whether regular troops, police or militia have been known to carry out killings.
- Find out whether the law provides for paramilitary militias, police reserves, civilian forces.
- Find out whether supposedly independent organisations who support the government are known to be organised on a paramilitary basis, and whether they receive military training, transport or equipment.

b. Collect information on their methods of operation and means of identification

- Identify the type of arms usually used by specific security branch or organisations.
- Identify the different uniforms and colours of uniforms for each security branch and paramilitary organisation.

- Identify the ranking system.
- List the various types of means of transportation each branch tends to use.
- List any other visible signs of identification, e.g. some branches may be dominated by one linguistic group; they may use specific expressions; etc.

c. Collect information on the organisation of armed opposition group(s) and monitor changes

- Find out whether organisations or parties that oppose the government are organised on a paramilitary basis. Identify the chain of command and their methods of operation.
- Identify the various armed factions or branches, their leadership and chain of command.
- Identify their international, regional or national supporters and origins of the arms at their disposal.
- Monitor the reactions of the leadership of opposition groups to killings.

d. Collect information on their methods of operation and means of identification

- Identify the type of arms usually used by specific armed factions.
- Identify the different “uniforms” and colours worn by members of armed groups.
- Identify the ranking system.
- List the various types of means of transportation.
- List any other visible signs of identification, e.g. language, use of specific expressions; etc.
- Collect all operations known to have been carried out by the armed groups; identify methods of proceedings and common points.

3. Record and monitor individual cases

Let's return for a moment to Thabo Motlamelle's example: You may recall that he had already monitored a number of cases of political killings, in particular the killing of a deputy prime minister:

> *A deputy prime minister had died in an incident that involved soldiers and to date his alleged killers have not been brought to book and there does not appear to be any will to do so; neither in future nor in the past has there been any intent to apprehend those involved in his killing . . .*

Having already investigated this case, he knew that: (i) soldiers were involved; (ii) no one had been brought to justice.

To facilitate monitoring, it is recommended that you **design a form** on which you can record individual cases of alleged political killings that are brought to your attention, either through the media, or by family members, witnesses, etc.

This format is meant to give you a quick look at a case and to identify possible common points among a number of cases. You will need to refer to the broader file to get all the details regarding the case.

Opposite you will find an example of such a form. You will need to adapt it to the specific circumstances of your country or region.

4. Identify patterns

Patterns constitute one or several typical features of human rights violations, in this case, political killings. You identify patterns in political killings by:

- reviewing and analysing a number of cases over a given period of time; and
- identifying the common elements amongst all cases, such as: location where the killings took place; date and time; causes of death; circumstances; etc.

Sample form for recording information on political killings

Date: ..... Registration number: ..... Information compiled by: .....
Visit to the scene: No ☐ Yes ☐ by ..... on .....
Interviews of witnesses: No ☐ Yes ☐ by ..... on .....

1. Victim identification information

Name (Last and first name, nickname): .....
Date of Birth or Age: ..... Gender: .....
Profession/Occupation: ..... Family Status: .....
Address: .....
Nationality: ..... Religion: ..... Ethnicity: .....
Other identity-related status: .....
Physical description or picture: .....

2. Location of the killing

Date, time and year of the alleged killing (or date of the disappearance): .....
.....
Province: ..... District ..... City/village (or nearest): .....
Street address (if applicable): .....

3. Nature of the killings

Number of victims .....
Killings during or following:

police/security operations	☐	military operations	☐
riots/demonstrations	☐	inter-communal fighting	☐
arrest	☐	imprisonment	☐
abduction	☐	other	

Disappearance .....
Was any property:

- ☐ damaged .....
- ☐ destroyed .....
- ☐ stolen .....
- ☐ confiscated .....
- ☐ other: .....

4. Causes of death

Causes of death (e.g. gunshot): .....

Brief description of the killing: .....

.....

5. Circumstances

Briefly describe the events immediately preceding the killings (e.g. new legislation; military attacks, etc.) .....

.....

.....

6. Alleged perpetrators (e.g. police forces, armed forces, armed groups, paramilitary groups, etc.) .....

.....

.....

7. Evidence

Witnesses: .....

Forensic evidence: .....

Court record: .....

Other: .....

8. Government responses

Complaint lodged: when? ..... where? .....

Public statements: .....

Investigation: .....

Court cases: .....

9. Responses of the armed group, if any

Did you contact representatives of the armed group? .....

How did they react to the allegation? .....

.....

Were any measures taken by their leadership; if so, what? .....

.....

.....

Let's return again to Thabo Motlamelle's example. You may recall what he said about impunity:

> [*This*] *has been the situation in the country for some time: a lot of deaths have occurred in which the armed forces may have been implicated and the results have invariably been that no one would be arrested or the investigations have always ended up as paper tigers that never bring solutions as to who did it.*

In other words, he knew that in all the cases of alleged political killings, the police had never seriously investigated them; no one had ever been arrested. What he did here was to establish a pattern regarding impunity. This knowledge of the patterns allowed him to place the specific incident he was investigating within its proper context.

Question: What kinds of patterns regarding political killings can you establish?

Patterns in the identity of the victims

The victims of political killings may have a number of elements in common, such as:

- nature of political activities
- professional activities or occupations
- ethnicity
- age-group
- gender
- religion
- residents of clearly defined areas

Patterns in the circumstances

The circumstances immediately preceding or following the killings may also be quite similar and therefore present a pattern. For instance, political killings may take place especially during, after, or following:

- new legislation
- declaration of a state of emergency
- elections

- announcement of meetings or request for authorisation
- meetings
- demonstrations, riots
- troop movements in the context of armed conflicts
- specific attacks or activities by armed groups
- reprisal operations
- kidnapping
- arrests
- long-term detention
- intimidation and/or death threats

Patterns in the locations of the killings

Quite often, the locations of political killings and/or killings committed by armed groups follow a clear pattern. That is, killings may take place overwhelmingly in specific:

- regions
- cities or localities
- neighbourhoods
- prisons

Patterns in the causes of death

The causes of death may be similar in a majority of cases, hence indicating the existence of a pattern. Such causes may include:

- gunshot in the head, the heart, etc.
- strangulation
- torture

Patterns in the methods used

Quite often, the methods used by the perpetrators are consistent and similar. Such commonalities may characterise:

- the type of arms used
- the type of torture techniques (demonstrating an intention to kill)
- the use of a specific instrument or method to kill (e.g. machetes, drowning, etc.)
- the position of the body (e.g. hands tied in a certain way; location of the body; etc.)
- the use of and reliance on a motor vehicle

Patterns on the identity of alleged perpetrators

Patterns may emerge indicating that killings are most likely to be committed by:

- specific branches or agencies of the security forces
- individuals
- alleged perpetrators of similar rank
- armed groups
- state-supported vigilante groups

In the majority of cases, you will not be able to fully prove their identity, but some of the elements related to the killings may indicate that the majority of them are committed by a specific security branch, an armed group, etc.

Such elements may include: the type of arms used, the location of the killings, the identity of the victims, etc. The perpetrators' freedom of movement at a time of curfew or roadblocks will tend to indicate that they are very well informed and that they may have allies within the security or military forces.

Patterns in governmental responses to alleged cases

A pattern may also emerge over time in terms of the responses of the government to accusations of political killings. Such a pattern may be characterised by:

- public statements following the killings
- the absence of or nature of the investigations (for instance, investigations falling short of being independent and impartial)
- the absence of or nature of prosecutions
- the identity of the courts responsible for the trials
- the absence of or nature of the verdict

Patterns in the responses of armed groups to accusations of political killings

A pattern may also emerge over time in terms of the responses of the leadership of an armed group to accusations

of political killings. Such a pattern may characterise:

- nature of public statements issued following the killings
- denials
- justification for the killings

III. How to conduct fact-finding

Fact-finding consists of investigating a specific incident or allegation of human rights violations, collecting or finding a set of facts that proves or disproves that the incident occurred and how it occurred, and verifying allegations or rumours.

Four main questions should guide your investigation of the alleged political killing:

- What kind of evidence do I need in order to assert that a political killing took place?
- Is it safe to go to the scene?
- Who is more likely to give me access to the evidence?
- How can I assess the reliability of my data?

1. List facts and evidence

a. List everything you know about the case and political killings

- Be knowledgeable about the law and standards related to killings. Find out exactly what is prohibited under domestic laws and international human rights standards.
- Be knowledgeable about the patterns related to political killings

b. Seek expert advice

- Get all necessary information or expert advice, e.g. consult with forensic pathologists, lawyers, etc.

c. Prepare your interview format

- Write down a check list of the data and facts necessary to assess the allegations.

- Show the check list to local contacts who have worked on the issue or have dealt with similar cases to get their input: they will often be able to add questions, delete others that are not appropriate, etc.

- Please refer to Part Four (Suggestions for Interviews) of the Booklet on "Monitoring and Documenting Human Rights Violations in Africa"

d. Identify the evidence you need to demonstrate the responsibility of the state or of armed opposition groups:

- When the presence and involvement of the security forces leaves no doubt (as in the case of demonstrations, riots, arrest, etc.), the primary issue guiding the investigation is whether the killing is unlawful and deliberate.

- In some circumstances, the involvement of security officials, and therefore their responsibility and that of the government, will be very difficult to ascertain: the government may deny any involvement, the killings may have been perpetrated by individuals in civilian clothes; etc.

- Similarly, in the case of killings possibly perpetrated by opposition groups, the leadership of these groups may deny all responsibility, and, again, the circumstances of the killings may make it difficult to establish that this group is responsible for the killing.

- It is often not possible to establish with certainty whether any particular killings were committed at the order of the state or of an armed group.
  - ⩾ Your knowledge of the methods of operation of security forces and/or opposition groups and the identification of patterns are crucial in terms of directing your investigation on the scene and developing hypotheses regarding the responsibility of the government or of an opposition group.

➢ Furthermore, as far as government responsibilities are concerned, if no full and impartial investigations have been conducted, and if impunity is allowed to prevail, this can be taken as a strong indicator that the government condones such killings, whatever its public statements may be.

2. Before going (or not) to the scene

Carry out a thorough risk assessment

If you decide to go to the scene of an alleged political killing, you need to assess all the risks involved for you, your colleagues, and the people you will talk to.

- List all possible security concerns (e.g. your own physical security and the security of your contacts) and develop contingency plans to deal with each one of them (e.g. evacuation: how?). If access to, and your presence at, the scene of the killings carries many dangers, identify alternative means of carrying out the research (e.g. rely on a confidential local contact to bring possible witnesses outside the area).

- Possibly go on a reconnaissance mission where you can find out: the structures of authority in the area, the number of check-points you will have to go through, whether or not you need to disguise yourself, people's reactions and feelings, etc.

- Be ready: prepare responses regarding the reasons for your visit and what you are doing in case people ask you difficult questions or appear suspicious.

- If necessary, seek official written authorisation to go to the scene.

Composition of the delegation

- **Be strategic:** The investigative team should not be constituted of individuals who may be perceived as

partial by the informants because of their ethnicity, religion, known political affiliation, etc. As far as it is possible, identify team members who not only *are* impartial but who will also be *perceived* as impartial by the informants.

- **Experienced delegation:** An organisation's credibility is at stake, hence the need to send trained and credible researchers who can establish trust with informants

- **Experts:** Identify what expertise will be most needed during the investigation: you may need forensic pathologists, a ballistic expert, a lawyer, etc. If possible, you should include such an expert in your delegation. If it is not possible, you should meet with experts before going fact-finding.

- **Gender-balanced delegation:** The delegation should include a woman who will be able to interview other women.

- **Ethnicity, language, etc.** As far as possible, you should also seek to get delegates representative of different ethnic groups, language groups, etc. If you have little resources and few delegates, identify the one who will be best equipped to deal with the ethnic, language or other important factor.

3. Identify and interview sources of information

You may recall Thabo Motlamelle's visits in the course of his investigation.

He went to:

- the hospital
- the police station
- the offices of the construction company that employed the striking workers
- the sanctuary where striking workers had found refuge;
- the mortuary.

He interviewed:

- hospital workers;
- policemen to get their side of the story;
- the director of the company that employed the workers to get his side of the story;
- an eye-witness: a wounded worker in the hospital;
- eye-witnesses: striking workers in the church sanctuary;
- eye-witnesses: workers in the mortuary

In the majority of unlawful killings, these places and individuals will be crucial to your research. You will need to go to the hospital, to the police station, to the location where the killings took place, to the location where you are likely to find eye-witnesses (in the case of Motlamelle, the church where workers had found refuge), and to the mortuary. You will also need to go to the courts, in case the killings have been officially recorded or some family members have filed a complaint.

You will also need to interview hospital workers because they are likely to have seen the wounded or killed, mortuary workers because they are likely to see the corpses of the victims, eye-witnesses and survivors, as well as interview the police themselves and other officials involved, directly or indirectly, in the killings or the cover-up.

During your investigation and interviewing, you ought to be politically aware

- Rely on local knowledge; read the overall mood; be on your guard and do not hesitate to leave the scene whenever you feel that something is wrong.
- Be observant of your surroundings.
- Be prepared to respond to requests or questions regarding your presence and activities.
- Seek all necessary permissions.

A generic list of possible sources of information (individuals and/or groups)

- Eye witnesses
- Other witnesses
- Relatives
- Community leaders
- Lawyers
- Journalists
- Medical personnel
- Prosecutors
- Local human rights activists
- Members of religious institutions
- Members of political parties, civil rights groups, trade unions; ethnic groups, etc.
- Members and officials of the police force
- Other police/judicial representatives
- Members and officials of the army
- Members and officials of armed opposition groups

Possible material evidence

- Hospital and/or autopsy records
- Court records
- Police reports
- Arms left behind, bullet shells
- Documents left behind by the deceased
- Videos, pictures, etc.
- Official statements

IV. How to assess information?

1. Reliability of initial source

- Are your initial sources or contacts reliable?

2. Consistency with patterns

- Is the incident reported to you consistent with what you know about the pattern in political killings in the country?

  In many countries, the incidents of political killings will present strong similarities from which patterns can be extracted.

- Compare the case under investigation with what you know about patterns in political killings.

3. Consistency of medical evidence

- Whenever possible, you should get the assistance of medical experts and forward them all medical evidence.

- Some of the key questions concern the autopsy, if it has been performed (see p. 36).

4. Reliability of the testimonies

- Do the witnesses' testimonies appear reliable and consistent with each others?

- In assessing the testimonies, keep in mind the points developed in the guidelines Monitoring and Documenting and Documenting Human Rights Violations in Africa.

Pay special attention to:

- The witnesses' account of the circumstances, location, procedures, individuals involved, etc. Are they consistent with what others who witnessed similar

events at the same time and place say; or with the patterns in political killings?

- ⩾ The witnesses' account of the sequence and timing of the events
- ⩾ Consistency of the testimony: Whether the testimony concurs with others as well as with any previous pattern of political killings in the country/ region? Do the witnesses contradict each others when asked the same or similar questions?
- ⩾ Inconsistencies of the testimonies: Are they the result of the witnesses' dishonesty or of faults in memory, exaggerations, unsubstantiated rumours,

5. Assessing the responsibility of the government or of the armed group

The following questions should assist you in assessing the responsibility of the government or the armed group.

a. The context: Does it indicate increased targeting of specific individuals or groups by the government or opposition groups?

Answers to these questions may be located in:

- Statements made by governments or opposition groups officials, media reports;
- New laws or decrees or police measures suggesting that specific individuals or activities are prohibited;
- Declaration of a state of emergency;
- Previous attacks and/or killings of specific individuals;
- Targeting of members of certain social or political groups, or people in a particular geographical area, etc.

b. The victim(s): Is there anything about the victims that suggests government forces or armed groups may have killed them?

- Is there any apparent motive for the killing? Had these individuals been previously threatened or targeted? By whom?

- Had the victims been subject to regular short-term detention or questioning by police or military forces? Were they killed shortly after a visit to a police station or army camp?

c. The circumstances: Do they suggest the involvement of security forces or of members of opposition groups?

- Were security or military officials seen around the location of the killings? Where? When?

- Were "strangers" seen around the scene? What were their characteristics (motor vehicles, clothes, etc.)?

- Did the perpetrators operate with apparent impunity – for example, by travelling during curfews or driving vehicles through check-points without difficulty?

- Was the area where the bodies were located under the surveillance or control, even if informal, of security forces or armed groups?

- Had victims been detained, "disappeared" for a period and finally been found dead? Had there been any acknowledgement of detention, even if informal?

d. The method: Does it suggest the involvement of specific security forces or opposition groups?

- What was the cause of death? Had this method been used before by a particular branch of security forces or opposition groups?

- Was the victim tortured before being killed? Were the methods of torture those ordinarily used by the security services or opposition groups?

- What was the position of the body?

- Were the victims killed where the bodies were found or were the bodies transported considerable distances before being "displayed"?

e. Autopsy: did it follow international principles?

- Was an autopsy performed? Did the autopsy follow national and international protocols?

- What were the results of the autopsy? What conclusions were drawn?

- Could the family get private forensic examinations carried out? Does the private forensic evidence contradict the official account of the deaths and official forensic results?

f. Responses of the authorities: Do they suggest that they condone the killing?

- Were families able to recover bodies of victims without any obstacle?

- Did public officials try to "justify" the killings in any way, or vilify the victims after their death?

- Was an investigation conducted? Did it follow international principles? Were the findings made public?

- Were any alleged perpetrators brought to justice? How was the trial conducted? Was anyone condemned? Was anyone condemned but then released?

- Were the civilian judges or prosecutors who pursued the investigation threatened, intimidated or killed?

g. Responses of the armed opposition group: Do they suggest that it condones the killings?

- Did the leadership of the opposition group try to "justify" the killings in any way, or vilify the victims after their death?

- Did it claim responsibility for the killings? Did it deny any responsibility for the killings?

- Did it agree to carry out an internal investigation?

Annexe One: Definitions of Key Terms

The United Nations Special rapporteur on Summary or Arbitrary Executions and the United Nations High Commission on Human Rights refer to **political killings** as: "extralegal, summary and arbitrary executions".

Summary executions are those which take place after some sort of judicial or legal proceedings which fall short of international minimum procedural or substantive standards.

Arbitrary executions consist in the arbitrary deprivation of life as the result of the killing of person carried out by order of the government or with its complicity or tolerance or acquiescence without any judicial or legal process.

Annexe Two: International and Regional Standards

Since the 1948 adoption of the Universal Declaration of Human Rights by the United Nations General Assembly, a number of international and regional standards have been adopted which have given a legal character to the specific rights enshrined in the declaration. These standards take the form of declarations, treaties, protocols and other instruments. Many of these standards are legally binding on the states which have ratified them. In other words, states which have ratified them are legally bound by their provisions.[3]

The following standards and articles specifically relate to political killings. They provide a very important legal framework which allows the human rights monitor to demonstrate and assert that fundamental human rights have been violated.

International human rights standards

1948 Universal Declaration of Human Rights, Art. 3 "everyone has the right to life, liberty and security of persons"

1966 International Covenant on Civil and Political Rights, Art. 6 (1) "no one shall be arbitrarily deprived of his/her life". Art.4 states that no derogation from art.6 is possible even in an emergency.

1989 Economic and Social Council, in its Resolution 1989/65 adopted the "Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions".

1978 UN Code of Conduct for Law Enforcement Officials, Art. 3:

- Force should be used "only when strictly necessary". The official Commentary included in the Code says that the use of force should be exceptional, that force should be used only "as is reasonably necessary under the circumstances" and that it should be used for only two purposes: "the prevention of crime" and "effecting or assisting in the

3 Amnesty International, *Handbook*. London: Amnesty International Publications, 1992.

lawful arrest of offenders or suspected offenders".

- The force used should be proportional to the objectives (it should be used only "to the extent required" for the performance of law enforcement officials' duty). The Commentary acknowledges the "principle of proportionality" laid down in national laws and says that the Code should not be taken to authorize the use of force which is "disproportionate to the legitimate objective to be achieved."

1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials:

The use of firearms is restricted to a series of situations involving "the imminent threat of death or serious injury" or "grave threats to life", and "only when less extreme means are insufficient" to achieve the objectives specified. Furthermore, the "intentional lethal use of firearms" is to be made only "when strictly unavoidable in order to protect life". The phrase "strictly unavoidable" implies that lesser means should be used first and that firearms should not be used before lesser means have proved insufficient to protect life.[4]

International humanitarian law standards

1949 Geneva Conventions, Common article 3: this is an article which is common to all four conventions, which extends to conflicts not of an international nature, and applies to all parties to such conflicts including armed opposition groups:

- "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (i) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse

4 Amnesty International, *Disappearances and Political Killings*, Amsterdam, 1994, p. 101

distinction founded on race, colour, religion or faith, sex, birth, or wealth, or any other criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . .

Regional standards: African charter on human and peoples' rights

According to **Article 4**, "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".

According to **Article 5**, "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

According to **Article 7**

1 Every individual shall have the right to have his cause heard. This comprises: a)-The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; b)-the right to be presumed innocent until proved guilty by a competent court or tribunal; c)-the right to defence, including the right to be defended by counsel of his choice; d)-the right to be tried within a reasonable time by an impartial court or tribunal.

2 No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

According to **Article 8**, "freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms".

According to **Article 10**

1 Every individual shall have the right to free association provided that he abides by the law.

2 Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

According to **Article 11**, "Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others".

National criminal laws

National criminal laws universally prohibit murder. Both extrajudicial executions by governments and deliberate and arbitrary killings by opposition groups violate such laws.

Recommendation: Identify the national laws in your country relevant to political killings and add these to this Handbook.

Annexe Three: Suggestions for Action and Recommendations

The following are some suggestions regarding action to be taken following your investigation of political killings cases:

- Send your report to the relevant authorities within the government or the armed group and ask for their comments and action to be taken
- Push for independent and impartial investigation and prosecution
- Pursue the case until it gets to court and judgement
- Use public media: radio and newspapers
- Conduct international lobbying
- Sensitise the international community
- Lobby the government for increased and enforced discipline and training of security forces

Annexe Four: Amnesty International 14-point programme for the prevention of political killings (extrajudicial executions) by state officials

1. Official condemnation
The highest authorities of every country should demonstrate their total opposition to extrajudicial executions. They should make clear to all members of the police, military and other security forces that extrajudicial executions will not be tolerated under any circumstances.

2. Chain-of-command control
Those in charge of the security forces should maintain strict chain-of-command control to ensure that officers under their command do not commit extrajudicial executions. Officials with chain-of-command responsibility who order or tolerate extrajudicial executions by those under their command should be held criminally responsible for these acts.

3. Restraints on use of force
Governments should ensure that law enforcement officials use force only when strictly necessary and only to the minimum extent required under the circumstances. Lethal force should not be used except when strictly unavoidable in order to protect life.

4. Action against "death squads"
"Death squads", private armies, criminal gangs and para-military forces operating outside the chain of command but with official support or acquiescence should be prohibited and disbanded. Members of such groups who have perpetrated extrajudicial executions should be brought to justice.

5. Protection against death threats
Governments should ensure that anyone in danger of extra-judicial execution, including those who receive death threats, is effectively protected.

6. No secret detention
Governments should ensure that prisoners are held only in publicly recognized places of detention and that accurate information about the arrest and detention of any prisoner is made available promptly to relatives, lawyers and the courts. No one should be secretly detained.

7. Access to prisoners
All prisoners should be brought before a judicial authority without delay after being taken into custody. Relatives, lawyers and doctors should have prompt and regular access to them. There should be regular, independent, unannounced and unrestricted visits of inspection to all places of detention.

8. Prohibition in law
Governments should ensure that the commission of an extrajudicial execution is a criminal offence, punishable by sanctions commensurate with the gravity of the practice. The prohibition of extrajudicial executions and the essential safeguards for their prevention must not be suspended under any circumstances, including states of war or other public emergency.

9. Individual responsibility
The prohibition of extrajudicial executions should be reflected in the training of all officials involved in the arrest and custody of prisoners and all officials authorized to use lethal force, and in the instructions issued to them. These officials should be instructed that they have the right and duty to refuse to obey any order to participate in an extrajudicial execution. An order from a superior officer or a public authority must never be invoked as a justification for taking part in an extrajudicial execution.

10. Investigation
Governments should ensure that all complaints and reports of extrajudicial executions are investigated promptly, impartially and effectively by a body which is independent of those allegedly responsible and has the necessary powers and resources to carry out the investigation. The methods and findings of the investigation should be made public. The body

of the alleged victim should not be disposed of until an adequate autopsy has been conducted by a suitably qualified doctor who is able to function impartially. Officials suspected of responsibility for extrajudicial executions should be suspended from active duty during the investigation. Relatives of the victim should have access to information relevant to the investigation, should be entitled to appoint their own doctor to carry out or be present at an autopsy, and should be entitled to present evidence. Complainants, witnesses, lawyers, judges and others involved in the investigation should be protected from intimidation and reprisals.

11. Prosecution

Governments should ensure that those responsible for extrajudicial executions are brought to justice. This principle should apply wherever such people happen to be, wherever the crime was committed, whatever the nationality of the perpetrators or victims and no matter how much time has elapsed since the commission of the crime. Trials should be in the civilian courts. The perpetrators should not be allowed to benefit from any legal measures exempting them from criminal prosecution or conviction.

12. Compensation

Dependants of victims of extrajudicial execution should be entitled to obtain fair and adequate redress from the state, including financial compensation.

13. Ratification of human rights treaties and implementation of international standards

All governments should ratify international treaties containing safeguards and remedies against extrajudicial executions, including the International Covenant on Civil and Political Rights and its first Optional Protocol which provides for individual complaints. Governments should ensure full implementation of the relevant provisions of these and other international instruments, including the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, and comply with the recommendations of intergovernmental organizations concerning these abuses.

14. International responsibility

Governments should use all available channels to intercede with the governments of countries where extrajudicial executions have been reported. They should ensure that transfers of equipment, know-how and training for military, security or police use do not facilitate extrajudicial executions. No one should be forcibly returned to a country where he or she risks becoming a victim of extrajudicial execution.

Annexe Five: United Nations principles on the effective prevention and investigation of extra-legal, summary or arbitrary executions

Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989[5]

Prevention

1. Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions.

Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority.

2. In order to prevent extra-legal, arbitrary and summary executions, Governments shall ensure strict control, including a clear chain of command over all officials responsible for apprehension, arrest, detention, custody and imprisonment, as well as those officials authorized by law to use force and firearms.

3. Governments shall prohibit orders from superior officers or public authorities authorizing or inciting other persons to carry out any such extralegal, arbitrary or summary executions. All persons shall have the right and the duty to defy such orders. Training of law enforcement officials shall emphasize the above provisions.

4. Effective protection through judicial or other means shall be guaranteed to individuals and groups who are in danger

5 In resolution 1989/65, paragraph 1, the Economic and Social Council recommended that the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions should be taken into account and respected by Governments within the framework of their national legislation and practices.

of extra-legal, arbitrary or summary executions, including those who receive death threats.

5. No one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country.

6. Governments shall ensure that persons deprived of their liberty are held in officially recognized places of custody, and that accurate information on their custody and whereabouts, including transfers, is made promptly available to their relatives and lawyer or other persons of confidence.

7. Qualified inspectors, including medical personnel, or an equivalent independent authority, shall conduct inspections in places of custody on a regular basis, and be empowered to undertake unannounced inspections on their own initiative, with full guarantees of independence in the exercise of this function. The inspectors shall have unrestricted access to all persons in such places of custody, as well as to all their records.

8. Governments shall make every effort to prevent extra-legal, arbitrary and summary executions through measures such as diplomatic intercession, improved access of complainants to intergovernmental and judicial bodies, and public denunciation. Intergovernmental mechanisms shall be used to investigate reports of any such executions and to take effective action against such practices.

Governments, including those of countries where extra-legal, arbitrary and summary executions are reasonably suspected to occur, shall co-operate fully in international investigations on the subject.

Investigation

9. There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the

cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.

10. The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify. The same shall apply to any witness. To this end, they shall be entitled to issue summonses to witnesses, including the officials allegedly involved and to demand the production of evidence.

11. In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.

12. The body of the deceased person shall not be disposed of until an adequate autopsy is conducted by a physician, who shall, if possible, be an expert in forensic pathology. Those conducting the autopsy shall have the right of access to all investigative data, to the place where the body was discovered, and to the place where the death is thought to have occurred. If the body has been buried and it later appears that an

investigation is required, the body shall be promptly and competently exhumed for an autopsy. If skeletal remains are discovered, they should be carefully exhumed and studied according to systematic anthropological techniques.

13. The body of the deceased shall be available to those conducting the autopsy for a sufficient amount of time to enable a thorough investigation to be carried out. The autopsy shall, at a minimum, attempt to establish the identity of the deceased and the cause and manner of death. The time and place of death shall also be determined to the extent possible. Detailed colour photographs of the deceased shall be included in the autopsy report in order to document and support the findings of the investigation. The autopsy report must describe any and all injuries to the deceased including any evidence of torture.

14. In order to ensure objective results, those conducting the autopsy must be able to function impartially and independently of any potentially implicated persons or organizations or entities.

15. Complainants, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation. Those potentially implicated in extra-legal, arbitrary or summary executions shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as over those conducting investigations.

16. Families of the deceased and their legal representatives shall be informed of, and have access to. any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence. The family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy. When the identity of a deceased person has been determined, a notification of death shall be posted, and the family or relatives of the deceased shall be informed immediately. The body of the deceased shall be returned to them upon completion of the investigation.

17. A written report shall be made within a reasonable period of time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. The report shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection. The Government shall, within a reasonable period of time, either reply to the report of the investigation, or indicate the steps to be taken in response to it.

Legal proceedings

18. Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or co-operate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.

19. Without prejudice to principle 3 above, an order from a superior officer or a public authority may not be invoked as a justification for extra-legal, arbitrary or summary executions. Superiors, officers or other public officials may be held responsible for acts committed by officials under their authority if they had a reasonable opportunity to prevent such acts. In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.

20. The families and dependents of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable period of time.

The Publishers

Amnesty International (AI) is a worldwide voluntary activist movement working towards the observance of all human rights as enshrined in the Universal Declaration of Human Rights and other international standards. It promotes respect for human rights, which it considers interdependent and indivisible, through campaigning and public awareness activities, as well as through human rights education and pushing for ratification and implementation of human rights treaties. Amnesty International takes action against violations by governments of people's civil and political rights. It is independent of any government, political persuasion or religious creed. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect. It is concerned solely with the impartial protection of human rights.

Amnesty International Dutch Section Special Programme on Africa (SPA) was established in 1994. Initially, SPA developed a programme to assist Amnesty Sections worldwide to improve the effectiveness of their campaigning against human rights violations in Africa. Since 1996 SPA has moved towards providing support to the broader Human Rights Movement in Africa. Rather than funding projects, SPA is developing and co-ordinating long term projects for and and in cooperation with other human rights organisations and AI sections. In addition to copublishing *Ukweli,* SPA is also coordinating advocacy and training workshops in southern and West Africa, a project on policing and Human Rights, and a pilot project to raise human rights awareness in rural areas in Liberia.

CODESRIA is the Council for the Development of Social Science Research in Africa head-quartered in Dakar, Senegal. It is an independent organisation whose principal objectives are facilitating research, promoting research-based publishing and creating multiple forums geared towards the exchange of views and information among African researchers. It challenges the fragmentation of research through the creation of thematic research networks that cut across linguistic and regional boundaries.

CODESRIA publishes a quarterly journal, *Africa Development*, the longest standing Africa-based social science journal; *Afrika Zamani*, a journal of history; the *African Sociological Review*, and the *African Journal of International Affairs (AJIA)*. Research results and other activities of the institution are disseminated through 'Working Papers', 'Monograph Series', 'New Path Series', 'State-of-the-Literature Series', 'CODESRIA Book Series', the *CODESRIA Bulletin*, *KIBARU* and *CIVIC AGENDA*.

Monitoring and Investigating Sexual Violence

Amnesty International and CODESRIA

Amnesty International

Council for the Development of Social Science Research in Africa

Amnesty International Dutch Section, Keizersgracht 620, PO Box 1968,1000 BZ Amsterdam, The Netherlands

Council for the Development of Social Science Research in Africa
Avenue Cheikh Anta Diop Angle Canal IV, BP 3304 Dakar, Senegal

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Fax: 44-01865-793298 Email: abc@dial.pipex.com
web site: www.africanbookscollective.com

Contents

I. When is sexual violence a crime under international human rights law?

1. What is sexual violence?

Sexual violence includes many different types of acts, such as:

- rape
- indecent assault (e.g. touching a woman's breast)
- sexual slavery
- forced marriage
- forced impregnation and forced maternity
- sexual mutilation

All acts of sexual violence constitute crimes of violence, aggression and domination. Sex is used as the means of exercising power over the victim. The goal for the offender is gaining control, degrading, and humiliating the victims. This booklet will focus principally on acts of sexual violence against women and girls because the majority of the victims tend to be women and children. However, it is important to underline that men are also the victims of sexual violence, although such acts remain yet under-reported and under-investigated.

Acts of sexual violence are prohibited under both international human rights law and humanitarian law.

Sexual violence can be an element of almost all major crimes prohibited by international human rights law, international humanitarian law, and domestic law.

- Sexual violence may have many different names, depending on the circumstances and on the form of the violence. It may be referred to as torture, cruel, inhuman or degrading punishment, rape, etc.

- Sexual violence can constitute torture or cruel treatment. Sexual violence may also constitute an element of a crime against humanity or of genocide. During an armed conflict, it may be considered as a war crime, a violation of the laws and customs of war or a grave breach of the Geneva Conventions.

- Many acts of sexual violence – in the first place rape, sexual slavery or forced marriage – may constitute torture if they fulfil the international definition of torture. Lesser violent acts may be cruel, inhuman or degrading treatment.

2. Definitions

There is no international legal definition of what constitutes sexual violence: each national jurisdiction has developed its own definition of different forms of sexual violence within the criminal law system.

- It is therefore very important that you make yourselves familiar with the domestic legal definitions of sexual violence, such as rape, as well as with their possible shortcomings.

Possible definitions of some acts constituting sexual violence are as follows:

- **Rape** consists in the forced or non-consensual penetration of the human body with the penis, or with an object, such as a truncheon, stick or bottle.

- **Sexual slavery** consists in women and girl children being held against their will and owned by one or several persons in order to provide sexual services to their owner or owners, as well as, quite often, other forms of domestic services. Sexual slavery of women and girl children may be preceded by their forced marriage to their owners. The ownership of sexual slaves includes the power to kill them. Sexual slavery may be especially prevalent in armed conflict situations.

- **Forced (or servile) marriage** refers to:
  - a woman or girl child being given in marriage, without the right to refuse, by her parents, guardians, the community, etc.

- ⩾ or the husband of a woman, his family, or his clan, transferring her to another person;
- ⩾ or a widow who, on the death of her husband, is inherited by another person

- **Forced pregnancy** refers to all acts of sexual violence whose objective is to impregnate women.

Women may be the victims of sexual violence for several reasons: because they are women, as a result of their activities or beliefs, their family relationships, etc.

- Women may be the victims of sexual violence perpetrated by officials of the state or armed groups because of their activities and political beliefs, such as their being community leaders, human rights or women's rights activists, etc.

- State or armed groups may be targeting women as a means of pressurising family members and stigmatising them. Often enough, women are targeted because they are women (i.e. male relatives may not be targeted or not in the same manner) but also because it is suspected that they are somehow involved in the activities of their relatives. There is a deliberate attempt on the part of armed opposition groups or the government to use the women in order to intimidate, get confessions, and humiliate *both* the activists and the women themselves.

- Women may also be targeted because they are women. They may be attacked by members of the state or armed groups, but also by members of their family or the community. Within the family and the community, sexual violence may take the form of domestic violence, female genital mutilation, female infanticide, rape, etc.

- Women may be the victims of sexual violence in the context of their imprisonment. Sexual violence may be perpetrated by prison officials, or by fellow male inmates.

3. What is torture or cruel, inhuman or degrading treatment or punishment?[1]

The Convention Against Torture (CAT) defines torture as follows:

- an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person
- for such purposes as:
  - (i) obtaining from that person or a third person information or a confession,
  - (ii) punishing that person for an act he/she or a third person has committed or is suspected of having committed,
  - (iii) intimidating or coercing that person or a third person,
  - (iv) for any reason based on discrimination of any kind,
- inflicted by or at the instigation of or with the consent or acquiescence of the authorities.

Cruel, inhuman or degrading (hereafter CID) treatment or punishment is a "lesser" form or act of torture. Please refer to the booklet *Monitoring and Investigating Torture, Cruel, Inhuman or Degrading Treatment and Prison Conditions*.

Torture and other CID treatment or punishment includes beatings, imposition of electric shocks, hanging by the arms or legs, strip-searches, punishments that are nor provided for in law, the denial of food, the denial of medical treatment, etc. Torture and other cruel treatment also includes rape, sexual assault, or the threat of rape or sexual assault, sexual slavery, forced marriage, etc.

The international definition of an act of torture comprises three main elements:

- It constitutes **acute suffering**, and
- it is **inflicted for a purpose** (i.e. not by accident),

1 Please see the booklet Monitoring and Documenting Torture and Cruel, Inhuman or Degrading Treatment or Punishment."

such as obtaining information or a confession, punishing, intimidating, coercing, or for any reason based on discrimination of any kind, and

- it is **inflicted by a public official** or other person acting in an official capacity, or on his/her instigation or with his/her consent or acquiescence.

Notice that Article 7 of the the International Covenant of Civil and Political Rights differs from the CAT definition in that, according to the ICCPR, torture can be inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.

Acts of sexual violence by government agents are a common method of torture inflicted on women. It is both a physical violation and injury, and an assault on a woman's mental and emotional well-being.

Sexual violence is considered as torture to the extent that it fulfils these three criteria defining torture.

Many acts of sexual violence meet the first two criteria in virtually every respect:

- They cause severe physical and mental suffering
- They are always committed for a purpose, such as humiliating, intimidating, degrading, obtaining information, or, in many cases, for reasons based on discrimination, etc.

However, not all cases of sexual violence necessarily constitute torture. The key limiting factor in determining when sexual violence may be defined as torture is the identity of the perpetrator, or, more precisely, the relationship between the perpetrator and the state.

4. When does sexual violence constitute torture?

- The victims of acts of sexual violence are always in some sense "detained or restricted", even where they may not formally be prisoners. As a result, detention should be understood as including:
  - ⩾ prisons, military centres, or other official buildings of security agencies,
  - ⩾ unofficial or secret detention centres,
  - ⩾ any other locations, such as the victim's home, a village, a street, etc.

- Acts of sexual violence (such as rape, or the threat of rape) against detainees by prison, security or military officials *always* amounts to torture.

  In other words, sexual violence committed by a security, military or police official should, not be seen as a "personal" or private act.

  The overall trend, at both a national and international level, is to consider rape by officials as always constituting torture.

- Other forms of sexual violence by law enforcement officials may either constitute torture or cruel, inhuman or degrading treatment.

- Some acts of sexual violence against women detainees, such as rape, may also constitute torture when such acts are perpetrated by male inmates because of the failure of the public officials to separate male and female inmates.

  International human rights law requires that prisoners be separated, according to their sex, age, criminal record and other considerations. If prison officials do not abide by this rule, and if women inmates are the victims of rape or other forms of sexual violence, human rights workers may argue that rape has been committed with the consent of public officials, and therefore that it constitutes torture.

- Some acts of sexual violence against child detainees, such as rape, may also constitute torture when such acts are perpetrated by male inmates because of the failure of the public officials to separate child and adult inmates.

- Some acts of sexual violence against male detainees, such as rape, may also constitute torture when such acts are perpetrated by fellow male inmates with the complicity, consent or acquiescence of detention officials.

5. What about sexual violence committed by armed groups?

It will be recalled that, in international human rights law, sexual violence constitute an act of torture or CID treatment only when it is committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting officially.

But armed groups can also be held responsible for sexual violence committed by their forces, in the same way that they are held accountable for any unlawful act, such as beatings, mutilations, abductions and killings of civilians.

- Some non-governmental organisations, such as Amnesty International, apply the definition of torture to acts committed by members of armed groups.

- Under a conflict situation, all armed groups are required to abide by the Geneva Conventions (as they are applied to internal conflicts) which define the laws and customs of war. The laws of war prohibit all parties to the conflict from perpetrating torture or indecent assault against women.

- Armed groups are therefore always responsible for any acts of sexual violence committed by their forces, be they rape, sexual assaults, forced marriage, sexual slavery, forced pregnancy, etc.

  Many such acts of violence committed by the members of armed groups will always constitute torture or CID treatment.

Such acts may take place in detention centres created by the armed groups, but also at other locations, such as the victim's home, the village, the field, a road, etc.

- Perpetrators may also be held accountable under domestic law as it relates to torture and/or rape or sexual violence.

6. Is the state responsible for sexual violence committed by private actors?

Newspapers are full of stories of women and children being raped or beaten by strangers or by people they know.

- Is the state also responsible for acts of sexual violence committed by individuals who are not state officials?

- The response is "yes" under certain conditions

  - Every act of sexual violence by a private actor may not be one for which you can hold the state accountable.
  - But, under international law, the state may be held accountable for its failure to provide protection for abuses against all persons. If patterns of inaction or discrimination on the part of the state authorities can be shown, then the state can be held to task.

1. The authorities can be held responsible for the climate which made it possible for rape or other forms of sexual violence to be committed.

- **State incitement to violence:** This particularly applies to situations where state officials incite private citizens to commit acts of violence, including rape and other forms of sexual violence, against other citizens.

  Example: State officials may incite citizens of a certain ethnic group to commit violence against citizens from another ethnic group, specifically inciting them to rape.

Example: State officials may incite citizens to attack all women who are not dressed in a certain way, i.e. women who wear trousers, or who are not veiled.

2. States can be held responsible for acts of sexual violence committed by private individuals if they fail to prevent them or to protect the victims.

An illegal act that violates human rights and is perpetrated by a private person can lead to international responsibility of the state, not because of the act itself, but because of the lack of measures to prevent the violation or respond to it.

States are under an obligation to protect all persons against human rights violations (including rape or other forms of sexual violence). This obligation applies whether these acts are inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. Such an obligation is also referred to as the obligation to act with due diligence.

- Please note that in many cases, the reasons for the inaction of the government may be not only the female gender of the victims, but also other factors linked to the identity of the victims, such as race, ethnicity, religion, membership of a specific tribe, occupation (such as prostitution and domestic work), etc. You may therefore need to document not only the failure of the government to protect women but also the failure of the government to protect women who are facing other kinds of discrimination and hardship because they are members of specific groups (be they ethnic, racial, religious, class, work, etc.)

Examples of state failure to protect (concept of due diligence):

- **Failure to enact necessary laws**: the failure of the state to enact laws to name and criminalise certain abuses may underline its passivity, inaction or unwillingness to protect women against such abuses. For instance, the failure of the state to legislate against

rape in marriage may show that it considers married women to be their husband's property and that it is unwilling to take basic action to protect them.

- **Failure to intervene:** If law enforcement officials witness any acts of violence against women, including rape, or were informed about the incident by witnesses but refused to intervene, then they have failed to prevent an illegal act from occurring and they have failed to protect a woman. If such situations keep recurring, i.e. if the law enforcement officials almost always refuse to intervene, the human rights investigator may then conclude that (i) there is a pattern of state passivity or inaction, and (ii) the state is failing to protect women against sexual violence. (This is true for rape or sexual violence and for other acts as well: for instance, if the police witness a racist attack but decide not to prevent or punish it, then its responsibility is at stake.)

- **Failure to investigate:** The same conclusion may be reached if law enforcement officials try to convince women victims or other individuals not to file a complaint and if they fail to investigate acts of sexual violence reported to them. If they almost always fail to investigate, the human rights worker may reach the conclusion that there is an official state passivity or inaction *vis-à-vis* rape or other forms of sexual violence: the state is denying that anything wrong happened and, consequently, is failing to protect women against acts of sexual violence.

- **Failure to prosecute:** If and when acts and practices of sexual violence (such as rape but also female genital mutilation, for instance) are never or rarely prosecuted as criminal offences under domestic law, the human rights worker may reach the conclusion that the state itself is abandoning its function of protecting its citizens from any kind of torture.

- **Failure to punish:** Similarly, the quasi-systematic

failure to punish rape or other forms of sexual violence, or inadequate sentencing, demonstrate not only that there are problems with the way rape is investigated and treated in court, but also that there is an official passivity or inaction to remedy the situation. In effect, it means that the state is failing to protect women against sexual violence committed by private individuals.

A number of courts, for instance, have ruled that the state is under an obligation to protect women against rape committed by their husbands, by making rape in marriage a criminal offence.

- **Failure to provide redress:** The failure of the state to provide victims of sexual violence with adequate compensation also underlines an official indifference to the plight of the victims and alck of concren fro their well-being.

7. When do acts of violence committed by private individuals constitute torture?

In some cases, not only do you want to document sexual violence by private actors as falling under the responsibility of the state, but you may also want to demonstrate that such acts of sexual violence perpetrated by private individuals constitute torture for which the state can be held responsible.

Benefits of calling an act torture: such benefits include:

- the responsibility of the state to prosecute the torturer anywhere he or she is found;
- the obligation placed upon the state to take steps to prevent the acts from happening again;
- the obligation of the state to provide compensation to the victim.

Difficulties: On the other hand, referring to an act of sexual violence by private individuals as torture raises many difficulties.

- You may recall that under the CAT definition of torture, an act of violence constitutes torture when it is committed by, or at the instigation of, or with the consent or acquiescence of a public official or other persons acting officially.

- A number of human rights actvists and organisations also held the state responsible for acts of torture committed by private individuals when the state has failed to act with due diligence.

- To prove torture and state responsibility therefore, you need todemonstrate some connection between the perpetrator (a private individual) and the state, such as complicity, acquiescence, or lack of due diligence on the part of the state.

- You should also judge whether calling an abuse torture is a good and effective strategy in terms of combatting the abuse.

II. How to monitor sexual violence

Monitoring is the long-term observation and analysis of the human rights situation in a country or region.

- It consists of collecting **systematically and consistently** information that may be related to human rights violations, from a variety of sources.

- This information, collected over a certain period of time, should allow you to **put the cases under investigation into a political and legal context**, as well as to **identify patterns** in terms of sexual violence. They should also allow you to develop an in-depth knowledge of the security forces and opposition groups, their methods of operations, their chains of command, etc.

- Please refer to the handbook *Monitoring and Documenting Human Rights Violations in Africa*.

Sexual violence is unfortunately a common state of affairs throughout the world, hence the importance of thorough monitoring to assess the extent of the violations and to identify the likely set of events that triggers and characterises such violence.

Three main steps for monitoring cases of sexual violence

- Step 1: **Collect** information on the law, political climate, organisation of the security forces and armed groups.

- Step 2: **Record and follow-up** individual allegations of sexual violence, etc.

- Step 3: **Analyse** information and allegations and identify **patterns**

1. Collect information on the legal, political and cultural context

This type of information is essential in order to understand the nature and extent of sexual violence. It assists the researcher in four ways: (i) assessing evidence; (ii) establishing a pattern of violations; (iii) determining impunity; (iv) when applicable, reminding the government of its obligations under domestic and international law.

a. Legal information

Some of the legal provisions to be specifically researched include:

Provisions regarding torture and ill-treatment: e.g.
- are all forms of torture and ill treatment prohibited by law and/or the constitution?

Provisions regarding rape and sexual assault: e.g.
- What is the legal definition of rape, of sexual assault?
- What type of evidence is required from the victim?
- Are sentences set out in law?
- Are there separate offences for rape and sexual assault?
- Are there laws addressing marital rape, violence against women, sexual harassment?

Provisions regarding forced marriage, female genital mutilations, domestic violence, etc.

Provisions regarding sexual activities, e.g.:
- Is consenting sex between adults prohibited outside marriage?

Possible sources of information

- Media
- The consitution
- Domestic law

Prosecution and trial of alleged rapists, including non-state actors

- Are women likely to report rape, whether or not it occurred in custody? (Social and cultural considerations.)
- How often are rapists brought to justice?
- What is the most likely sentence?

Prosecution and trials of alleged perpetrators of torture

- Are victims likely to report torture?
- How often have alleged torture perpetrators been brought to justice?
- What has been the average sentence?
- Have other forms of "punishment" been used (i.e. moving the alleged perpetrator from one office, city, prison, etc. to another)?

Which international conventions or treaties relevant to women or torture have been ratified? Have they been incorporated into domestic law?

- Has the government ratified the Torture Convention, and the Women's Convention?.
- Does the government report to the Committee Against Torture and to the Committee on the Elimination of Discrimination Against women (CEDAW)?

b. Political framework

Specific issues to be researched include:

- How do officials of government and armed groups define opponents and activities against them?
- How do officials of government and armed groups respond to accusations of torture, including sexual violence?
- How do official speeches and documents define the role of women in the country and society?
- What stereotypes or images regarding women and men inform these discourses?

c. Social or cultural mores

Issues to be especially researched include:

- How is women's virginity or women's sexuality considered?
- Is incest taboo?
- How is violent behaviour within the family considered? Is it commonly accepted for husbands to batter their wives, or fathers their daughters? Are sanctions exercised against men if they do so?
- Is polygamous marriage customary? Is dowry or bride price a customary requirement for marriage?
- Are forced marriages and/or child marriages practised?
- What kind of work or activities are women forbidden to do by custom?
- Which stereotypes inform the representation of women in newspapers, television, etc.?

2. Collect information on the consequences of sexual violence

This type of information is very important in several ways.

- It allows the researcher to better understand the nature of sexual violence and its impact on victims.
- It allows the researcher to refer the victims to medical or legal experts who may be in a better position to help the woman victim. Such experts may be medical personnel specialising in the medical consequences of sexual violence, counsellors, women's NGOs assisting women, lawyers, etc.

a. Medical consequences and remedies

These may include: absence of institutions or professionals working with rape victims; insensitivity of medical personnel; laws forbidding abortion; lack of access to medical check-ups for sexually transmitted diseases, including the HIV virus; etc.

The human rights investigator should seek to collect information relating to the following questions:

- What are the medical consequences for the victim in the context of her country (e.g. high prevalence of sexually transmitted diseases, including HIV virus)?
- Are there any institutions or professionals working with victims of sexual violence?
- Are there any facilities for medical check-ups for STDs or the HIV virus?
- What are the facilities and provisions for reproductive health (including abortion)?

b. Social and economic consequences and remedies

- What are the social and economic consequences (e.g. unable to work because of trauma or pregnancy, ostracism, etc.)?
- What are the consequences in terms of the woman's relationship with, or status within, her family or community?
- What are the consequences for the other members of the family or the community?

c. Legal consequences and remedies

These include: lack of legal literacy and capacity to initiate legal action; community pressures to refrain from reporting or seeking redress for certain abuses; less access than men to economic resources necessary to pursue redress; government failure to prosecute in cases involving sexual violence. When adequate remedies do exist in law, *de facto* discrimination may deter or obstruct women's recourse to these remedies.

- Does the constitution include a guarantee of equality of men and women?
- Are there any laws or administrative or other practices that discriminate against women?
- Do women have the same access, in law and in practice, to legal remedies?
- Are women likely to report acts of sexual violence?
- Are there any legal professionals specialising in sexual violence?

- Are rural and/or poor women likely to find access to such professionals?
- Are police officials specially trained to deal with victims of sexual violence?
- Are police officers likely to discourage women from filing a complaint about rape?
- What kind of training do judicial officials receive?

3. Record and follow up individual cases

By following up individual cases brought to your attention, you should be able to develop a better knowledge about the nature, causes and main perpetrators of acts of sexual violence

- **Record and follow up allegations brought to your attention**

  Such individual cases may be brought to your attention by the victims themselves, their families, witnesses, lawyers, medical personnel, or the media, which often carry stories of sexual violence.

- **Conduct fact-finding whenever necessary or possible, in order to assess allegations;**

- **Develop a filing or database system to access and analyse the information easily**

To facilitate monitoring, it is recommended to develop a form to record individual cases of alleged sexual violence. An example appears on the next page. You need to adapt it to the specific circumstances of your country or region.

Sample form for recording information on sexual violence

1. Victim identification information

Name (Last and first name, nickname): .....

Date of Birth or Age: ..... Gender: .....

Profession/Occupation: ..... Family Status: .....

Address: .....

Nationality: ..... Religion: ..... Ethnicity: .....

Physical description or picture: .....

2. Location of the incident

Date and time of the alleged incident: .....

Precise location (e.g. name of the police station): .....

Province: ..... District ..... City/village (or nearest): .....

Street address, if applicable: .....

3. Description of the incident:

.....

.....

.....

.....

.....

4. Circumstances

Briefly describe the events immediately preceding the incident: .....

.....

.....

.....

5. Alleged perpetrators

.....

.....

.....

6. Evidence

Witnesses: .....

Forensic evidence: .....

Court record: .....

Other: .....

7. Government responses

Was a complaint launched? No ☐ Yes ☐

If yes, where? ..... when? .....

Public statements: .....

Official investigation: .....

Conclusion: .....

Court cases: .....

Judgement: .....

8. Your actions

Identity of first source: .....

Date: .....

Information compiled by: .....

Visit to the scene: No ☐ Yes ☐ by ..... on .....

Interviews of witnesses: No ☐ Yes ☐ by ..... on .....

4. Identify patterns

In many parts of the world, acts of sexual violence present a number of common characteristics also called patterns. You will be able to identify these patterns through the review and analysis of the information collected and allegations brought to your attention. Such patterns may include:

Patterns in the identity of the victims

- Who are the most likely victims of sexual violence?

  The victims of sexual violence may present a number of common characteristics, such as type of political activities, professional activities or occupations, ethnicity, age group, gender, residents of clearly defined areas, religion, etc.

Patterns in the circumstances resulting in the incidents or allegations

- Are incidents of sexual violence usually preceded by a specific set of events? Or do reports of sexual violence increase (or decrease) following specific events?

Patterns in nature of the harm or injury

- Are there prevalent forms of sexual violence?

  A pattern may emerge in terms of the nature of the acts of sexual violence. For instance, the majority of incidents of sexual violence may be rape, gang-rape, defilement, incest, sexual slavery, etc.

Patterns in the location of the incidents of sexual violence

- Where are incidents most prevalent?

  Such locations may include specific regions or cities,

specific police stations or prisons, military facilities, civilian homes, secret detention centres, etc.

Patterns in the identity of alleged perpetrators

- Does a pattern emerge in terms of the identity of the perpetrators?

- If perpetrators are security force agents, who are the principal forces and individual perpetrators within these agencies most often denounced?

Pattern on the methods used by the perpetrators

- Are similar methods used by the perpetrators?

  For instance, many incidents may be preceded by abduction.

- How many individuals are usually involved?

Patterns of incidents in custody

If many cases are reported in the context of detention, such incidents may present a number of common characteristics such as:

- Patterns regarding the circumstances of the arrest, the individuals or agencies involved, the time and location where sexual violence take place, the nature of conditions in detention, etc.

Patterns in government responses to alleged cases

A pattern may emerge over time in terms of the responses of the government to the accusations. Such a pattern may be reflected in an official investigation or lack of one, public statements following sexual violence, the nature of the investigations, the nature of the procedures, the nature of prosecutions, the identity of the courts responsible for the prosecution, the absence or nature of the verdict; etc.

- Are complaints and reports of sexual violence systematically, investigated? Or are victims often unable to file a complaint?

- Are those alleged to have committed sexual violence charged and prosecuted?

Patterns in the response of armed groups to allegations of torture

A pattern may also emerge over time in terms of the responses of the leadership of the armed group to accusations of sexual violence. Such a pattern may be characterised in:

- the nature of public statements issued following the allegations
- blunt denials
- promises of investigation
- justification for the acts of sexual violence
- putting the blame on the government forces

III. How to conduct fact-finding

Fact-finding consists of investigating a specific incident or allegation of human rights violations, collecting or finding a set of facts that proves or disproves that the incident occurred and how it occurred, and verifying allegations or rumours.

Step 1: Gather **material evidence** which will confirm (or not) the allegations

- Ask yourself what kind of evidence you need in order to ascertain that an act of sexual violence took place.

- Ask yourself what kind of evidence you need in order to ascertain that this act of sexual violence constitutes torture or cruel treatment.

  Material evidence may include: medical records, photographs, physical signs or marks, official documents or acknowledgement.

Step 2: Conduct **interviews**

- Ask yourself who is more likely to give you access to this evidence.

  Individuals to be interviewed may include victims, family members, eye-witnesses or other witnesses, security officials, local officials, etc.

Step 3: Assess the information and evidence

Having gathered material evidence and interviewed the victims or witnesses, you will need to **assess** the information and evidence provided in order to determine the nature of the crime of sexual violence committed and establish responsibilities.

1. Preparing for the investigation: Get the facts

List everything you know about sexual violence

- Be knowledgeable about the law and standards related to sexual violence. Find out exactly what is prohibited under domestic laws and international human rights standards.

- Be knowledgeable about the law related to torture or CID; find out exactly what is prohibited under domestic laws and international human rights standards; seek information from experts.

- Be knowledgeable about the patterns related to torture or CID treatment in your country.

- Be familiar with the possible stigma attached to sexuality and sexual violence in the area, as well as the various phases of trauma that victims of sexual violence may go through.

- Find out about local or national structures (NGOs, hospitals, lawyers, etc.) that may provide assistance to victims of torture, including rape.

  This knowledge and information may help you in breaking barriers, understanding covert messages (women survivors' reluctance to talk about it; sense of guilt; verbalisation of what happened, mental health and recovery) and addressing some of the pain.

Get the facts

- List everything you already know about the case

- Ask yourself the following questions: What do you already know about the case? What information is missing? What kind of evidence is lacking?

Seek expert advice

- Get all the necessary information or expert advice before going to the scene, e.g. consult with medical doctors, lawyers, counsellors etc.

Prepare your interview format

- Write down a check-list of the data and facts necessary to assess the allegations.
- If this is your first investigation of sexual violence, show the check-list to local contacts who have worked on such cases to get their input: they will often be able to add questions.
- Please refer to Part Four, "Interview Guidelines", of the booklet, *Monitoring and Documenting Human Rights Violations in Africa.*
- See Annexe Two for an interview format

2. Before going to the scene and other locations

Carry out a thorough risk assessment

- List all possible security concerns (e.g. your own physical security and the security of your contacts) and develop contingency plans to deal with each one of them (e.g. evacuation: how?). If access to, and your presence at, the scene carries many dangers, identify alternative means of carrying out the research; e.g. rely on a confidential local contact to bring possible witnesses from outside the area.

Composition of the delegation

- **Women delegates:** It is crucial that the delegation be composed of women with expertise in carrying research on sexual violence and interviewing victims of sexual violence.

- **Experts:** Identify what expertise will be most needed during the investigation. If possible, you should include such an expert in your delegation. If it is not possible, you should meet with experts before going on a fact-finding mission.

3. Identify main sources of information

List all possible contacts and sources of information you may need to interview and meet in order to investigate and corroborate the information.

Identify who it may be more appropriate to meet first, provided, of course, that you have the luxury to set up and organise meetings. In any case, you should decide whether and at which point in the investigation you will meet with security officials.

Possible sources of information: Individuals and groups

- Victims
- Other witnesses
- Women leaders
- Community leaders
- Journalists
- Eye-witnesses
- Relatives
- Women NGOs
- Lawyers
- Medical personnel
- Local human rights activists
- Members of political parties, civil rights groups, trade unions, ethnic groups, etc.
- Members and officials of the police force
- Prosecutors
- Other police/judicial representatives
- Members and officials of the army
- Members and officials of armed opposition groups

4. On the scene: Breaking barriers

In addition to the usual problems faced during a fact-finding mission (e.g. security problems), you are likely to face two other problems: (i) women victims of sexual violence may be unwilling to talk to you; (ii) community spokespeople may be suspicious because you want to talk to the women.

Women may be unwilling to report human rights violations. There may be a number of pressures (pressures from the family or community; shame; fear) that prevent the women from talking to you. In areas where you have never conducted research on human rights violations, contacts may be limited and untrustworthy; investigation of sexual violence, for instance, requires much effort in terms of breaking a number of barriers. In places where women's access to education is very limited, research may require even more time and effort to address lack of communication due to cultural and language differences, and contrasting modes of reporting information.

Community spokespeople are often men who may be reluctant to introduce the delegations to women, or may not understand why the delegation wishes to meet women. If the delegation is comprised of men only, the problem may be insurmountable.

In order to address these problems:

- Be proactive: while preparing the mission and while on the mission, ask yourself the question: Where are the women? You must actively seek access to them, and ask to meet with women.

- Follow the lines of authority and convince the men and leaders that you must speak with the women.

- Organise focus groups composed of women interested in human rights violations to develop a better understanding of the situation and explain your research. Rely on women leaders to reach out other women in the community.

- There are few people at the grass-roots level who know about fact-finding. A method of information-sharing should be established with people at the grass-roots to encourage them to tell you about their experiences

- Follow the focus group approach: Work with a group of 4 to 6 women:

- Bring together women of the same age-group.

- Begin your investigation with general questions and discussion, such as how do you define violence; what is it that makes women different from men; etc.

- Avoid direct questions on rape or sexual abuse

- Be aware of the women who do not dare to speak and find a way to talk to them in private

5. Identify and collect material evidence

Almost all acts of sexual violence leave traces. It is the work of the investigator to find and document these traces. The evidence comes in a variety of forms that carry different weight and pose different problems in evaluation.

Acknowledgement by authorities

Any statement by a government, government agency or armed group that an individual under its authority has committed sexual violence represents evidence that such act an did take place.

Official documents

In some cases sexual violence has been documented by official or highly reputable unofficial sources. The most persuasive example of this is a legal document in which the state itself acknowledges that a woman has been the victim of sexual violence. This happens, for example, in states which require a state-run forensic institute to

examine prisoners at some point in their period of detention or release.

Medical certificate

There may be medical certificates available, or the victim may have sought independent medical certificates. If the victim has not yet seen a medical doctor, you should immediately organise a medical visit and ask for a medical report confirming the allegations.

Physical marks of sexual violence

Common physical signs following sexual violence include:

- Genital trauma (bruising, lacerations, mutilations and damage to surrounding pelvic structures such as the bladder and rectum);
- Bruising in the arms and chest, patches of hair missing from the back of the head; bruising on the forehead.
- Sexual violence is often accompanied by beatings and other forms of violence. Therefore, there may also be signs of violence to other parts of the body (such as scars, deformities, burns, etc.)

Photographs

Sexual violence is often accompanied by beatings or other acts of physical violence, the traces of which may have been photographed. Expert evaluation by trauma or forensic specialists may result in strong evidence of rape.

Autopsy record

If the victim has died, the autopsy report should indicate the probable causes of death. In a number of cases, the family may have to request a second autopsy to be performed.

Testimonies

Access to the victims or witnesses and interviews are crucial to the investigation.

As with all forms of violations, but probably even more so with victims of sexual violence, the researcher will need the assistance of a "gate-opener," someone who has relationships with victims because of his/her work and activities, who is trusted by the victims and can act as an intermediary between the researcher and the victims.

Such individuals may be other human rights or women's rights activists, midwives, nurses, priests, etc.

They may also be individuals who, in the course of their life or professional activities, have come to know a great deal about the women of a given area. These may be religious officials, medical doctors, midwives, community leaders, etc.

For an interview format, please see Annexe Two.

Possible material evidence

- Medical record
- Photographs
- Official acknowledgement
- Official documents, e.g. police records, court records, etc.
- Post-mortem report
- Physical signs or marks
- Mental state of the victim

IV. How to assess evidence

Some of the key questions guiding the assessment are the following:

1. Reliability of initial source

- Are your initial sources or contacts reliable?

Often the allegations of incidents of sexual violence come from the media, a local organisation or individual contacts who have conducted their own fact-finding exercises. In your experience, have these sources been reliable and accurate before?

2. Consistency with patterns

- Is the incident reported to you consistent with what you know about the pattern of incidents of sexual violence in the country?

  In many countries, the incidents of sexual violence will present strong similarities from which patterns can be extracted.

- Compare the case under investigation with what you know about patterns of sexual violence.

3. Consistency of medical evidence

- Whenever possible, you should get the assistance of medical experts and forward them all medical evidence.

- If medical experts are not available, you should be very observant while interviewing the victims. Please see Part Four, Interview Guidelines, in the booklet, *Monitoring and Documenting Human Rights Violations in Africa.*

- Are physical signs on the survivor consistent with the allegations?
  Physical signs which can occur as a result of sexual violence may have a variety of possible causes. Rarely can

the medical findings prove beyond doubt that sexual violence occurred, especially since the passage of time makes this type of evidence difficult to acquire. This means describing medical evidence as "consistent with" the sexual violence alleged by the survivor.

- What if there are no physical signs of sexual violence?

  Sexual violence may not leave physical marks visible to the researcher or, indeed, to a medical professional. Medical evidence may require vaginal and rectal examination, blood and urine analysis (for sexually transmitted diseases, pregnancy), etc., which are not necessarily available. Furthermore, torture is increasingly carried out by means which do not inflict long-term physical injury. In such cases, effort is required to elucidate a clear description of what happened.

- Are psychiatric signs and symptoms consistent with the allegation?

  The mental and behavioural consequences of sexual violence are not uniquely caused by it. Depression, withdrawal, anxiety, sleeping, eating, and sexual disorder, suicidal thoughts, etc., can be linked to a variety of traumatic experiences or to pre-existing psychopathology. Nevertheless, the survivor's description of her/his psychiatric symptoms and other illnesses (see Annexe One on Rape Trauma Syndrome, RTS) should allow you to draw some conclusions as to whether the information is consistent or inconsistent with the allegation of sexual violence.

4. Reliability of the testimony

- Does the victim's testimony appear reliable?:

  In assessing the testimony, keep in mind the points developed in the guidelines, *Monitoring and Documenting Human Rights Violations in Africa.*

While interviewing, pay special attention to:

- The survivor's description of the **symptoms following the allegation of sexual violence**: what type of physical pains and mental reactions has the woman experienced following the alleged acts?

- The survivor's description of **current symptoms and illnesses**: what are her current health complaints, both physical and mental?

- The survivor's account of the **circumstances, location, procedures, individuals involved**, etc.

- The survivor's account of the **sequence and timing of the events.**

- **Consistency of the testimony:** Does the testimony concur with others as well as with any previous pattern of similar acts in the country/region? Does the survivor contradict himself/herself when asked the same or similar questions?

- **Inconsistencies in the testimonies**: Are they a result of the survivor's dishonesty or of faults in memory, exaggerations, unsubstantiated rumours, cultural differences and misunderstandings between the interviewer (or interpreter) and the interviewee?

5. Assessing the responsibility of the government

- Do the incident and the government's response indicate that it is responsible (e.g. complicity or by negligence) for the incident?

  Official responses include: official acknowledgements or unofficial statements by representatives of the government or armed groups; court testimony; conclusions of independent investigation bodies or lack of independent investigations;

- In assessing this evidence, be aware that political factors may come into play: if abuses have allegedly been carried out by the opposition or other governments, the government of the country concerned may be issuing statements and bring up evidence that should not necessarily be taken as proof that sexual violence has occurred.

- Court testimony where those accused of sexual violence have given testimony, may help indicate the degree of knowledge and responsibility of officials.

- Whenever law enforcement or any other state officials are the perpetrators, the government is responsible. Sexual violence perpetrated by them constitutes torture or cruel, inhuman or degrading treatment.

- Furthermore, the absence of (independent) investigations into acts of sexual violence committed by state officials and lack of preventive or remedial measures imply a lack of concern to stop incidents of sexual violence. A continuing pattern of such incidents must then be attributable to the state condoning such acts.

- Whenever private individuals are responsible for acts of sexual violence, the responsibility of the state may be at stake if you can show that it failed to protect women against sexual violence.

- Failure to protect women against sexual violence committed by private individuals may be shown if the state (or state officials, such as the police force) almost systematically fails to prevent such acts from occurring, or fails to investigate them, or fails to prosecute perpetrators, or fails to punish perpetrators. (Please refer to the first part of this booklet, sections 6 and 7.)

6. Assessing the responsibility of the armed group

- Does the incident and the response of the armed group indicate that it is responsible?

Assessing the responsibility of an armed group may be particularly difficult:

- There may be several armed groups in the same area, the government and the armed group may be using similar methods, the government may accuse the armed groups of acts of torture committed by its own forces, etc.

- Material evidence may be scarce. Information gathered through interviews and your knowledge of the usual methods followed by the armed group will therefore be central to your assessment of the responsibility.

Some of the key questions guiding the assessment of responsibility include:

- **identity of the victims:** Has the armed group been known to target these specific individuals or groups?

- **Motive:** Is there any apparent motive for the act of sexual violence? Had these individuals been previously targeted? By whom?

- **Methods:** Are these methods ordinarily used by armed group?

- **Location:** Have previous allegations been made in this particular area? Is the area where sexual violence is alleged to have taken place under the military control of the armed group? Has the armed group been known to carry out attacks in this area?

- **Responses of the armed group:** Did the leadership of the opposition group try to "justify" the abuses in any way? Did it claim responsibility for these acts? Did it deny any responsibility for them? Did it admit or agree to carrying an internal investigation?

Annexe One: Medical and social consequences of sexual violence

1. The medical consequences of sexual violence are often very serious.

These include sexually transmitted diseases, including AIDS, stomach pains, nausea, vaginal pains, generalised pains, infertility, miscarriage, stillbirth, pregnancy, etc. They may also suffer from Rape Trauma Syndrome (see below).

Access to medical treatment may be very difficult: women or girl child victims of sexual violence may not be able to get access to the required medical treatment because of absence of institutions or professionals working with victims of sexual violence, insensitivity of medical personnel, laws forbidding abortion, lack of access to medical check-ups for sexually transmitted diseases, including the HIV virus, etc.

2. Social rejection and alienation

Women victims of sexual violence may face stigma, ostracism, divorce, etc. If a woman is declared unfit for marriage as a result of rape, she will also face severe economic and social obstacles to her livelihood. Women may become withdrawn, lose self-esteem or fall into prostitution.

In the case of women who have lost their husbands because of imprisonment or killing, the consequences of the violations persist, such as social and economic hardship, medical problems, etc.

The human rights investigator must be aware of the consequences of sexual violence upon victims.

Rape Trauma Syndrome (RTS)

RTS[2] is a form of Post-Traumatic Stress Disorder (PTSD) and shares most of its symptoms in varying degrees. PTSD does not affect *all* victims of torture, including rape, but the probability of it occurring is very high. It generally follows three phases, with some degree of overlap from one phase to the other:

1. Impact phase

Duration: Immediately following assault until approximately 24–48 hours post-assault.

Emotional reactions: Wide range. Memory gaps are common; responses are likely to reflect automatic coping styles. The survivor may have concerns about pregnancy, venereal diseases and AIDS. In general, responses can be divided into two broad categories:

1 **Expressed style**, in which feelings of fear, anger and anxiety are shown through such behaviour as crying, laughing, restlessness and tension;
2 **Controlled style**, in which feelings are contained and a calm, composed or a subdued effect is demonstrated.

Intervention: When dealing with a survivor during the impact phase, it is extremely important to emphasise three things: 1) she has been through an extremely frightening experience; 2) she is not to blame for what has happened; and 3) she is now in a safe place (if that is tru*e*).

2. Acute phase

Duration: Variable: from a few days to 6 weeks or more. Period of disorganisation; predominant feeling is fear; physical symptoms are especially troubling.

2 "Rape Trauma Syndrome", in New York City/ Balkan Rape Crisis Response Team, *Training Manual*, September 1993, pp. 1–3.

Physical reactions: skeletal muscle tensions, fatigue, sleep disturbances, stomach pains, nausea, vaginal discharge, itching, burning and generalised pains.

Emotional reactions: Flashbacks, sleep disturbances, nightmares, poor concentration, memory loss, guilt/self-blame, shame, anger, vulnerability, appetite change, fear, anxiety, moodiness, denial, obsession with details of the rape, lack of trust.

Intervention: Some victims are ready to talk about what has happened. It is important to reassure the survivor that she is experiencing normal, expected reactions to a traumatic event. It is also important to reassure the survivor that with time she will get better. Support non-judgmental attitude that places blame on the rapist.

Some rape victims are not ready to talk immediately. The victim should not be forced to discuss the incident and it will be reassuring for her to know that whatever she chooses to do – talk or not talk – is OK.

3. Reorganisation phase

Duration: Long-term process lasting from one to two years. The effectiveness of the reorganisation phase is dependent on many variables, such as ego strength, social supports, and prior history of victimisation.

Emotional reactions: With support and/or counselling, the survivor gradually regains control and is able to trust herself and place blame on the perpetrators.

Without support, the acute trauma symptoms tend to lessen over time but the survivor is likely to suffer from one of the following symptoms:

1 Isolation/withdrawal;
2 Lowered self-esteem: feels shameful, dirty, powerless, naïve, stupid;
3 Restricted mobility: phobias, fear of being alone, fear of darkness,
4 Depression/restricted effect: wary, clamping down on emotions, holding things inside;

5 Sexual dysfunction: fear of sex, numbing, sometimes promiscuity.

Intervention: Help her to identify how existing symptoms are connected to the rape.

Annexe Two: Check-list for interviews of victims of rape or other forms of sexual violence

The following is a list of data and/or evidence you may need to collect in the course of the interviews. Notice that this is an extensive list and that, in most cases, not all data mentioned below will be necessary. The type of information required will depend on the objectives of the interview, the circumstances of the interview (conflict zones, danger, etc.), your schedule and the survivor's schedule, his/her health, etc. Furthermore, the nature and order of the questions will vary from interview to interview.

1. Interview

Date
Location of the interview
Interviewer
Interpreter
Others present

2. Personal Information

Surname and first name, nickname
Gender
Mother's name and father's name (if relevant)
Date of birth
Marital status
Number of children
Address
Nationality
Ethnic origin
Region of origin
Religion
Occupation

3. Circumstances of arrest or attacks

When (day and time)
Where was the victim at the time?
Were other people present?

Who carried out the arrest/attack? (Description of the individuals involved: number, uniforms, whether they were carrying arms, etc.)
What did they say?
Was violence used?
Was the victim the only one arrested/attacked?
Were there any witnesses?
In case of an arrest: Was an arrest warrant presented?

4. Circumstances of the rape or other forms of sexual violence

Location (e.g. detention centre, private prisons, home of the victim, etc.)
Were any questions asked?
Who participated? (Number of people involved, personnel such as security, military, others, etc.)
Was a medical officer present? Did he/she participate in the torture?
Did the victim see a medical officer before/after the torture?

Other forms of physical abuse
Other forms of psychological abuse
Duration and frequency of the sexual violence (e.g. several times a day, twice a week, etc.)
Physical pains experienced immediately following the abuse
Mental reactions experienced immediately following the abuse

Was the victim made to sign any statements?
Were charges filed against the victim?
Did the victim have access to a lawyer during detention?

5. Circumstances following the abuse

How long did the victim remain in detention?
Access to a lawyer
Access to a medical professional (Name, gender, day of the first examination, other examinations)
Type of examination and diagnosis

Date and circumstances of the release

Did the victim file charges?
Investigation by government of victim's accusations?
Circumstances of the trial

6. Current situation and symptoms

Victim's state of health *before* the incident (e.g. past illnesses, previous injuries)
Feelings and other symptoms which the victim noted at various intervals (e.g. one week afterwards, one month afterwards, etc.)
Current physical symptoms
Current mental symptoms
Medical or other treatment the victim is currently receiving

7. Observation: Wounds

Marks/scars/bruises
Hair missing

If rape was accompanied by other forms of torture:
- Fractures
- Deformities
- Burns
- Amputations
- Other distinguishing characteristics

Medical certificates

8. Observation: How is the interviewee behaving

Tone of voice (e.g. soft, loud, emotionless, etc.)
Gaze (e.g. little eye contact)
Tears (at which point during the interview?)
Silence or talk non-stop
Body Language (e.g. nervous movements, no movements)
Responses (hesitations after questions, asks for questions to be repeated, etc.)
Other

Annexe Three: Recommendations and possible actions

Legal action

- Review, evaluate and revise laws, codes and procedures, especially criminal law, to ensure their value and effectiveness in eliminating violence against women. Lobby government so that it removes provisions that allow for or condone violence against women.

- Take cases to court; provide legal, material or any other support to victims of sexual violence who have brought their cases to court

Support men and women victims

- Provide victims with medical and psychological support: they should not feel that they are guilty. Build self-confidence and self-esteem.

- Empower the victims of sexual violence: ask them to join your or other organisations, organise training for them, ask them to become advisers, etc.

Action on behalf of women in custody

- Lobby governments and prison authorities so that:
  - ⩾ female detainees and prisoners are held separately from male detainees and prisoners, and do not share bathing or toilet facilities;
  - ⩾ female security personnel are always present during the interrogation of women detainees and are solely responsible for conducting body searches of women detainees;
  - ⩾ there should be no contact between male guards and female detainees and prisoners without the presence of a female guard;
  - ⩾ the imprisonment of a mother and child together must never be used to inflict torture or ill treatment on either by causing physical or mental suffering;
  - ⩾ any female detainee or prisoner who alleges that she

has been raped or sexually abused must be given an immediate medical examination, preferably by a female doctor;

- ⩾ women receive appropriate medical treatment for injuries, infections, or other related trauma, including psychological care, treatment for sexually transmitted disease;
- ⩾ victims of sexual violence are entitled to fair and adequate compensation and appropriate medical care.

Training

- Organise training sessions for police officers; guards; judges; and others regarding sexual violence against women as well as against men.

Public awareness campaign

- Inform, launch public awareness campaigns on violence against women, including sexual violence.
- Inform, launch public awareness campaigns on sexual violence against men;
- Mobilise high-profile women in the country and the community, such as women MPs, women ministers, journalists, etc.
- Create lobby groups composed of a variety of NGOs, including human rights NGOs, women's NGOs, etc., aimed at eradicating violence against women
- Network and create umbrella organisations to co-ordinate activities
- Ask all NGOs to integrate a gender-sensitive and cultural-sensitive perspective into their work.
- Ask all NGOs to develop expertise in investigating cases of sexual violence and assisting victims

Armed conflicts

- Lobby governments to sign and ratify the creation of the International Criminal Court

- Lobby governments to undertake a full investigation of all acts of violence against women during war; bring to justice those alleged to have committed war crimes against women and provide full redress to women victims

- Ask governments and armed groups to issue clear orders that torture, including rape and other sexual abuse of women and girls, will not be tolerated under any circumstances.

Annexe Four: International and Regional Legal Standards

1) **The Universal Declaration of Human Rights.** (UDHR) 1948. In its art. 3 declares that:"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

2) **The International Covenant on Civil and Political Rights.** (ICCPR) 1966. In its art. 7 declares that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment ...". Besides art. 7, it must be noted that the Covenant, in its art. 10 number 1, declares that: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

The Human Rights Committee responsible for monitoring the implementation of the ICCPR, stated, in its General Comment 20 (10/04/92), that:

- it is the duty of the states to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.
- There should be provisions in criminal law which penalize torture and cruel, inhuman and degrading treatment, whether committed by public officials or other persons acting on behalf of the State, or by private persons.
- States should disseminate, to the population at large, relevant information concerning the ban on torture and the treatment prohibited by article 7. Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training.
- States could keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest... Provisions should be

made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends.

3) **The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**. (CAT) 1984.

4) **The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**. (1975).

5) **Standard Minimum Rules for the Treatment of Prisoners** (1977). This body of international law provides important basic rules for the treatment and accommodation of prisoners. This instrument is especially relevant for Rape as Torture. Indeed, art. 8 provides the separation of the different categories of prisoners according to their sex, age, criminal record and other less relevant considerations. Additionally, art. 9 (1) prescribes that "... it is not desirable to have two prisoners in a cell or room".

Bearing in mind that rape is torture not only when it is inflicted by public officials and officials of armed groups, but also *when it is done with the consent or acquiescence of a public official*, the non compliance of prison officials with rules such as the separation of women and man or young males from adult males in prisons can be tantamount to acquiescence to rape, thus configuring the elements of rape as torture.

6) **Basic Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.** (1988). This body of principles was adopted by the General Assembly of the United Nations in an attempt to further improve the situation of people under any form of detention or imprisonment. Important articles of this set of principles are: a) Principle 1, which provides that "All persons under any form of detention or imprisonment shall be treated in a human manner and with respect for the inherent dignity of the

human person"; b) Principle 6, which outlaws torture and other cruel, inhuman or degrading treatments or punishments in detention centres or prisons and declares that these practices are to avoided always, without exception; and c) Principle 35, that provides for compensation for detained or imprisoned person that have suffered "damaged incurred because of acts or omissions by a public official contrary to the rights contained in these principles".

These standards reinforce the idea that the officials in charge of a detention centre or prison have to ensure that all person deprived of their liberty shall be treated in a human manner, which, regarding the practice of rape, means that officials of those places are not only to avoid committing those acts, but also to actively take reasonable measures in order to ensure that women and minors are not going to be exposed to rape by other detainees and convicted people.

7) **United Nations Rules for the Protection of Juveniles Deprived of their Liberty**. (1990). Number 29 of the Rules prescribes that :"In all detention facilities juveniles should be separated from adults, unless they are members of the same family."

8) **Code of Conduct for Law Enforcement Officials.** (1979). Art. 5 mandates:"No law enforcement official may inflict, instigate *or tolerate* any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment. Art. 6 declares that "Law enforcement officials shall *ensure the full protection of the health of persons in their custody*...".

These two norms are of particular importance. Given the situation of deprivation of liberty of detainees and prisoners these rules of international law require from the official in charge of these places to take a more active role in the protection of the person under their responsibility. The relatively common case of juveniles that are raped by adult inmates while being in the same premises can thus be seen

as a case of rape as torture, inflicted with the tolerance of the officials that made the decision of putting juveniles together with adult inmates.

9) **Convention on the Elimination of All Forms of Discrimination against Women** (1979)

Article 1 defines discrimination against women as:

> "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

In **General recommendation 12,** adopted in 1989, the Committee requested that States include in their reports information about violence against women and the measures taken to eliminate such violence.

General recommendation 19, formulated in 1992, defines gender-based violence as: *"violence directed against a woman because she is a woman or which affects women disproportionately."*

10) **Declaration on the Elimination of Violence Against Women**

Article 1 defines violence against women as:

> "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."

The Preamble to the Declaration recognises that "violence against women is one of the crucial social mechanisms by

which women are forced into a subordinate position compared with men."

The Preamble also identifies groups of women who are especially vulnerable to violence, including women belonging to minority groups, refugee women, migrant women, women living in rural or remote communities, destitute women, **women in detention**, female children, women with disabilities, elderly women and **women in situation of armed conflicts.**

Article 2 of the Declaration identifies various forms of violence against women, including physical, sexual and psychological violence in the family, within the general community, and violence perpetrated or condoned by the state wherever it occurs.

10) **African Charter on Human and Peoples' Rights**

Article 5 states that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. It prohibits all forms of exploitation and degradation particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 18 (3) requests that the state ensure the elimination of every discrimination against women and the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

The Publishers

Amnesty International (AI) is a worldwide voluntary activist movement working towards the observance of all human rights as enshrined in the Universal Declaration of Human Rights and other international standards. It promotes respect for human rights, which it considers interdependent and indivisible, through campaigning and public awareness activities, as well as through human rights education and pushing for ratification and implementation of human rights treaties. Amnesty International takes action against violations by governments of people's civil and political rights. It is independent of any government, political persuasion or religious creed. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect. It is concerned solely with the impartial protection of human rights.

Amnesty International Dutch Section Special Programme on Africa (SPA) was established in 1994. Initially, SPA developed a programme to assist Amnesty Sections worldwide to improve the effectiveness of their campaigning against human rights violations in Africa. Since 1996 SPA has moved towards providing support to the broader Human Rights Movement in Africa. Rather than funding projects, SPA is developing and co-ordinating long term projects for and and in cooperation with other human rights organisations and AI sections. In addition to copublishing *Ukweli,* SPA is also coordinating advocacy and training workshops in southern and West Africa, a project on policing and Human Rights, and a pilot project to raise human rights awareness in rural areas in Liberia.

CODESRIA is the Council for the Development of Social Science Research in Africa head-quartered in Dakar, Senegal. It is an independent organisation whose principal objectives are facilitating research, promoting research-based publishing and creating multiple forums geared towards the exchange of views and information among African researchers. It challenges the fragmentation of research through the creation of thematic research networks that cut across linguistic and regional boundaries.

CODESRIA publishes a quarterly journal, *Africa Development*, the longest standing Africa-based social science journal; *Afrika Zamani*, a journal of history; the *African Sociological Review*, and the *African Journal of International Affairs (AJIA)*. Research results and other activities of the institution are disseminated through 'Working Papers', 'Monograph Series', 'New Path Series', 'State-of-the-Literature Series', 'CODESRIA Book Series', the *CODESRIA Bulletin*, *KIBARU* and *CIVIC AGENDA*.

Monitoring and Investigating Human rights abuses in armed conflict

Amnesty International and CODESRIA

Amnesty International

Council for the Development of Social Science Research in Africa

Amnesty International Dutch Section, Keizersgracht 620, PO Box 1968,1000 BZ Amsterdam, The Netherlands

Council for the Development of Social Science Research in Africa
Avenue Cheikh Anta Diop Angle Canal IV, BP 3304 Dakar, Senegal

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and

African Books Collective, 27 Park End Street, Oxford, OX1, 1HU UK
Fax: 44-01865-793298 Email: abc@dial.pipex.com
web site: www.africanbookscollective.com

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I. Introduction

Widespread abuses of human rights and international humanitarian law are a common feature of modern conflicts. Civilians, particularly women and children, are the main victims in these wars. Several armed groups terrorise the civilian population to weaken support for their opponents. In some cases government forces attack unarmed civilians because of their ethnic origin or political affiliation. In other situations the state is weak and no longer holds legal authority to protect the weak. In conflicts like these human rights are virtually never respected, despite being protected by international law.

For many years the International Committee of the Red Cross (ICRC) took the leading role in encouraging the application of humanitarian law in situations of international and internal armed conflict. Now an increasing number of human rights organizations are also monitoring respect for humanitarian law in situations of armed conflict. Many development agencies are also considering what their role should be.

Investigating a specific human rights abuse[1] within armed conflict is not so different from investigating the same kind of violation in other situations. However, some features in the process of monitoring and documenting abuses do make a difference and often make it more difficult; for example, the context and working environment, the different parties involved, and the scale of the abuses. There are also new areas to monitor. These include the use of child soldiers and slavery, the importance of human rights considerations in peace agreements and peace-keeping operations, the sale of weapons, and questions about the personal safety and impartiality of the monitor. To examine these issues the editorial advisory committee of UKWELI has decided to publish this booklet in addition to those on monitoring and investigating (i) political killings, (ii) torture, (iii) excessive use of force, (iv) death in custody, and (v) sexual violence.

The booklet starts with a look at monitoring in the context of armed conflict and examines what general information is required to prepare for fact-finding in situations of armed conflict. This is followed by an overview of what sorts of abuses

1 Throughout this text, the term "violation" is used in the same way that Amnesty International and UN use the term. It refers specifically to a clear breach of international human rights law which is formally binding on governments. The term "abuse" is a more general term, which includes reference to the breaking of international humanitarian law by any party in a conflict.

occur in armed conflict and some ideas on how to investigate and verify information relating to each of these specific incidents. The Annexes contain relevant extracts from international and regional human rights law and international humanitarian law. These can be used to clarify the legal basis for investigating, documenting and taking action on abuses.

Armed conflict and humanitarian law[2]

The monitoring and documenting of abuses in armed conflicts is a relatively new area of work for many organizations. This activity requires an understanding of humanitarian law as well as detailed knowledge of the nature of the specific conflict. The four Geneva Conventions of 1949 deal mainly with international armed conflicts, with the exception of article 3, which is common to all four Conventions and deals with 'Conflicts not of an international character'. In 1977 two protocols were adopted which contain rules to protect the civilian population against the effects of hostilities. These are seen as a great step forward in humanitarian law.

Protocol I covers international armed conflicts[3] and extends the application of the 1949 Geneva Conventions to:

> *armed conflicts in which peoples are fighting against colonial domination and alien occupation and racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations…*

Protocol II[4] substantially supplements and develops Common article 3 (the only previous provision which covered internal armed conflict) and only applies to internal armed conflicts. These are defined as:

> *armed conflicts … which take place in the territory of a (party to the convention) … between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. (Article 1.1)*

2 See Annex II for international humanitarian law

3 Protocol I has been ratified by over 150 countries

4 Protocol II has been ratified by 149 states

Protocol II also distinguishes internal armed conflict from other internal conflict situations. It states clearly:

> *This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and others acts of a similar nature, as not being armed conflicts. (Article 1.2)*

II. How to monitor in the context of armed conflict

Monitoring is the long-term observation and analysis of human rights situations in a country or region. It consists of the systematic and regular collection of information that may be related to human rights abuses.

Information can be obtained from a variety of sources. These include:

- Local, national or international non-governmental organisations
- Religious groups
- Professionals, such as, doctors, lawyers, journalists, trade unionist, etc.
- Members of government and Parliament
- Members of all political parties
- Members of the security forces, the army, police, etc.
- International organisations, UN Agencies
- Diplomats and Embassy staff

This information, collected over a period of time, should allow you to place the cases under investigation within a political, legal and military context, as well as identify patterns of abuses.

1. What kinds of information are especially relevant when monitoring human rights abuses in armed conflict?

A. Contextual information, such as:

- **Historical context** of the conflict. How and when did the conflict arise? Who are the main parties in conflict? What are the root-causes behind the conflict? Has the nature of the conflict changed over time?
- **Economic indicators** and how these have been affected by the conflict. This would include examining the impact of sanctions. Where do the resources to maintain the conflict come from? What are the economic factors behind the conflict – minerals, drugs trade etc?
- **Social indicators,** for example, access to land, education and health care. What impact has the conflict had on these indicators and other social services? Are different age, gender, ethnic or political groups of the population affected differently?

- **Demographic data related to population trends** (size, age, male/female, urban/rural). How is this changing in the current period of conflict? Refugees and internally displaced populations would be of particular concern.

B. National and international political information would include:

- Alliances between and among armed factions and the ethnic/political sympathies of factions;
- Internal and external influences on the parties to the conflict. These could include internal supporters and foreign governments which might be providing direct military support and weapons, supporting resolutions at international fora, offering financial support or safe havens for refugees or fighters, etc;
- Activities of the war: dates and places of attacks, methods used, number allegedly killed, wounded, displaced etc.

C. The legal and constitutional context would include national and international law, as well as informal systems of justice. For example:

- Legislation governing the use of force by the police, military and other security bodies;
- Legislation governing the written media and broadcasting, including new legislation which may have been introduced during the conflict;
- The role of military courts, the number and types of cases handled, prosecutions and judgements.
- Laws regulating investigations, such as post-mortem procedures and provisions for immunity from prosecution;
- Special legal provisions which apply at time of war, declared states of emergency, formal withdrawal from international legal obligations (known as derogations);
- Whether certain armed groups have their own systems of justice;
- International humanitarian and human rights laws concerning armed conflict (a selection appears in the Annexe);
- Information about new developments, such as the International Criminal Court and precedents in

extradition procedures (e.g. the recent case against ex-General Pinochet of Chile at the turn of the century);
- The workings of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda;
- The deadlines of the government's international reporting obligations to various human rights bodies, such as the Human Rights Committee, to allow for the preparation of submissions;
- Any provisions for amnesty laws and how they have been applied in the past. This might prove useful in peace negotiations when issues around how to address human rights abuses will be raised.

D. A comprehensive knowledge of the organisation of the government security and armed forces and of other armed groups involved in the conflict will help you establish which party is responsible for specific human rights abuses in the conflict.

Collect information on the organisation of the *government security* forces and monitor changes:

- Identify the different branches within the security forces, establish their area of authority and their respective chains of command. Who makes the decisions and who gives the orders? Who carries out the orders?
- Establish where responsibility lies for holding the military accountable;
- Collect and study various codes of conduct, regulations and internal guidelines regarding the use of lethal force;
- Find out what type of training is provided and whether any foreign countries are involved in the training;
- Research other forms of foreign military assistance;
- Identify which parts of the security forces are usually involved in violating human rights;
- Find out if there are armed independent organisations (paramilitary groups, militias) who support the government and if they receive military training, transport and equipment from the government;
- Identify what sort of security agreements exists (between countries, with the UN etc).

Collect information on their methods of operation and means of identification:

- Identify the type of arms usually used by specific units within the security forces;
- Identify the different uniforms for each unit;
- Identify the ranking system;
- List the various means of transport each unit tends to use;
- List any other visible signs of identification, e.g. it could be they use a particular language, specific expressions, etc;
- Identify their most likely victims.
- Collect details of all operations known to have been carried out by the armed groups ; identy common patterns in their methods of operation.

Collect information on the organisation of *armed opposition groups* and monitor changes:

- Identify whether any organizations or parties are organized on a paramilitary basis;
- Identify the various armed factions or branches, their leadership and chain of command;
- Identify their international, regional or national supporters and the nature of their support;
- Identify their sources of weapons, military training and other expertise;
- Identify others sources of funding e.g. pillaging, taxing the local population, trafficking of drugs, minerals etc;
- Monitor the reactions of their leadership to human rights abuses.
- Identify their relationship with the local population. For example, is there a natural alliance or is it ruled by terror?

Some additional sources of information that may help with this difficult area are:

- The Internet provides reliable reference material about weapons etc. from military publishers;
- Military advisors or personnel attached to diplomatic missions in the country;
- Military advisors or personnel attached to UN operations, if any;

- Reports available to the public from countries transferring weapons, munitions, or technical expertise (e.g. US Defence Department reports to Congress and the equivalent materials from France, UK, Portugal etc)
- Humanitarian workers who may work in the conflict zone;
- Deserters or other former fighters.

2. How to record and monitor individual cases and incidents

Even though it may not be possible to investigate all incidents of human rights abuses, it is helpful to monitor all cases that come to your attention through the media, family members, or witnesses etc. This will enable you to develop an understanding of the pattern of incidents.

- To help you with monitoring, it is recommended that you develop a form to record individual cases of alleged human rights abuse that are brought to your attention.
- The form is meant to give you a quick look at a case and to identify possible common points among a number of cases.

Below are examples of certain types of data you will need to record individual cases

General data

- Victim identification information
- Location of the incident
- General circumstances of the incident
- Nature of the incident
- Precise circumstances of the incident
- Alleged perpetrators
- Evidence
- Official responses[5]

[5] For more details, see other booklet in this series entitled: *Monitoring and Investigating Political Killings.*

3. How to identify patterns:

Below are some examples of the types of patterns you might look for:

- Patterns in the identity of the victims
- Patterns in the circumstances
- Patterns in the locations of the incidents
- Patterns in the methods used
- Patterns in the identity of alleged perpetrators
- Patterns in responses by government forces or armed groups[6]

6 For more details, see other booklet in this series entitled: *Monitoring and Investigating Political Killings.*

III. How to conduct fact-finding

Fact-finding consists of:

- Investigating a specific incident or allegation of human rights abuse;
- Collecting or finding a set of facts that proves or disproves that the incident occurred and how it occurred; and
- Verifying allegations or rumours.

Four main questions should guide your investigation:

1. What kind of evidence do I need to make sure that the particular abuse has occurred?
2. Is it safe to go to the scene?
3. Who is most likely to give me access to the evidence?
4. How can I be sure that the information is reliable?

The following information will help you organise your fact-finding.

1. List facts and evidence[7]

List everything you know about the specific incident and the conflict zone:

- What human rights and humanitarian law issues are raised by the incident?
- Were there previous incidents of the same violation and other violations in the same area?
- Were there recent military activities in the area concerned, and is it land mined?
- What is the latest security situation in the specific area?

Seek expert advice:

- Get all the necessary information or expert advice, for example, consult with medical personnel, lawyers, military experts and other informed sources.

7 For more detailed advice, refer to the other booklet in this series entitled: *Monitoring and Investigating Political Killings.*

Prepare your interview format

Identify the evidence you need to show that a human rights abuse has occurred and who is responsible - see the "evidence required" section at the end of each abuse listed in "Checking your information" in section IV of this booklet.

2. Before going (or not) to the scene

Carry out a thorough risk-assessment

This is particularly important in areas of armed conflict.

If you decide not to go to the scene, it is important to devise an alternative strategy. This will include making use of all other sources of information.

If you decide to go to the scene of some form of human rights abuse, you need to assess all the risks involved for you, your colleagues, and the people you will talk to.

- List all possible security concerns (e.g. your own physical security, and security of your contacts) and develop contingency plans to deal with each of them (e.g. will you be able to leave the area quickly and safely?). If access to the scene and your presence there is too dangerous, identify alternative means of carrying out the research. For example a confidential local contact may be able to bring possible witnesses outside the area.
- A reconnaissance mission would help to find out: the lines of authority in the area, the level of hostilities, the number of check-points you will have to go through, whether or not you need to disguise yourselves, people's reaction and feelings, and whether someone of a different ethnic group or political profile would be safer, etc.
- Be prepared. Have good reasons for your visit and what you are doing in the area in case people ask you difficult questions or appear suspicious.
- If necessary, seek "official" protection in the area. When considering this option, think through the consequences of having an "official" escort – will it jeopardise your impartiality and will people still trust you?

- You should always consider the risks to those you hope to interview. Can you minimise the risks to witnesses who might be prepared to talk to you? Reliable local contacts can help to encourage people to speak to you and may provide the best chance to guarantee their safety after the interview. You should always try not to attract attention to your enquiries and meetings.

Ensure a suitable delegation

Be strategic. Find an experienced delegation, seek out experts, ensure a gender balance and give consideration to ethnicity, language etc.[8] The composition of your delegation will depend on the objective of the mission or field-trip. This may be low- or high-profile (attracting publicity) or have a specific purpose that requires certain expertise, e.g. observing a trial may require a lawyer to be present.

3. Identify and interview relevant sources of information

List all possible contacts and sources of information you may need to interview to investigate and confirm the information.[9] Make a decision about whether you need to meet with security officials and at which point in the investigation.

4. Assess the information

The following is a list of questions and issues that may help you in the investigation:

1. The context:

In a situation of armed conflict, there is likely to be much misinformation promoting one cause or another. When receiving and analysing information, always ask: what does the source of the information stand to gain from this story? It is important to collect and check information from a wide variety of sources.

8 The issue of a suitable delegation is more fully explored in the other booklets in this series. See *UKWELI*, page 11

9 More details about suggested sources of information are provided in the other booklets in this series. See *UKWELI*, page 13

Some situations tend to lead to more abuses. These might be:

- during negotiations between factions;
- in reaction to certain statements by an opposing side;
- a state of despair within an armed faction;
- after criticism at home or before an international audience,
- retaliation for attacks or recent defeats.

2. The victim(s): is there anything that suggests why the victims have been targeted?

- Are the victims "legitimate targets"? Not all killings in armed conflicts are illegal. For instance, armed forces are not prohibited from killing individuals who take a direct part in hostilities, such as soldiers, members of armed opposition groups, etc. People taking part in hostilities may be killed under the laws of war, as long as they are not prisoners or have not put down their arms. Such lawful killings do not constitute an abuse of human rights. (See Articles 43-47 from Optional Protocol I in Annex II.)
- Is there any apparent motive for the killing? Had these individuals or group been previously threatened or targeted? By whom?

3. The circumstances: do they point to involvement of the security forces or of a particular armed group?

- Which soldiers or armed group members were seen at the scene of the incident?
- What were their identifying characteristics? What vehicle? What "uniform"?
- Which group was in control of the area?
- Which groups have been active in the area?

4. The method: does it suggest the involvement of government forces or a particular armed group?

- Has this method of repression been used before by a particular branch of the government security forces or by a particular armed group?

By gathering details about the incident itself, the sequence of events, the way the abuse was carried out and the way the perpetrators left the scene, you will be better able to identify which group may have been responsible.

5. Responses to the incident:

- Was there any public response to the incident? Did any group claim or deny responsibility?
- Has any party agreed to carry out an investigation into the incident?
- Has anyone been held responsible for the incident?

IV. Checking your information—What is sufficient proof?

Human rights organizations should decide the level of proof they want to achieve before they start monitoring. The standard of proof guides the quantity and quality of evidence that has to be gathered in order to support certain conclusions. [10]

In the course of gathering facts, human rights organizations need to determine if they have obtained 'sufficient proof' to arrive at reasonable conclusions. Otherwise, fact-finding can become a never-ending process.

The normal rules of evidence followed by courts require different proof for different levels of liability. For example, in Anglo-Saxon criminal law, the guilt of the accused must be proved "beyond a reasonable doubt" during hearings before an impartial court. The court must hear 'both sides', the evidence against the accused and arguments in their defence. In most cases, human rights organizations are not able to attain this level, partly because they do not have the power to compel witnesses to testify or produce documents, and cannot impose sentences for withholding evidence. However, where possible, human rights organizations should strive to attain the level of "beyond reasonable doubt" in their investigations. Another level of proof is the "balance of probabilities". This is used in civil trials that do not involve the loss of liberty of the defendant.

Level of proof

The level of proof used by human rights organizations depends on the action that is planned for after the fact-finding.

Example: A letter of concern sent to the authorities may only need credible second-hand reports of human rights violations. However, a major report meant for publication would require more substantial evidence on the violations.

10 This section is reproduced and slightly revised from "Monitoring State-sponsored violence in Africa", ARTICLE 19, January 2000. We would like to thank ARTICLE 19 for making this material available

If the government normally contests every fact in a human rights report the level of proof needs to be high. You should try and get the government to undertake their own fact-finding and to disclose the results of their investigations.

The level of proof may also depend on the readership of the report.

Example: Some of the UN agencies require a higher level of proof before taking action on allegations of torture.

You may discover pieces of evidence of varying weight and persuasiveness. Consistency and care should be taken when compiling the findings. The final report should state the standard of proof that has been used.

You should show in the report how certain the level of evidence is. In most reports incidents that are not 100 per cent established can be included, as long as the level of probability is disclosed.

Example: If there is not enough evidence to "definitely conclude", the case can still be presented as "very likely", "probable", "eyewitnesses stated that" or in similar phrases.

When reporting on sudden crisis situations there may not be enough time to check all the facts and make a comprehensive report. It is NOT a good idea to use less than a minimum level of proof to make statements concerning the situation. Reports (emergency bulletins) made in such situations should be written in a qualified way so that, if a mistake is made, the organization is not bound by it.

Example: Emergency reports on crisis situations should use qualifying terms such as "witnesses say that" and "we are unable to verify at the moment" to indicate the sources and status of the information.

There should be some consistency in the level of proof used from report to report, unless there is a good reason to change it.

Example: If a particular form of punishment is described as torture in one report, it should not be changed without giving reasons in later reports.

There have been some attempts to categorise levels of proof. The United Nations Truth Commission in El Salvador had three levels of proof. First was "overwhelming proof", which meant highly convincing proof. The second was "substantial proof", which was solid proof in support of the conclusion. Finally, "sufficient proof", was proof in support, rather than in contradiction, of the conclusion. The Truth Commission also worked on the basis that no source or witness by itself was sufficient to establish the truth on any vital fact.

Human rights organizations using these rules may be delayed in reaching conclusions in cases where they have some evidence to believe that human rights violations are occurring, but not enough to prove them.

Admissions against interest

Governments often tend to totally deny reports and allegations of human rights violations. However, by publishing credible reports, human rights organizations can succeed in forcing governments to acknowledge the findings of investigations.

Example: A human rights organization may publish a report with numerous cases of disappearances. The government may respond by admitting that only a few cases have occurred.

The organization may accept the government's admission, against its own interest, as a fact or as a minimum figure for the number of confirmed cases of disappeared.

Whenever possible, government officials should be interviewed. Such interviews may provide information and clues that are useful to the investigation. In cases where a government refuses to meet human rights organizations, or remains silent despite the publication of credible reports, its silence cannot automatically be taken as an admission of guilt.

However, the government's refusal to meet with human rights groups can be shown as an indication of a lack of commitment to human rights. The fact that the government was given a chance to present its side can be used to show, at the very least, that the fact-finding was undertaken fairly.

Burden of proof

When a human rights organization reports that human rights violations have taken place, the burden of proof rests on the government to show that this was not the case, or that government agents were not responsible for the violations.

Burden of proof (or onus) is another way of showing whose turn it is to respond to the evidence—the organization engaged in fact-finding or the government. Obviously, human rights organizations always want the onus to be on the government. They must first show sufficient evidence to shift the burden to the government. A primary purpose of human rights investigations is to find the truth, or the nearest thing to it, and present it in such a way as to shift the burden of proof to the government—to make them respond and take some action. At each step, the evidence has to be enough to shift the burden back to the government. What is "enough" varies.

V. What constitutes an abuse of human rights in armed conflict?

When deciding on what is an abuse of human rights, it is important to understand the accepted definitions of armed conflict, civilians and members of the armed forces from the perspective of international humanitarian law. These are covered in Annexe II, dealing with international humanitarian law.

Below, we look at the following:

- Types of killings
- Torture
- Deliberate mutilations
- Deliberate and indiscriminate attacks on the civilian population
- Particular abuses against children
- Rape and other forms of sexual violence
- Use of hate speech to incite violence against others
- Unfair trials in armed conflict – ending impunity and summary justice
- Displacement/refugee populations – the rights of refugees and internally displaced people
- Hostage-taking

After each type of abuse, there is a list of evidence required and possible sources for the information.

As with any other party in armed conflict, peacekeepers are equally bound by international human rights and humanitarian law. Violations by peacekeeping forces should be researched and documented in the same way as those committed by government forces and armed opposition groups.[11]

11 A useful source of information here is the UN Secretary General's Bulletin on Observance by UN Forces of International Humanitarian Law (available on the Internet at www.un.org/peace).

A. Types of killings

1. Not all killings are human rights abuses

- Many are crimes that are handled under criminal law, e.g. when a robber kills a shop owner.

- Some killings by the state do not violate international human rights standards. For example, if a person is killed as a result of police using the minimum force necessary to protect life, the killing is not unlawful.

2. Killings are human rights violations when they are murders directly committed by the authorities or condoned by the authorities. They must show the following three characteristics:

- **They take place at the order, complicity or with the agreement of the authorities.** Killings carried out by individual police officers or soldiers in violation of enforced orders do not constitute human rights violations unless they go unpunished or are ignored by the authorities.
- **They are deliberate:** They have NOT occurred by accident or because of ignorance or self-defence.
- **They are unlawful:** They violate national laws such as those prohibiting murder, as well as international human rights and humanitarian standards forbidding arbitrary deprivation of life. They did not follow proper and adequate judicial or legal proceedings.

3. Killings constitute human rights abuses when they violate the laws of war prohibiting the killing of unarmed individuals and prisoners of war. Such violations include:

- Deliberate killing of prisoners of war
- Deliberate killing of civilians

4. Killings by an armed opposition group constitute human rights abuses when they violate international

norms prohibiting the arbitrary deprivation of life. That is:

- They are **deliberate**. They are not committed in self-defence, by accident or ignorance;
- They disobey the minimum standards of human behaviour which apply to both governments and armed opposition groups;
- They are committed **on the authority of a political entity** or with its consent. The killings are part of a policy to eliminate specific individuals or groups or categories, or they occur because they are tolerated and are allowed to be committed.[12]

Examples of armed conflict killings that *are* human rights abuses

Category 2 above:

"On 3 March 1997, at least 150 unarmed civilians, and possibly as many as 280, were killed by RPA soldiers in a military search operation in the communes of Kigombe, Nyakinama and Mukingo, in Ruhengeri, one day after an attack by an armed group in the town of Ruhengeri in which several people were reportedly killed. The RPA carried out large-scale "cordon and search" operations in several locations in the area; soldiers – reportedly assisted by gendarmes – reportedly rounded up local residents from their homes, led them away and shot them or beat them to death." (Rwanda: Ending the silence. *Amnesty International 25 September 1997)*[13]

Category 3 above:

In August 1998, combatants of the opposition alliance known as the Rassemblement congolaise pour la démocratie (RCD), Congolese Rally for Democracy, together with Rwandese soldiers reportedly killed 37 people, including Stanislas Wabulakombe, a Roman Catholic priest, and three nuns at Kasika Roman Catholic parish and as many as 850 other unarmed civilians in surrounding villages. (Amnesty International Report 1999, p.139).

12 Please see booklet in this series entitled: *Monitoring and investigating political killings* for a full exploration of this subject.

13 The authorities recognized the excessive use of force in these incidents and several officers allegedly involved in this operation were reported to have been arrested after these killings.

Example of armed conflict killings that are *not* human rights abuses

The laws of war make some killings in armed conflict lawful and therefore not an abuse of human rights. For example, killing as a result of armed combat between different factions or between government troops and an armed faction.

Fact-finding – **Establish how the incident fits into the patterns you have already identified. You will then need to collect the following evidence.**

Evidence required

Were the victims civilians?

=> **If yes,** was the killing deliberate and not accidental? Was the killing arbitrary?
To answer these questions, you will need the following information:

- Were civilians given a warning to leave the area?
- Was it clear to the perpetrators that the victims were non-combatants, or were they accidentally caught up in the context of fighting?
- Was the attack specifically aimed at civilians and was it persistent?

If civilians were warned to leave the area and the answer to the other two questions is no, for example, the civilians were killed by mistake as a result of a skirmish between two armed groups, the killing is NOT an abuse of human rights.

=> **If the victims were combatants.** Had the victim already been detained or disarmed by the attacker? It is a violation of humanitarian law to kill anyone who is "detained", including military or security personnel who are no longer taking part in hostilities.

For killings as a result of deliberate and indiscriminate attacks on the civilian population (e.g.

by use of shells or landmines), please see Section D below.

=> **Possible sources:**
- Military observers
- Eyewitnesses
- Hospital staff
- NGO workers operating in the area.

B. Torture

The following is an extract from the booklet in this series entitled: *Monitoring and Investigating torture, cruel, inhuman or degrading treatment, and prison conditions* which provides full information about the evidence required and possible sources.

"II - Armed groups and torture

The definition of torture raises an important question. Acts of torture have to be committed by, or at the instigation of, or with the agreement of state officials. Does this mean that the word "torture" cannot be used with reference to armed groups? The response is "No"—armed groups may also be held accountable for acts of torture, as shown in the examples below:

- In a conflict situation all armed groups are required to abide by the Geneva Convention which governs the laws and customs of war. The laws of war prohibit torture by all parties in a conflict.[14]

- Armed groups are always responsible for any acts of torture committed by their forces.

- As a human rights worker investigating torture by armed groups, you will not be in a position to refer to the international convention on torture because the perpetrators are members of an armed group. However you can refer to the laws of war and state that all parties to a conflict are prohibited from perpetrating acts of

14 Non-Governmental Organisations such as Amnesty International apply the definition of torture to acts committed by members of armed groups.

torture and acts of indecent assault (which includes rape and other forms of sexual assault against women, men or children).

Examples

The following are the testimonies of children and adults caught up in the conflict between the Ugandan government and an armed opposition group, the Lord's Resistance Army (LRA).

A 17-year-old girl, abducted by the LRA, described what happened to her when she tried to escape:

"I was seen by the rebels staying up in the trees. They caught me and punished me for trying to escape. "The teacher tortured me. He poured boiling oil on my hand."

A woman describes what happened to her family during an LRA attack on her village:

"I was sitting in my home with my six-month-old baby. The rebels arrived. They picked the baby from me and threw him on the ground. He survived. My husband was a civil servant. He was there, along with a man who had come to buy groundnuts. The rebels started beating them. They killed my husband. They did not kill the buyer but he is now mentally deranged. Then they started raping me. My daughter was seven years old. They burnt her with fire, tortured her and asked her where my husband had put government property. I was also beaten on the head and lost my teeth."

The case of Ibrahima Mané

Ibrahima Mané, a 19-year-old pupil at the Koranic school in Kaolack, left Niaguis in mid-March 1998 for Ziguinchor to obtain his identity papers. At Adéane he was arrested by soldiers who tortured and ill-treated him. His body was burned using pots of melted plastic and burning ash was spread over him. He was then transferred to Zinguinchor where he was detained for 37 days at the command post of the southern

military zone. He escaped on the night of Friday 24 April and was able to contact RADDHO which raised the case with the Senegalese Committee for Human Rights and arranged for a lawyer to defend him. He is still waiting as no inquiry into his case has been opened to this day.

From RADDHO's annual report 1998-1999.

C. Deliberate mutilations

Additional Protocol II of the Geneva Conventions, Article 4, specifically outlaws this particular form of torture. See Annex II.

Example: In April 1998 in Sierra Leone, rebel forces embarked on a campaign of terror against civilians which they called "Operation no living thing". The following figures are from a report by Medicins Sans Frontières in May 1998:

As of 6th April 1998 Connaught Hospital started receiving small or large groups, depending on the availability of transport. By early May 1998 some 115 victims of severe mutilation had been admitted to this hospital in the centre of Freetown; about 60 were admitted on one day alone, 26 April 1998. The report gives the following overview of the wounds:

- 4 men with both arms amputated, age ranging between 16 and 40.
- 14 men with one arm amputated, age ranging between 23 and 50.
- 5 men had, in addition to having their arm(s) amputated, a part of, or one or both ears cut off.
- 1 woman with one arm amputated as a result of a gunshot wound.
- 1 patient with an amputated foot, 1 patient with an amputated leg, both as result of gunshot wounds.
- 23 patients with deep lacerations on lower arms, severed tendons, broken ulna and radius, as result of cutlass attacks.
- 7 patients with either a complete hand or several fingers

missing as result of cutlass attacks.
- 20 patients with gunshot wounds.
- 1 patient with shrapnel wounds as result of Ecomog* bombing.
- 2 women who were raped and had foreign objects inserted in their vagina.

Only one of these victims could be identified as a combatant (in this case a Kamajor fighter. All others were civilians, with occupations ranging from housewives, trader, farmer to diamond digger and miner. (*Atrocities against civilians in Sierra Leone* – Médicins Sans Frontières, May 1998.)

* ECOWAS Monitoring Group

D. Deliberate or indiscriminate attacks on the civilian population

Definition

Deliberate or indiscriminate killing of civilians in armed conflict are unlawful killings of civilians during an attack by an armed force under the control of a government or opposition group. The armed force either intentionally or recklessly disregards its obligation to direct attacks only at military objectives and to distinguish between military and civilian targets.

The definition of deliberate or indiscriminate killings of civilians includes several elements:
- Such killings are **unlawful** because they are an arbitrary deprivation of the right to life and violate fundamental rules of the laws of war.
- Such killings are carried out by **armed forces under the control of a government or an armed opposition group.**
- Such killings take place during **attacks occurring in the course of an armed conflict.**[15]
- Such killings are the result of an armed force **either intentionally (deliberate) or recklessly (indiscriminate) disregarding its obligation to distinguish** between military objectives and civilians or civilian objects.
- Those killed are **civilians, or non-combatants.**

15 The rules governing the conduct of hostilities are different depending on the nature of the armed conflict. It could be an international armed conflict (involving armed forces operating outside their own territory) or an internal armed conflict. Direct attacks against civilians are prohibited in both types of conflict, but prohibitions on indiscriminate attacks are only *explicitly* set out in the rules governing international armed conflicts (including certain wars of "national liberation"), which also include more rules regarding the protection of civilians against the effects of hostilities. (...)

The following are some examples of an indiscriminate attack:

- Attacks which are not directed at a specific military objective, e.g. "blind fire" and orders for aircrews to release bombs anywhere over enemy territory before returning to base;
- Attacks which treat a number of clearly distinct and separated military objectives as one military objective, e.g. "area bombardment";
- Attacks that cannot be directed against a specific military target, usually because the weapons are not able to make a distinction between civilian and military targets (e.g. long-range missiles with questionable accuracy).
- Disproportionate attacks,[16] for example, one aimed at a legitimate military target but which has a disproportionate impact on civilians.

Example of Disproportionate attacks:

Between April and June 1999, the Mouvement des forces démocratiques de Casamance (MFDC), Democratic Forces of Casamance Movement, fired several shells in and around Ziguinchor, the capital of the Casamance region of southern Senegal, including at the airport. It appears the later shells were a response to a raid by the Senegalese army, designed to dislodge MFDC fighters. All the victims of the shellings were civilians, attacked in their homes or in the street. (See: *Senegal – Casamance civilians shelled by the MFDC*, Amnesty International, 30 June 1999, for more details.)

Such use of force violates Common Article 3 of the four Geneva Conventions of 1949 and the second protocol of the Geneva Convention of 1977, in particular Article 13.

Fact-finding – Evidence required:
When alleged unlawful killings of civilians are the result of an attack by artillery, mortar or other "crew-served weapons" (tanks, mobile artillery, rocket launchers, etc.) the following factors should be considered:

- What, if any, legitimate military objectives were in the area attacked?

However, some NGOs, such as Amnesty International, equally oppose indiscriminate attacks in internal conflict.
The rules on the conduct of hostilities in Protocol I are aimed at protecting civilians and include the principle of distinction, the prohibition of direct and indiscriminate attack, and a list of necessary precautions (see Annexe II). These are accepted as customary for international armed conflict and are binding on countries that are not party to Protocol I.

16 Customary law for international conflict prohibits disproportionate attacks (see Protocol I, 51(5)(b).

- How important were the military objectives?
- What were the rules of engagement?
- What type of weapons system was used and what was its accuracy? Take into account the range at which it was fired, the size of the military target, the weather and other conditions (including any immediate threats to those firing it) affecting its accuracy.
- What type and quantity of ammunition was used in the attack?
- How many civilians were killed or injured? How many military personnel were killed or injured?
- What was the scale of damage to civilian objects and to military objectives?
- What degree of knowledge or intelligence did the attacking force have of the areas under attack?
- What, if any, type of system was used by the attacking force to locate the target they were aiming at (forward observers, aerial surveillance, radar systems)?
- Were they firing from fixed or mobile emplacements? (Generally, weapons are more accurate when fired from fixed emplacements.)
- What was the timing and duration of the attack?
- Was the attack pre-planned, or was it an attack on a "target of opportunity"?

When alleged unlawful killings of civilians are the result of an attack from the air, the following additional factors should be considered:

- What type of aircraft was used in the attack?
- What type of munitions were used? Were they precision-guided munitions?
- Did those firing from the aircraft have visual contact with the target?
- From what height and distance from the target did the attack take place?
- What were the rules of engagement?
- What sort of intelligence did the attackers have?
- What was the military objective?
- Were they attacking a fixed target?

Possible sources of information:

- Eyewitnesses to the attack itself or to preparations for the attack, including the military force involved
- People who visited the site of the attack shortly afterwards (could include journalists, diplomatic staff, medical relief workers)
- Medical staff who treated casualties
- Military personnel
- Civilian authorities, including local national Red Cross or Red Crescent.
- Military advisors or personnel attached to any UN operations
- Military advisors or personnel attached to diplomatic missions
- Field staff of the International Committee of the Red Cross.

E. Particular abuses against children:

(a) The detention of children:

Children detained by the security forces or by armed opposition groups may be particularly at risk if held in unofficial places of detention. It is important to trace their place of detention and ensure that they are allowed visits by the International Committee of the Red Cross, their family, medical personnel, lawyers and NGOs working in the field of human rights or human welfare.

(b) The use of child soldiers:

In addition to protection of basic human rights, children are also protected specifically by the UN Convention on the Rights of the Child and by the Additional Protocol II of 8 June 1977 relating to the Protection of Victims of Non-International Armed Conflicts. These two legal texts lay down a minimum age of fifteen years for soldiers.

However, a draft optional protocol to the Convention on the Rights of the Child sets 18 years as the minimum age for

participation in hostilities.[17] The draft optional protocol would also prohibit the compulsory recruitment by Governments of persons below 18 years and ban recruitment or use in hostilities of persons under 18 by other armed groups. The document raises the standards contained in article 38 of the Convention on the Rights of the Child and shows a willingness to take stronger measures to keep children out of armed conflicts.

(c) Children as sexual slaves:

In some circumstances, the abduction and forced ownership of children by an army or armed group can be consistent with the international definition of slavery.[18]

Example of abduction and slavery:

Discipline within the Lord's Resistance Army (LRA) is maintained by extreme and arbitrary violence. LRA commanders force captured children to take part in the almost ritualized killing of others very soon after their abduction. The intention appears to be to break down resistance to LRA authority, to destroy taboos about killing and to implicate the child in criminal acts. The effect is to terrorize children… There is no discrimination on gender grounds when it comes to making abducted children kill those who try to escape…Each abducted child is allocated to a "family" headed by a commander… The powers of the men at the head of each family, under the overall authority of Joseph Kony (LRA leader) and other senior commanders, are such that they effectively "own" the children allocated to them as chattels. Girls are held in forced marriages. Commanders have the power to impose hard labour and physical punishment – and the power to kill. In Amnesty International's opinion the degree of ownership over child members of the "family" is such that their condition is consistent with the international definition of slavery. (*UGANDA–"Breaking God's commands": The destruction of childhood by the Lord's Resistance Army*, Amnesty International, 18 September 1997.)

17 A working group of the United Nations Commission on Human Rights, 21 January 2000

18 Article 1 of the 1926 Slavery Convention defines slavery as: "the status or condition of a person over whom any of the powers of ownership are exercised".

Fact-finding – Monitoring these issues with a view to establishing clear patterns is very important. Once you are aware of the patterns of an armed group or government armed forces, you can start to collect facts about individual cases.

Evidence required:

Child detainees

- Are children being held?
- If so, by whom, where and why?

Child soldiers

- Are children under the age of fifteen involved in combat?
- Which armed groups does this apply to?
- What are the names of the child soldiers?
- What are the details of their activities?
- Can you confirm their account of activities with evidence from other sources about the operations of that group and the weapons mentioned?
- Can you obtain a statement from a spokesperson from an armed group about the use of child soldiers?
- Is there psychological evidence that a child has been involved in combat?

Children as sexual slaves

- Trace events since the child's abduction;
- Identify the power relations between the armed group and the captives;
- What activities was the child involved in?
- Was there a difference between the activities expected of children of different ages and gender?
- Did the child have an opportunity to refuse certain activities?
- Is there medical evidence that a child has been sexually abused?
- Is there psychological evidence that a child has been sexually abused

Sources:

- The children themselves. It may be difficult to interview young children and traumatised children. It is unlikely

that you will gather all the information you need in one session with a child. Be aware that the child's perception of their experience may be quite different from yours – try to see their story through their eyes;
- Drawings made by the children;
- Their parents/guardians/counsellors or others the children are able to trust;
- Medical records (these may be useful to provide evidence that a child has been sexually abused);
- Security forces or others responsible for detaining them;
- Eyewitnesses.

F. Rape and other forms of sexual violence

Rape by agents of a state or other officials is classified as torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Rape causes "severe pain or suffering, whether physical or mental", it is intentional, and it has the purpose of punishing, intimidating or coercing.[19]

Example: Mariatu, now aged 16 years, was abducted from the village of Mamamah, some 40 kilometres from Freetown, as rebel forces retreated from the capital in January 1999. Both her parents were killed by rebel forces when they attacked the village. Mariatu was repeatedly gang-raped by a number of rebels. If she attempted to resist rape she was denied food and beaten. She was forced to accompany rebel forces first to Lunsar and then to Makeni and was eventually forced to become the "wife" of one of the rebels. Many other girls were held in the same situation. When she became pregnant, she was taken back to her family and abandoned. ("Sierra Leone, Rape and other forms of sexual violence against girls and women", Amnesty International, 29 June 2000)

19 See other booklets in this series entitled: *Monitoring and Investigating Sexual Violence* and *Monitoring and InvestigatingTorture, Cruel, Inhuman or Degrading Treatment, and Prison Conditions*

(a) Rape as a war crime:

- Rape is also classified as a war crime because it is a violation of the laws of war, which is "committed by persons 'belonging' to one party to the conflict against

persons … of the other side."[20]

- More specifically, the Fourth Geneva Convention (Article 27, paragraph 2), which applies to areas considered occupied territory, states:

  "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault."

- Article 4 of the Second Protocol of the Geneva Convention which regulates internal armed conflicts expressly forbids: "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."

- The International Criminal Court (ICC) Statute gives the ICC the power to try cases of rape or other sexual abuse as war crimes and, when committed on a widespread or systematic basis, as crimes against humanity.

(b) Rape as a crime against humanity:

The Statutes of the International Tribunal for Yugoslavia and the International Tribunal for Rwanda list rape as a crime against humanity. To prove rape as a crime against humanity, the following must be established:

- it must be directed against civilian populations;
- it must be widespread or large-scale, i.e. the rapes must be directed against a number of victims. Single or isolated acts fall outside the scope;
- it must be part of a systematic pattern of abuse through a pre-conceived plan or policy, of which rape is an element. In these circumstances, rape has become a weapon of war;
- it must be committed by state actors (e.g. soldiers, police etc) or by non-state actors (e.g. members of armed opposition groups, individuals acting at the direction of state officials or members of political groups, or with

20 Meron, 1993, quoted in paper on 'The International Legal Status of Rape', Agnès Callamard, February 1997.

their consent or knowledge). This excludes inhuman acts committed by individuals on their own initiative or as part of criminal actions.

(c) Rape as genocide:

Under international humanitarian law, rape can be categorised as genocide. The Convention on the Prevention and Punishment of the Crime of Genocide defines genocide to mean:

"Any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such … (b) causing serious bodily harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group."

Under international law genocide is a crime in times of peace and armed conflict, whether international or internal.

For details about evidence required and possible sources please see booklet entitled: *Monitoring and Investigating Sexual Violence.*

G. Use of hate speech to incite violence against others

"Hate speech" and other types of expression, which advocate war, and religious or racial hatred is a specific limitation to the right to freedom of expression. Article 19 of the International Covenant on Civil and Political Rights defends freedom of expression, while Article 20 stipulates:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

It is important to note that the phrase "that constitutes incitement" requires that the views must not only be advocacy of unacceptable and dangerous views, but advocacy which

may incite others to action. The freedom of expression community has often argued that the best antidote to hate speech is more speech – thereby extending pluralism rather than restricting it. Hate speech has previously been used mainly by small extremist groups. However, in Rwanda hate speech was used as an important tool for the widespread organisation of genocide. Since then, it has been used in the same way in Burundi and the Democratic Republic of Congo.

Evidence required:

- To establish the context,
  => what are the restrictions on other types of media?
  => has there been a change in the treatment of the independent media?
  => who owns and/or controls the various media outlets?
  => what are their political/ethnic/religious affiliations?

- What is the nature of broadcasts or written material that may represent advocacy of "hatred that constitutes incitement to …"? Keep copies of written material, transcribe radio or TV broadcasts.
- Can you reveal a correlation between the material and violence? Take care to avoid simple deductions – these have often been used to introduce censorship and destroy freedom of expression, for example where film and TV violence has been inconclusively blamed for leading directly to an increase in violent crimes.
- Can you prove "direct and public incitement to commit genocide" or an "attempt to commit genocide" or "complicity in genocide"? All of these are outlawed by the Convention on the Prevention and Punishment of the Crime of Genocide.
- Can you obtain evidence of the State's failure to "stop incitement to violence"? Both the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights require governments to take concrete measures against violence and incitement to violence based on ethnic hatred.

Possible sources:

- TV/Radio personnel
- Journalists
- Foreign radio stations which may monitor national or local broadcasts
- Freedom of expression NGOs inside or outside the country

H. Unfair trials in armed conflict – ending impunity and summary justice

International humanitarian law contains important safeguards for fair trials. These apply to various categories of people during international wars and internal conflict, including civil wars.[21]

When armed groups establish their own forms of justice:

Armed factions may administer their own form of justice – for example, between 1990 and 1992, Charles Taylor effectively organised his territory as "Greater Liberia" and led a government with a full range of ministers, including one responsible for justice.
Trials that take place in such circumstances are regulated by the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 6. See Annexe II.

Evidence required:

Was the person found guilty by a court offering the essential guarantees of independence and impartiality? In particular;

- Was the accused informed of the alleged offence and allowed a defence before and during the trial?
- Was the person tried on the basis of individual responsibility?
- Was the person innocent until proven guilty?
- Was the accused present at the trial?
- Did the accused have legal representation at the trial?

21 Please refer to Chapter 32 of the Fair Trials Manual, Amnesty International 1998 (available on http://www.amnesty.org)

If the answer to any of these questions is no,
OR, if the accused was compelled to testify against himself or to confess guilt,
OR, if death penalties were passed against persons under the age of eighteen years at the time of the offence or carried out on pregnant women or mothers of young children, then the trial contravenes the provisions of the Geneva Convention, Protocol II, Article 6.

When the judicial system remains operational:

When a conflict is only affecting part of a country, it is possible that the judicial system will continue to operate.

Uganda is a good example

The war in northern Uganda pitches the government's Uganda Peoples' Defence Forces (UPDF) against the Lord's Resistance Army (LRA), yet the main victims are civilians. The UPDF has reacted to pressure from NGOs and stopped the army from punishing their own staff for criminal acts. Instead, the police force plays a role in holding the military accountable for their actions by taking responsibility for detaining those handed over by the military, bringing criminal charges and organising trials in civilian courts. However, policing and criminal investigation remains a challenge in the circumstances of armed conflict. For example:

- Politically motivated allegations and counter-allegations are rife;
- The obstacles to locating and protecting witnesses are immense;
- The police are lightly armed and are a target of the LRA. They need the protection of the UPDF if they are to function outside of the main towns;
- Courts have difficulties functioning; and
- It seems the political will to punish the army is absent – between January 1996 and April 1998, the police charged 82 soldiers with serious crimes against the person, but in only three cases, involving 8 soldiers, have there been trials and convictions. (*Uganda – Breaking the circle:*

Protecting human rights in the northern war zone, Amnesty International 17 March 1999)

Evidence required:

- You will need a comprehensive knowledge of how the criminal investigation and prosecution service works in normal circumstances to establish the particular irregularities in the context of armed conflict. This will help you to evaluate whether any irregularities are specifically tolerated to allow the armed forces or a militia close to the authorities to act with impunity. While any shortcoming would constitute an abuse of human rights, it is important to be able to present the information in its context.
- Issues around fairness of trials (as above). Article 14 of the International Covenant on Civil and Political Rights would also apply if an emergency has not been declared and if the country concerned has ratified the Covenant;
- How many soldiers have been charged with serious offences and never brought to trial? What has happened to them? Are they on active duty?
- What happens to soldiers who are released for lack of evidence?
- Are there cases where you have good information to report a suspected crime?

When there is no administration of justice:

In many armed conflicts, the administration of justice is an early casualty and it is not until a peace agreement has been signed that the question of impunity can be addressed. In these circumstances, the facts and evidence you are collecting may prove vital to holding perpetrators accountable at the end of the conflict.

Evidence required:

The evidence required is as listed above under the other categories. It should be compiled and kept in a way that is presentable to relevant legal structures. This could include a

war crimes tribunal, a commission for truth, justice and reconciliation, etc.

Possible sources:

- Lawyers
- Judges
- Court clerks
- Journalists
- Defendants themselves

I. Displacement/refugee populations – the rights of refugees and internally displaced people[22]

International humanitarian law allows for the displacement of civilians in certain circumstances, for example, for their security or for military reasons. All possible measures must be taken to ensure the shelter, hygiene, health, safety and nutrition of the civilian population.[23] However, civilian populations can be at increased risk if they are displaced.

Example: In northern Uganda, the government created camps for displaced people in reaction to the scale of LRA violence against villagers. However, the authorities failed to guarantee food security and provide adequate protection from violence in camps (or for communities in areas where camps have not been created). Lack of food has meant that in some areas villagers have returned home to cultivate or forage for food, which has exposed them to human rights abuse. The authorities have failed to demonstrate, in Gulu District at least, steps to minimize displacement. They have not taken effective steps to bring to an end the situation that has caused displacement in the first place. This all raises serious questions about whether continuing action to compel people to leave the countryside remains consistent with international law. (From *Uganda – Breaking the circle,* Amnesty International, 17 March 1999).

22 The internally displaced are in a similar situation to refugees, except that they have not fled across an international border – they remain displaced within their own country.

23 See Article 17 of the Geneva Conventions Additional Protocol II.

Evidence required:

You will need to answer the question:

- If the government or an armed opposition group is displacing the civilian population, are there reasonable measures to ensure their protection and well-being?

For this you will need to know:

- Was the civilian population displaced?
- Is this part of a policy by the government forces or the armed group? How long has this policy existed? What is the declared intention?
- What arrangements are made for the displaced in the new area?
- How are they being treated by the local population?
- What provisions are made for their safety, nutrition, shelter and health?
- Are different groups (for example: on the basis of age, gender, ethnicity, nationality) treated differently?
- Are measures in place to protect the most vulnerable (e.g. women, children, people of a particular ethnic group) and to ensure they are integrated into all programmes?
- Do you have sufficient information to conclude that the group responsible is not taking "all reasonable measures"?

International standards for refugees:

All countries are bound under international refugee law[24] to allow all asylum seekers to enter their territory, to provide adequate protection and to respect the principle of *non-refoulement*.
In addition, Conclusion No.22 of the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) establishes an international principle that:

- In situations of large-scale influx, asylum-seekers should be admitted to the state in which they first seek refuge.
- If the state is unable to admit them on a durable basis, it should admit them on at least a temporary basis.

24 The UN Convention relating to the Status of Refugees and the OAU Convention governing the specific aspects of refugee problems in Africa

- They should be admitted without any discrimination as to race, political opinion, nationality, country of origin or physical incapacity".

Example: The Guinean authorities became increasingly concerned about the large influx of people from Sierra Leone. On 8 June 1997 120 people from West African countries, about half of them from Sierra Leone, had to remain on board the vessel which brought them as they were refused permission to disembark. The Guinean authorities threatened to deny entry to more boats from Freetown (the Sierra Leonean capital) carrying refugees for reasons of internal security. …In mid-June 1997 some 3,000 Sierra Leonean refugees trying to cross the border into Guinea at Guékédou were refused entry by the Guinean authorities. (*Sierra Leone: A disastrous set-back for human rights*, Amnesty International, 20 October 1997.)

Evidence required:

Gather information about the international relations between the countries concerned and their previous record on hosting asylum seekers. In addition, you will need to know:

- Identities and/or numbers of those seeking asylum
- What type of people are they – men/women/children, old/young, a particular ethnic group etc.?
- Dates of their arrival, *refoulement,* and return
- Which immigration officials made the decision to not allow the asylum seekers to enter?
- What has happened to the people since their return? If they have been victims of human rights abuse since their return, this will add weight to your case on their behalf.

Interviewing refugees or displaced people

This can be particularly difficult. Remember that they are in a stressful situation away from their families and other familiar situations. They might well have high expectations of what you can offer them – take time to explain your role and your limitations.

Possible sources:

- International refugee bodies, such as the UN High Commission for Refugees (UNHCR) and local/national ones.
- Development agencies which may be providing supplies to refugee groups.
- Port/airport/border staff.

J. Hostage-taking

The United Nations' International Convention Against the Taking of Hostages, which came into force in June 1983, sets out its terms of reference by defining a hostage as:

Article 1:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking" within the meaning of the Convention).

Hostage taking is also regulated by humanitarian law (see Article 34 of the Fourth Geneva Convention, Annexe II).

Example: Armed Forces Revolutionary Council (AFRC) forces captured more than 30 UN military and civilian personnel who had gone to the Occra Hills in August with an ECOMOG escort to supervise the release of abducted civilians. Their captors claimed that Johnny Paul Koroma (AFRC leader) was held under duress by RUF forces and that the peace agreement disadvantaged AFRC forces. All were released after six days.

In December Revolutionary United Front (RUF) forces captured two foreign nationals working for Médicins Sans

Frontière (MSF-France), in Kailahun District, Eastern Province, and held them hostage for 10 days in protest against disarmament and demobilization being supervised by UN peace-keeping forces and ECOMOG troops. (*Amnesty International Report 2000*, entry on Sierra Leone, p. 209)

Fact-finding—Evidence required:

- Names and other means of identity of those held;
- Place and date and other circumstances of their abduction;
- Details of statements made by their captors and by those who are expected to fulfil the conditions set by the hostage-takers.

Possible sources:

- NGOs based in the area;
- Families of those abducted;
- Eyewitnesses;
- Those responsible for the hostage taking (be politically aware – getting involved in negotiations yourself could damage your work as a human rights monitor).

VI. Taking action

Taking action in a context of armed conflict is particularly difficult. For example, seeking legal remedies may be impossible while the conflict lasts. Medical remedies and outside publicity become all the more important. To cope with these difficulties, building coalitions is necessary. This could include development NGOs that have access to areas of conflict and are open to collaboration with human rights activists. It could also include working with organisations that offer assistance to ex-child soldiers, play a role in peace negotiations, as well as NGOs working on civil and political rights. There are other additional issues to bear in mind.[25]

Other targets:

1. Third parties who support a particular faction:
You may broaden your activities to include putting pressure on other governments and bodies that are supporting the different parties in the conflict. This requires careful fact-finding to prove the links and to clearly establish for example, that country X is providing faction/country Y with landmines or shells that are being used to indiscriminately attack civilian populations. If evidence is lacking, it may be possible to liaise with human rights groups in the other country to see if they can provide information to help in your assessment of the situation.

2. Actors in the peace process:
Providing participants in the peace process with information about human rights abuses is an important role for human rights activists. This can help to ensure that the issues are addressed as part of any agreements.

3. International bodies:
UN bodies for example UN Observer Mission in Sierra Leone (UNOMSIL) and UN Human Rights Field Operation for Rwanda (UNHRFOR).

25
This area has also been explored in other booklets in this series and they may provide other useful ideas.

4. UN Treaty bodies which oversee governments' adherence to international standards:
For example, the Committee on the Elimination of Racial Discrimination or the Human Rights Committee (which examines adherence to the International Covenant on Civil and Political Rights).

5. Corporations who have invested in the area of conflict:
They may be able to use their influence to improve respect for human rights or may employ security firms that are themselves responsible for human rights abuses.

6. Companies manufacturing weapons that are used to commit human rights abuses:
They could be informed about the evidence you have gathered and lobbied to ensure they do not provide further weapons that might escalate the level of abuse.

VII. Particular challenges and some solutions

You may face numerous obstacles and problems while monitoring human rights abuses in armed conflicts. This section identifies some of these problems and offers some solutions.

General challenges and possible solutions[26] are:

- Labelling
- Feeling exhausted or depressed
- Logistical problems
- Lack of access to information
- Risks to personal security
- Dealing with traumatised people
- Interviewing suspected perpetrators.

- **Labelling** becomes an even greater problem as the society polarises during the conflict and as each party in the conflict attempts to avoid responsibility for abusing human rights. You might be under pressure to takes sides in the conflict or accused of supporting one of the sides. Negative labelling or intimidation may be aimed at damaging your reputation and credibility. Women are particularly vulnerable to negative labelling from the government, family, friends and colleagues.

  Remedies might include emphasising the accuracy of your information. Ensure that the people you interview understand that your role is not to resolve the conflict, but to create an environment that will help others in this task. Explain your impartial approach. It might also be useful to expand any human rights education programmes to inform the population about humanitarian law and the role of human rights monitors in armed conflict. Issue public responses to any attacks on the reputation of your organisation or its members.

- **Feeling exhausted or depressed** is a great risk with the added stress of an armed conflict situation. You may have witnessed, or experienced, human rights violations. This is likely to have a negative effect on your mental well-being.

26 For more detailed information see *UKWELI – Monitoring and Documenting Human Rights Violations in Africa* Part 3.

This makes the **remedies** suggested all the more important. Insist that your organisation acknowledge the stresses and provide ways of dealing with them. Organise regular debriefing sessions which allow you to talk about your experiences and feelings. Make time to exercise, relax and take part in activities that relieve stress. If the depression or stress is severe, get professional help!

- **Logistical problems** become even greater as all means of communications and existing infrastructure are affected by the conflict. However you have to be adequately prepared and make sure that you have all the necessary equipment and suitable transport if you are in a dangerous situation. Try and get support from other reliable international organisations that are working in the area.

- **Lack of access to information.** During armed conflict people are afraid to speak and there is an even greater lack of public awareness about human rights abuse.

  Additional considerations might be whether you can travel to an area without an official escort. If you travel with a government official or an armed opposition group, this could damage your claim to impartiality and the credibility of your work.

  However, it is necessary to develop co-operative relations with government and other authorities in order to collect information. Human rights education may also help to encourage people to identify incidents as human rights issues.

- **Risks to personal security** are heightened during travel into areas where hostilities are a possibility and where the parties to the conflict do not wish to see their crimes exposed. Others at risk include your contacts and their family and friends.

  => Precautions include:
  • informing someone of your whereabouts at all times

and particularly if you are travelling to a dangerous zone;
- double-checking any contacts or guides you consider using (are they impartial, seen as impartial, sufficiently knowledgeable about hostilities/safe zones etc?);
- deciding whether to identify yourself as a human rights monitor when going into difficult areas;
- planning what to do in a given zone if you meet problems (such as arrest, abduction etc).
- Is it appropriate to accept an "official" escort?

- **Dealing with traumatised people**: Be aware of how the trauma may affect the person you are interviewing—they may deny the events, exaggerate them or be totally confused. Try to arrange a follow-up meeting with the person you have interviewed to determine the impact of your interview on their psychological state. Also be aware of the impact it may have on you. It will help to talk through the interview with your colleagues, while still respecting confidentiality[27]

- **Interviewing suspected perpetrators**: This is always a difficult situation, made more complex by the heightened tension of the armed conflict. It is important to try to obtain the official story, even though you will need independent sources to verify what you hear and learn. Once you have completed your research, it might also be useful to seek clarification of your allegations with the perpetrators.

  It is important to remain polite, even if the spokesperson's version sounds completely incredible. Seek clarification without being confrontational and be prepared to change your view of the situation.

  These difficult interviews are best planned in advance. This will allow you to prepare questions you need and give you space to listen to the answers.

27 This area is covered in more detail in the first booklet in this series.

Some additional challenges:

Securing a role for human rights monitoring in situations of armed conflict: To protect future human rights it is essential that the international community publicly condemns human rights violations during the conflict, the peace process and once peace is agreed. In a statement to the UN Security Council in September 1999, Mary Robinson, High Commissioner for Human Rights stated:

> *To grant amnesty to the authors of the most atrocious crimes for the sake of peace and reconciliation may be tempting, but it contradicts the purpose and principles of the UN Charter as well as international observed principles and standards.*

National and international human rights organizations play a vital role in providing the information that can help to hold perpetrators accountable. In addition, it is important that international field personnel, including those engaged in military, civilian and humanitarian operations, should not be "silent witnesses". Instead, they should report, through proper channels, any human rights violations they may witness or serious allegations they receive.

With a view to protecting human rights in the long term, it is important that peace settlements should provide for impartial investigations of past abuses. A process aimed at establishing the truth and measures to ensure that any perpetrators of human rights violations are brought to justice must be undertaken. Responsibility for human rights violations, past and present, must be made explicit, and general pre-conviction amnesties should not be part of peace settlements. Prior to peace negotiations, this would be an important part of any human rights education programmes you are able to organize.

If an international tribunal or a truth, justice and reconciliation commission is set up as part of the peace settlement, it is important that there is a formal role for human rights monitors in this stage of the process.

A difficult choice for a human rights organisation, or individual monitors, might be whether to advocate a cease-fire and play a role in conflict resolution. It is worth thinking about how this will impact on your impartiality.

Determining when you are dealing with "armed conflict" as defined in international humanitarian law: It is particularly important to know which international standards to apply. See the Introduction section to this booklet and the extracts from international humanitarian law attached in the Annexe II.

How to research and raise issues about arms transfers: These transactions are usually kept secret. However, there are numerous NGOs who are specifically researching these issues. If you suspect that your country is receiving weapons from country X, it might be worth contacting an arms trade NGOs in that country or institutes which carry out this research. The Internet is probably the best place to obtain up to date information on this subject. Here are some useful addresses:

UK:

World Development Movement
25 Beehive Place
London SW9 7QR
Tel: +41 20 7737 6215
Fax: +41 20 7274 8232
E-mail: wdm@wdm.org.uk
Web site: http://www.wdm.org.uk

Saferworld
3rd Floor, 34 Alfred Place
London WC1E 7DP
Tel: +41 20 7580 8866
Fax: +41 20 7631 1444
Web site: sworld@gn.apc.org

Mines Advisory Group
54A Main Street
Cockermouth
Cumbria CA13 9LU
Tel: +44 0900 828 580
Fax: +44 0900 827 088

US:

Federation of American Scientists Arms Sales Monitoring Project
307 Massachusetts Avenue NE
Washington DC 2002
Tel: +1 202 675 1018
Web site: www.fas.org/asmp/library/handbook/cover.html

Council for a Livable World Education Fund
Thomas A Cardamone
110 Maryland Avenue NE
Suite 201
Washington DC 2001
E-mail: clw@clw.org
Web site: www.clw.org/cat/foraid/faidtoc.html

Human Rights Watch – Arms Division
350 Fifth Avenue
34th Floor
New York
NY 10018-3299
USA
E-mail: hrwnyc@hrw.org Website: www.hrw.org

FRANCE:

Handicap International
ERAC
14 avenue Berthelot
69361 Lyon Cedex 07
Tel: +33 78 69 79 79
Fax: +33 78 69 79 94

Other Websites:
Coalition to Oppose the Arms Trade
Web site: www.ncf.carleton.ca/ip/global/coat

Arms Trade Database
Atdb.cdi.org

Annexes: International and regional standards

Annexe I: Relevant International human rights law – Full texts are available on the Internet

1. The International Covenant on Civil and Political Rights

Article 4 (1):
Allows for the derogation from certain rights "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed...". However, Article 4(2) specifies that no derogation from "articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision". Of particular relevance here are:

Article 6 (3):
When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

Article 8 (1):
No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

Article 8 (2):
No one shall be held in servitude.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

2. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Article 3:
No state may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional

circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

3. 1951 UN Convention relating to the Status of Refugees

4. UN Convention on the Elimination of Discrimination against Women

5. UN Declaration on the Protection of Women and Children in Emergency and Armed Conflicts

6. International Convention on the Elimination of All Forms of Racial Discrimination

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

7. UN Convention on the Prevention and Punishment of the Crime of Genocide

Article 1
The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article 2
In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article 3
The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

Article 4
Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article 6
Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was

committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article 7
Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.
The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

8. UN Convention on the Rights of the Child

Article 38

1. State Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. State Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. State Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have attained the age of eighteen years, State Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, State Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39
State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment, or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Annexe II: International humanitarian law

1. Geneva Conventions and Additional Protocols (extracts):

Common Article 3 of the Geneva Conventions of August 12 1949:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1)Persons taking no active part in the hostilities, including members of the armed forced who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949

Article 34
The taking of hostages is prohibited.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1)

Section II—Combatant and Prisoner-of-War Status
Article 43 : Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Article 44: Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power

of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) During each military engagement, and

(b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

Article 45: Protection of persons who have taken part in hostilities

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the

interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.

3. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, an such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

Article 46: Spies

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.

4. A member of the armed forces of a Patty to the conflict who is not a resident of territory occupied by an adverse

Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

Article 47: Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:
(a) Is specially recruited locally or abroad in order to fight in an armed conflict;
(b) Does, in fact, take a direct part in the hostilities;
(c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
(d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) Is not a member of the armed forces of a Party to the conflict; and
(f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

PART IV: CIVILIAN POPULATION

Section I: General Protection Against Effects of Hostilities

Chapter 1: Basic Rule and Field of Application

Article 48: Basic rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and

combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Article 49: Definition of attacks and scope of application

1. "Attacks" means acts of violence against the adversary, whether in offence or in defence.
2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.

3. The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

4. The provisions of this Section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

Chapter II: Civilians and Civil Population

Article 50: Definition of civilians and civilian population

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

Article 51: Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
(a) Those which are not directed at a specific military objective;
(b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
(c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:
(a) An attack by bombardment by any methods or means which treats as a single military objective a

number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

Chapter III—Civilian Objects

Article 52: General protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture

or neutralization, in the circumstances ruling at the time, offers a definite military of advantage.
In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Article 53: Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

(a) To commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
(b) To use such objects in support of the military effort;
(c) To make such objects the object of reprisals.

Article 54: Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:

(a) As sustenance solely for the members of its armed forces; or
(b) If not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

4. These objects shall not be made the object of reprisals.

5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

Chapter IV—Precautionary Measures

Article 57: Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:
(a) Those who plan or decide upon an attack shall:
(i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
(ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
(iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of

civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

Article 58: Precautions against the effects of attacks

The Parties to the conflict shall, to the maximum extent feasible:

(a) Without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;

(b) Avoid locating military objectives within or near densely populated areas;
(c) Take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

Article 77(2)
The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among these persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest."

1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

Part II—Humane Treatment

Article 4: Fundamental guarantees

1.All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2.Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture mutilation or any form of corporal punishment;
(b) collective punishments;

(c) taking of hostages;
(d) acts of terrorism;
(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape enforced prostitution and any form of indecent assault;
(f) slavery and the slave trade in all their forms;
(g) pillage;
(h) threats to commit any of the foregoing acts.

3.Children shall be provided with the care and aid they require, and in particular:
(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of their parents, of those responsible for their care;
(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;
(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part of hostilities despite the provisions of sub-paragraph (c) and are captured;
(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Article 5: Persons whose liberty has been restricted

1. In addition to the provisions of Article 4, the following provisions shall be respected as a minimum with regard to persons deprives of their liberty for reasons related to the armed conflict, whether they are interned or detained:

(a) the wounded and the sick shall be treated in accordance with Article 7;
(b) the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict.
(c) they shall be allowed to receive individual or collective relief;
(d) they shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions;
(e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

2.Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons:
(a) except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women;
(b) they shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority as it deems necessary;
(c) places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety;
(d) they shall have the benefit of medical examinations;
(e) their physical or mental health and integrity shall not be endangered by an unjustified act or omissions. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the

person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.

3.Persons who are not covered by paragraph 1 but whose liberty ha been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely in accordance with Article 4 and with paragraphs 1 (a), (c) and (d), and 2 (b) of this Article.

4.If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.

Article 6: Penal prosecutions

1.This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.

2.No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independent and impartiality. In particular:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no one shall be convicted of an offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed that that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed

innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt

3.A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limited within which they may be exercised.

4.The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.

5.At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

Part IV—Civilian Population

Article 13: Protection of the civilian population

1.The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2.The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3.Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

Article 14: Protection of objects indispensable to the survival of the civilian population

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.

Article 17: Prohibition of forced movement of civilians

1.The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measure shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2.Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

Annex III: Regional Human Rights Standards

1974 Organization of African Unity (OAU) Convention governing the specific aspects of refugee problems in Africa:

Article 1

Definition of the term "Refugee"

1. For the purposes of this Convention, the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.

2. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

3. In the case of a person who has several nationalities, the term "a country of which he is a national" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of which he is a national if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

Article 2

3. No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.

4. Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

5. Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.

6. For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.

Article 5

Voluntary Repatriation

1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.

2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.

3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.

4. Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.

5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organizations, to facilitate their return.

OAU African Charter on Human and Peoples' Rights

Article 5:
Every individual shall have the right to respect for the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

OAU Convention for the Elimination of Mercenaries in Africa of July 3 1977, came into effect in 1985.

For full details see Internet www.oau-oau.org

The Publishers

Amnesty International (AI) is a worldwide voluntary activist movement working towards the observance of all human rights as enshrined in the Universal Declaration of Human Rights and other international standards. It promotes respect for human rights, which it considers interdependent and indivisible, through campaigning and public awareness activities, as well as through human rights education and pushing for ratification and implementation of human rights treaties. Amnesty International takes action against violations by governments of people's civil and political rights. It is independent of any government, political persuasion or religious creed. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect. It is concerned solely with the impartial protection of human rights.

Amnesty International Dutch Section Special Programme on Africa (SPA) was established in 1994. Initially, SPA developed a programme to assist Amnesty Sections worldwide to improve the effectiveness of their campaigning against human rights violations in Africa. Since 1996 SPA has moved towards providing support to the broader Human Rights Movement in Africa. Rather than funding projects, SPA is developing and co-ordinating long term projects for and and in cooperation with other human rights organisations and AI sections. In addition to copublishing *Ukweli,* SPA is also coordinating advocacy and training workshops in southern and West Africa, a project on policing and Human Rights, and a pilot project to raise human rights awareness in rural areas in Liberia.

CODESRIA is the Council for the Development of Social Science Research in Africa head-quartered in Dakar, Senegal. It is an independent organisation whose principal objectives are facilitating research, promoting research-based publishing and creating multiple forums geared towards the exchange of views and information among African researchers. It challenges the fragmentation of research through the creation of thematic research networks that cut across linguistic and regional boundaries.

CODESRIA publishes a quarterly journal, *Africa Development*, the longest standing Africa-based social science journal; *Afrika Zamani*, a journal of history; the *African Sociological Review*, and the *African Journal of International Affairs (AJIA).* Research results and other activities of the institution are disseminated through 'Working Papers', 'Monograph Series', 'New Path Series', 'State-of-the-Literature Series', 'CODESRIA Book Series', and the *CODESRIA Bulletin*.

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