



Extracted from *Reconciliation after Violent Conflict*  
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# Justice

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Reconciliation and justice are almost twin notions. Many people argue that the search for peaceful coexistence, trust, empathy and democratic power sharing demands that “justice be done” - that in one way or another the crimes of the past are acknowledged and punished. But justice has many faces:

- It can be retributive and based on prosecution.
- It can be restorative and based on mediation.
- Truth commissions produce historical justice.
- Reparation policies aim for compensatory justice.

The tendency in thinking about justice, especially in the West, is to focus on the retributive dimension. Central to this view is the idea that perpetrators should not go unpunished - that they should pay a price. This chapter reviews the potential role of criminal justice in reconciliation processes.

Practitioners in the field argue that “there is no peace and no reconciliation without punitive justice”. Sceptics have raised four general objections to the use of trials and criminal prosecutions in dealing with a violent past:

- Political circumstances may mean that retributive justice is simply not possible as a post-conflict strategy.
- Retributive justice tends to ignore or sideline the real feelings and needs of victims.
- Material obstacles can seriously hinder the delivery of adequate justice.
- Trials have the potential to thwart reconciliation processes.

*Justice has many faces.*

In cases where trials may not be possible or may be counterproductive to reconciliation, alternatives are amnesty, mechanisms of restorative justice, truth-telling and reparation. Amnesty and restorative justice are discussed in sections 7.2 and 7.3. Truth commissions and reparations are the subjects of chapter 8 and chapter 9.

## **7.1 Retributive Justice: the Promise, the Practice and the Risks**

This section of the chapter poses four questions:

- Why is it that criminal prosecution in post-conflict societies can be conducive to reconciliation?
- How is retributive justice to be organized in a transitional context?
- Under what circumstances can trials and other forms of punishment obstruct reconciliation processes?
- What are the available alternatives?

### **7.1.1 The Potential Role of Retributive Justice in the Reconciliation Process**

For reconciliation to stand any chance in the immediate aftermath of a civil war or a regime transition, it is crucial to limit the danger of renewed violence and terror. If the fire re-ignites, coexistence

(the first step in reconciliation) will be further away than before. Reconciliation also involves the gradual building of self-confidence and mutual trust, and implanting a culture of human rights and democracy. Some say retributive justice is the obvious instrument to realize both these conditions.

Supporters of retributive justice have identified the following list of its possible benefits, which may help policy makers in assessing its potential contribution to reconciliation:

*Avoiding unbridled private revenge.* If there is no criminal prosecution at all, victims may be tempted to take justice into their own hands: the risks then are vigilante justice, summary executions, spirals of revenge and so on. In addition, such “self-help justice” can trigger social and political disturbance. Refraining from prosecuting may also encourage conspiracy theories according to which the leaders of the new regime are suspected of collusion with one side in the former conflict.

*Protecting against the return to power of perpetrators.* In the first months after a violent conflict has ended, the survival of a newly-established regime depends on swift and firm judicial action against those who are responsible for the gravest violations of human rights. This is seen as a necessary protection against sabotage “from within” and as a way of achieving some minimal physical security.

*Fulfilling an obligation to the victims.* Advocates of punitive justice argue that retaliation is exactly what most victims want. It serves to heal their wounds and to restore their self-confidence because it publicly acknowledges who was right and who was wrong and, hence, clears the victims of any criminal labels that were placed on them by the authorities of the past or, indeed, by rebel groups or the new authorities. Only trials, the argument runs, lead to a full recognition of the worth and dignity of those victimized by past abuses. A post-conflict society thus has a moral obligation to prosecute and punish the perpetrators.

*Individualizing guilt.* Criminal courts establish individual accountability. This is crucial in the eradication of the dangerous perception that a whole community (e.g., “the Serbs”, “the Muslims”, “the Hutu”, “the Tutsi”) is responsible for violence and atrocities. This idea of collective guilt is often the source of negative stereotypes, which may provoke more violence in turn.

*Strengthening legitimacy and the democratization process.* Prosecutions, it is said, also advance long-term democratic consolidation. Retributive justice, as a sort of ritual sacrifice and purification process, paves the way for an ethical and political renaissance. It also consolidates the values of democracy, instils public confidence in the capacity of the new regime to implement these values, and encourages the population to believe in them. Failure to prosecute, on the other hand, may generate in the public feelings of cynicism and distrust towards the political system and its values. This is precisely what happened in many newly-democratized Latin American countries.

*Breaking the cycle of impunity.* Prosecutions are seen as the most potent deterrence against

future abuses of human rights and the most effective insurance against sustained violence and atrocities. They can successfully put an end to the vicious circle of impunity that is at the origin of human rights abuse and injustice in

**Box 7.1: How Retributive Justice Can Help Reconciliation**

- avoiding unbridled revenge;
- protecting against return to power of perpetrators;
- fulfilling an obligation to the victims;
- individualizing guilt;
- strengthening legitimacy and process of democratization; and
- breaking the cycle of impunity.

many parts of the world. This argument has been heard in several countries that have emerged from painful conflicts. It is also behind the establishment of the international criminal tribunals for the former Yugoslavia and Rwanda at The Hague and Arusha, respectively, and the creation of the permanent International Criminal Court (ICC).

## 7.1.2 Forms of Retributive Justice

### Criminal Prosecution in Operation

Tribunals are the primary instruments for policing a violent past. They operate at a national and an international level.

#### National Tribunals

Domestic prosecution of the perpetrators of crimes against humanity, genocide and other gross violations of human rights has been extremely rare, largely because these crimes were not recognized in domestic legislation in the past. In Greece in 1974, after the fall of the generals, national tribunals tried some of the top military. In Argentina in 1985, a few junta leaders and army officers were brought before the courts, but because of heavy pressure from the army proceedings stopped after two years. A more recent example is the prosecution of the suspected Rwandan *génocidaires* in national tribunals in Kigali.

Another current case worth discussing in more detail is Ethiopia, where the authorities of the Marxist–Leninist regime have been brought before domestic criminal courts. Immediately after the capture of Addis Ababa in May 1991 by the troops of the Ethiopian People’s Revolutionary Democratic Front (PRDF) and the Tigrean People’s Liberation Front (TPLF), thousands of members of the defeated Mengistu regime were arrested. The new government asked a special presidential committee to set out a retributive justice policy. A central role was allocated to a Special Prosecutor’s Office, created in August 1992. The first charges, against 73 members of the former government, were submitted to the Central High Court in October 1994. Their trial started two months later and was still going on in mid-2002. More than 1,500 witnesses have appeared at the hearings of the court. In the meantime, the Special Prosecutor drew up charges against a further 5,200 suspects, of whom nearly 3,000 will be judged by default as they cannot be traced. These proceedings, mainly in regional courts, began in late 1997 and have not been completed at the time of writing. A total of 14,209 victims of genocide and torture have been identified.

The heart of the applicable penal law is Article 281 of the Ethiopian Penal Code on genocide, which says that any person is punishable who “with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, orders or engages in, be it in time of war or in time of peace: killings, bodily harm or serious injury to the physical or mental health of members of the group in any way whatsoever”. In order to avoid the risk of Article 281 being considered as inapplicable by the courts, the Special Prosecutor has also included in the indictment “homicide in the first degree” (Article 522 of the Penal Code). For other charges (disappearances, enforced migration of entire population groups) international customary law has been invoked.

*A consensus has emerged on the duty to prosecute those responsible for gross human rights violations, if necessary by courts that operate outside the country where the crimes were committed.*

#### International Tribunals as Supplementary to National Justice

For centuries criminal justice was based on a purely territorial logic: a state’s tribunals could only try crimes that were committed within the borders of that state. The only exception to this rule of national judicial sovereignty was the prosecution of piracy. This has changed dramatically since the 1950s. A consensus has emerged on the duty to prosecute those responsible for gross human rights violations, if necessary by courts that operate outside the country where the crimes were committed.

The legal foundations of such a duty are found in an array of UN conventions and in the principle of universal jurisdiction (see subsection below on universal jurisdiction).

At the practical level, international jurisprudence takes the following forms:

- ad hoc tribunals;
- the International Criminal Court (ICC); and
- national trials based on universal jurisdiction.

*International ad hoc tribunals.* The UN Security Council, confronted with the atrocities on the territory of the former Yugoslavia and in Rwanda, has established two international criminal tribunals.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was created in 1993 by UN Security Council Resolution 827. It was mandated to prosecute individuals allegedly responsible for violations of international humanitarian law during armed conflict in the territory of the former Yugoslavia. It is based in The Hague, Netherlands.

The International Criminal Tribunal for Rwanda (ICTR) was established in 1994 by UN Security Council Resolution 955. Like the ICTY, the tribunal for Rwanda was tasked with prosecuting individuals responsible for genocide and crimes against humanity committed in Rwanda between 1 January and 31 December 1994. The ICTR also has jurisdiction for prosecuting Rwandan citizens who committed such violations in neighbouring states. Its proceedings are held in Arusha, Tanzania.

Both tribunals have the same three-section structure. The three arms are the Judges' Chambers, the Office of the Prosecutor and the Registry. The judges are divided into two trial courts of three judges each and a five-judge appeals chamber. The judges are responsible for issuing indictments and hearing and deciding cases. The UN General Assembly elects the judges serving on the tribunals. The Office of the Prosecutor has the responsibility for investigating alleged crimes, framing indictments and prosecuting cases. He or she is appointed by the UN Security Council and is assisted by a Deputy Prosecutor and other staff. The Registry is the administrative division of the tribunal and performs a wide array of functions, including recommending protective measures for witnesses, providing counselling for victims and handling the appointment of defence counsel.

Although the ICTY and the ICTR are separate entities, they share some of the same personnel, such as the five appellate judges and the Chief Prosecutor.

*The ICC will have jurisdiction over the most serious crimes of concern to the international community, such as genocide, crimes against humanity and war crimes.*

International ad hoc tribunals give a country the chance to take strong, concrete steps towards building a society based on the rule of law through a process that is seen to be fair and law-based. The criticism of the post-World War II Nuremberg trials - that they imposed norms on the accused and victors' justice on the accused retroactively - no longer applies. In the intervening years, the notion of individual responsibility for war and related crimes has become internationally accepted.

Additionally, as with Rwanda and Yugoslavia, an international tribunal under the UN need not be controlled by the "victors", and therefore cannot be accused of seeking revenge.

A new departure in international jurisprudence is the creation of hybrid national-international criminal courts. In the case of Sierra Leone, the UN Security Council has set up, at the government's request, a tribunal that is a mixture of international and Sierra Leonean law and judges. The UN Secretary General appoints the foreign judges. The (planned) international court for Cambodia that was to prosecute Khmer Rouge leaders would have consisted of three Cambodian and two foreign judges. However, many problems arose at the implementation phase of this special court, and in

February 2002 the UN decided to abandon all plans. It was no longer sure that the Cambodian political elite wanted to respect the independence and impartiality of the proposed tribunal (see the case study following chapter 3).

**Box 7.2: Questions and Answers about the ICC**

**What is the ICC?** The International Criminal Court is a permanent international tribunal which will try individuals responsible for the most serious international crimes. One hundred and sixty countries attended a UN-sponsored conference in Rome in 1998 to draft a treaty establishing the ICC. After five weeks of intense negotiations, 120 countries voted to adopt the treaty. Only seven countries voted against it (including China, Iraq, Libya and the United States) and 21 abstained. For the court to be set up, 60 countries needed to ratify the treaty. The court was established on 1 July 2002 and is based in The Hague, the Netherlands. By 5 August 2002, 77 countries had ratified the Rome Statute.

**What crimes will the ICC prosecute?** The ICC will prosecute individuals accused of genocide, war crimes and crimes against humanity, all defined in the treaty setting up the court. It will help to ensure that these serious crimes, which have long been recognized by the international community, no longer go unpunished because of the unwillingness or inability of individual countries to prosecute them.

**Who can be brought to trial before the ICC?** The ICC will have jurisdiction over crimes committed by the nationals of governments which ratify the treaty or in the territories of governments which ratify it. It can try any individual responsible for such crimes, regardless of his or her civilian or military status or official position.

**What are the rights of those accused of a crime by the ICC?** The ICC treaty contains a detailed list of the rights that any accused person shall

enjoy, including the presumption of innocence, the right to counsel, the right to present evidence, the right to remain silent and the right to have charges proved beyond all reasonable doubt.

**How will national courts and the ICC work together?** The treaty gives the ICC jurisdiction that is complementary to national jurisdictions. This “principle of complementarity” gives states the primary responsibility and duty to prosecute the most serious international crimes, while allowing the ICC to step in only as a last resort if the states fail to implement their duty - that is, only if investigations and, if appropriate, prosecutions are not carried out in good faith. Bona fide efforts to discover the truth and to hold accountable those responsible for any acts of genocide, crimes against humanity, or war crimes will bar the ICC from proceeding.

**How is the ICC different from the International Court of Justice and other existing international tribunals?** The International Court of Justice (ICJ or World Court) is a civil tribunal that hears disputes between countries. The ICC is a criminal tribunal that will prosecute individuals. The two ad hoc war crimes tribunals for the former Yugoslavia and Rwanda are similar to the ICC but have limited geographical scope, while the ICC will be global in its reach. The ICC, as a permanent court, will also avoid the delay and start-up costs of creating country-specific tribunals from scratch each time the need arises.

**What good can the ICC do?** The ICC will help to end the impunity often enjoyed by those responsible

for the most serious international human rights crimes. It will provide incentives and guidance for countries that want to prosecute such criminals in their own courts and offer permanent back-up in cases where countries are unwilling or unable to try these cases themselves because of violence, intimidation, or a lack of resources or political will. As noted, the ICC is not intended to replace national courts. Domestic judicial systems remain the first line of accountability in prosecuting these crimes. The ICC will ensure that those who commit the most serious human rights crimes are punished even if national courts are unable or unwilling to do so. Indeed, the possibility of an ICC proceeding may encourage national prosecutions in states that would otherwise avoid bringing war criminals to trial.

**How can politically motivated cases be avoided?** Many safeguards exist in the ICC treaty to prevent frivolous or politically motivated cases from being brought. For example, all indictments will require confirmation by a Pre-Trial Chamber of judges, which will examine the evidence supporting the indictment before issuing it. The accused and any concerned countries will have an opportunity to challenge the indictment during confirmation hearings before the Pre-Trial Chamber. In addition, any investigation initiated by the Prosecutor will first have to be approved by the Pre-Trial Chamber. Prosecutors and judges will all undergo rigorous scrutiny before they are elected and appointed. *Source:* Reproduced with permission from the Human Rights Watch web site, <http://www.hrw.org/campaigns/icc/>.

The *International Criminal Court*. The establishment of a permanent international criminal court (the ICC) under the Rome Statute of July 1998 is another illustration of the emerging international consensus on the issue of transitional justice. It will effectively supplant the temporary mechanisms used since World War II to prosecute crimes against humanity, such as the Nuremberg and Tokyo war crimes tribunals and the ad hoc UN tribunals for Rwanda and former Yugoslavia. The ICC will have jurisdiction over the most serious crimes of concern to the international community, such as genocide, crimes against humanity and war crimes. Box 7.2 presents the key issues of the ICC.

*Trials based on universal jurisdiction.* The perpetrators of genocide, torture and other crimes against humanity are generally brought to justice by either domestic or international tribunals. There is, however, a growing tendency to accept the so-called “rule of universal jurisdiction”. This principle entails that the prosecution of genocide and related crimes is achievable by and in every state, no matter where the crimes were committed and regardless of the nationality of the victim or the offender.

Various countries have incorporated the rule of universal jurisdiction into their national criminal legislation. This development led to the Spanish indictment of former Chilean President Pinochet, to complaints in Belgium against Israeli Prime Minister Ariel Sharon, and to the conviction by a Swiss tribunal of a Rwandan official who was involved in the 1994 genocide. According to some observers, further diffusion of the principle will be a major step in the direction of “global justice”.

### Administrative Justice: Disciplinary Measures Outside the Criminal Court System

Disqualification (or “lustration”) of agents of the secret police, of military personnel, judges and other functionaries is an alternative way to address the question of punishing those who are responsible for aggression and repression. Such non-judicial disciplinary measures are usually meted out by administrative agencies. They come in various forms:

- political disqualification, for example, loss of suffrage;
- barring high-ranking officials from public service in the police, the army and the state administration; and
- softer types of penalty for senior officials, such as forced early retirement or transfer to less strategic posts.

*Outright punishment of those responsible may not be appropriate in every context.*

Political and professional disqualification was the preferred transitional justice measure in the Central European states after 1989, often as a way to side-step criminal prosecution.

It involves intricate vetting and screening operations which, as has been demonstrated in post-communist Europe, tend to become highly politicized. Leaders of political parties, for example, in Poland, have manipulated screening legislation to pin suspicion on rivals and eventually to expel them temporarily or permanently from public office.

### 7.1.3 The Limits to and Risks of Retributive Justice

Outright punishment of those responsible for violence and human rights violations may not be appropriate in every context.

- In some cases, political leaders consider retributive justice too risky as a strategy for dealing with the past because of the many dangers it provokes for a successor regime.
- Just as prosecutions have the potential to facilitate reconciliation, they can also produce inadequate results that could actually harm reconciliation.

## Political Risks

The end of a civil war or of a period of violent repression creates an intricate agenda - rebuilding the political machinery and the civil service, guaranteeing a minimum of physical security, healing the victims, repairing the damage inflicted to them and so on. Dealing with the perpetrators, eventually by means of criminal prosecution, is only one of many challenges. More often than not it will be impossible to tackle all tasks simultaneously. Choices have to be made. The place of justice in general, and of trials in particular, on the post-conflict agenda depends on the particular conjunction of political, cultural and historic forces. There may be legitimate arguments that other problems and needs are more important and/or more urgent than seeking justice through trials.

In addition, prosecutions are ambivalent in certain transitional contexts. They can have highly destabilizing effects on a peace settlement or a fragile shift to democracy. In fact, precisely to avoid such an outcome, Latin American policy makers throughout the 1980s deliberately opted against trials. Refusal to prosecute appears to be based on the argument that harsh punishment may have one or more of the following negative results:

*Destabilizing a fragile peace settlement.* Former military leaders may respond to the threat of prosecution by trying to reverse the course of events with a coup or a rebellion. The risk of a destabilizing backlash especially haunted the young democracies of Latin America in the 1980s and 1990s. Immediately after he came to power, President Sanguinetti of Uruguay, for example, rejected a punitive justice operation with the following argument: "What is more just - to consolidate the peace of a country where human rights are guaranteed today or to seek retroactive justice that could compromise that peace?". The general attitude has been that there is a sleeping lion in the background, which trials will inevitably provoke, thus risking a return to military dictatorship.

*Provoking hostile subcultures and networks.* A prolonged physical and social expulsion of certain sections of the population,

based on criminal court decisions, may obstruct democratic consolidation by driving the convicted perpetrators into social and political isolation. This in turn could result in the creation of destabilizing subcultures and networks which in the long run will become hostile to democracy.

*Causing crippling effects on governance.* The viability of a post-conflict state depends also on its efficacy. A far-reaching purge of administrative and managerial staff can have crippling effects on governance and endanger the vital political and economic development of the country. Prudent considerations of the problematic consequences of large-scale dismissals from the civil service and from high-level posts in industry have been heard regularly in post-communist Central and Eastern Europe.

### Box 7.3: Retributive Justice: Priority Questions and Political Risks

- Other points on the agenda are more important and/or more urgent.
- It risks destabilizing a fragile peace.
- It can provoke subcultures and networks, hostile to democracy.
- It may have crippling effects on governance.

## Other Shortcomings and Risks

Even where the establishment and operation of prosecutions is appropriate to the context, a number of reasons may still be found not to prioritize retributive justice in a reconciliation policy. Constraining factors tend to appear in one or more of the following ways:

- The general deficiencies of retributive justice are accentuated.
- Material obstacles may prevent the adequate operation of the criminal justice system of a post-conflict society.
- Post-transition trials may directly impede other routes to reconciliation.

**Box 7.4: Retributive Justice: Obstacles, Shortcomings and Risks**

**General shortcomings**

- Prosecutions are perpetrator-oriented.
- Trials may lead to re-victimization.
- Criminal courts restrict the flow of information.

**Material obstacles in times of transition**

- Evidence may have been destroyed.
- The criminal justice system may be in shock or crippled.

**Shortcomings and risks in a transitional context**

- Post-transition trials may be emergency justice.
- Post-transition trials may violate rule-of-law norms.
- Trials identify individual guilt, not patterns in atrocities.
- The penal system is not adapted to handle large-scale atrocities.
- Trials may work against the culture of a post-conflict society.

## General Shortcomings of Retributive Justice

Any criminal justice operation, even under normal conditions, has certain drawbacks. Among the most important are the following:

*Prosecutions are perpetrator-oriented.* Prosecution as a form of repairing past injustices concerns itself almost exclusively with the perpetrators. It is badly equipped to give the victims the attention they need in order to be healed from the injustices they suffered.

*Trials may lead to re-victimization.* Criminal proceedings usually involve cross-examination, turning a courtroom

into a hostile environment for victims. This may result in humiliation and renewed trauma. Re-victimization may also happen if trials do not meet victims' expectations because of lack of proof, inadequate judicial decision making or legal loopholes that assist the defence.

*Criminal courts restrict the flow of information.* The logic of criminal law is to generate "yes or no" decisions. The outcome of a trial must be "guilty" or "not guilty". To arrive at such clear verdicts, criminal courts restrict the amount of information that is processed. However, during violent conflict the

*Prosecution concerns itself almost exclusively with the perpetrators and is badly equipped to give victims the attention they need.*

behaviour of perpetrators often falls into a "grey area" in which various forms of guilt and innocence are mixed. (See chapter 5 for a discussion of this question.) Courtrooms are not usually capable of the subtlety needed to deal with such complexities.

## Material Obstacles in Times of Transition

Societies emerging from painful conflict are usually impoverished and thus short of the material and human resources to support a formal criminal justice operation. Among the most important problems are the following:

*Evidence may have been destroyed.* In collecting proof, tribunals are particularly dependent on the cooperation of security agencies, such as the army and the police, which may still reflect in their composition and culture the spirit of the old order. Their personnel often include the very individuals who are responsible for some of the most heinous crimes. This may result in the obstruction of the tribunal's work, for example, by destroying or concealing evidence. Consequently lack of proof can lead to acquittals of well-known perpetrators. Such justice, perceived as arbitrary, will seriously damage victims' trust in the whole system.

*The criminal justice system may be in shock or crippled.* The judiciary may have been one of the sources of injustice and/or the infrastructure may be badly damaged. The history of transitional justice in post-1991 Ethiopia or in post-genocide Rwanda, for example, demonstrates that the absence of legal technical expertise in trying violations of human rights is a serious handicap. One negative outcome is serious delay in the trials. In Ethiopia, almost all arrested suspects have now been on

remand since the summer of 1991 and will undoubtedly continue to be so for years to come. Some will eventually be acquitted for lack of evidence after an extremely lengthy captivity. The same situation exists in Rwanda. By the end of 2000, six years after the genocide and with some 130,000 arrested suspects, the Rwandan tribunals had only pronounced 5,200 verdicts. In 2001 no more than 1,200 new cases were dealt with. (Of these 6,400 individuals judged, approximately 25 per cent were acquitted.) The saying “Justice delayed is justice denied” is certainly very applicable here. And nothing is more damaging than ineffective justice.

### Shortcomings and Risks in a Context of Transition

Criminal prosecutions may also directly block or even reverse a reconciliation process. In transitional contexts, ranging from Spain in the 1970s to Cambodia in the 1980s to Mozambique in the 1990s, civil and political leaders have sometimes consciously opted not to try to bring perpetrators to court, precisely out of fear that prosecutions would endanger reconciliation initiatives. The following reasons have been given:

*Post-transition trials may be “emergency justice”.* The sooner trials start after the end of a conflict, the bigger is the danger of “emergency justice” being dispensed. The political and social climate is not yet well suited to a scrupulous sorting of all the levels of responsibility for the abuses of the past, and the criminal justice system is therefore incapable of dispensing fair and effective rulings. Consequently rash and hurried trials can actually add to injustice and inequality, especially if those who are tried first receive the most severe punishment, even if they are not the worst offenders. The resulting resentment will become an obstacle to reconciliation initiatives.

*Post-transition trials may violate rule-of-law norms.* Retributive justice after violent conflict involves a number of decisions that may trespass on rule-of-law norms and human rights. A key question is how to punish persons for activities that were approved, legalized and encouraged by those in power during a civil war or a cruel authoritarian regime. Political leaders may feel the need to issue retroactive penal legislation, thus breaking the rule that no conduct can be held punishable unless it is covered by a law that existed before the offence was committed. Or they may, with good intentions, renew the statute of limitation once it has run out because major perpetrators would otherwise escape punishment. In addition, in this volatile context, judicial impartiality may fall victim to political pressure, time constraints, shortage of trained judges and lawyers and, in the case of ad hoc courts, the appointment of non-career judges who are more amenable to pressure from politicians, the media and public opinion. The risk of partisan verdicts, or so-called “victors’ justice”, is very real. Tribunals may even turn into opportunities for settling old personal and political vendettas. The effect will almost certainly be that new victims are created and that new hatred and bitterness arise. Criminal prosecution must be discarded as a priority option if procedural standards cannot be maintained.

*The penal system is not adapted to handle large-scale atrocities.* Criminal justice systems are not well resourced to deal with the most extreme of crimes, such as gross human rights violations, particularly if these offences come in large numbers. There is a real risk that only a small percentage of perpetrators will be prosecuted and punished so that the process will appear merely arbitrary. Criminal courts are, moreover, not adapted to the complexities that arise when all sides have committed atrocities, as is usually the case in civil war.

*Trials identify individual guilt, not patterns in atrocities.* Criminal courts are, generally speaking, not able to get at the broader patterns of the multiple causes and (state) practices that contributed - and might still contribute in the future - to violence and terror. Moreover, trials only recognize criminal guilt, not political or moral responsibility.

*Trials may conflict with the culture of a post-conflict society.* Desmond Tutu, Chair of the South African Truth and Reconciliation Commission (TRC), argues that retributive justice is not characteristic of traditional African jurisprudence. It is too impersonal and has too little consideration for victims. The African view of justice is aimed at “the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he

*Trials only recognize criminal guilt, not political or moral responsibility.*

or she has injured by his or her offence”. Retributive justice, in contrast, may make reintegration much harder. Writing on the legacy of the 1967–1970 civil war in Biafra, when three million people died, Ifi Amadiume explains that, for Africans: “The evil is in the social system, in the guise of inequality and

oppression. According to this African logic, guilt is collective; Africans turn to their own social mediators, healers and reclassifiers, such as diviners and prophets. It is a modern arrogance to assume that courts are instruments of healing”. Similar arguments have been developed with respect to the Asian vision of dealing with victims and perpetrators, exemplified by the hesitation of the Cambodian people about instituting a retributive reaction to the crimes of the Khmer Rouge.

### The Need for a Multiple Cost–Benefit Analysis

The cry “No peace, no reconciliation without retribution” is a key argument in ongoing debates on how to deal with a violent past. As a public argument, it cannot be discarded without creating heavy opposition and re-victimization. It is clear from the preceding discussion that political, material and legal constraints may make retributive justice almost impracticable. However, this call for caution should not lead automatically to the abandonment of criminal prosecution as a dimension of transitional justice. Some problems can be resolved. Political leaders and civil society, both local and international, may develop measures that neutralize the paralyzing effects of the limitations and risks. Past experiences suggest that the best practice is to balance all costs and benefits of a given policy against each other, above all taking into account the particular conjunction of political, cultural and historical forces in a transitional society.

### Moral Requirements and Political Constraints

It is critically important that those who, in good faith, advocate the use of criminal justice understand the obstacles and risks in advance. But the political costs of criminal prosecutions should not be exaggerated. This is a difficult and delicate calculation, balancing short-term gains against long-term costs. But post-conflict policy makers can also make use of the international community at such a juncture. Outside actors can put pressure on dissidents who threaten stability. The ICC now offers permanent back-up in cases where countries are unable to try these criminals themselves because of violence, intimidation or a lack of political will and, finally, foreign criminal justice systems too can, on the basis of universal jurisdiction, bring offenders to their courts.

The crucial challenge is to strike a balance between the demands of retributive justice and political prudence or, in other words, to reconcile moral imperatives and political constraints. It entails a difficult and, on occasion, tortuous cost–benefit analysis.

### Overcoming Practical Limitations

Retributive justice, especially in the context of a post-conflict society, is at best plagued by certain shortcomings and, at worst, may endanger reconciliation and democratization processes.

One of the major risks relates to the problem of maintaining procedural standards. Countering the danger of rule-of-law violations requires drastic interventions in the criminal justice system - restoring the judicial infrastructure, reforming the police force, recruiting and training judges and defence lawyers, and developing a human rights culture in the prison system. In other words, keeping prosecution as an option in transitional justice is only justified if there is a simultaneous reorganization of the justice system. This is no easy enterprise. It may imply the mobilization of the international community, as is currently demonstrated in Burundi and Rwanda, where *Avocats Sans Frontières* (an international NGO) offers training to judges and lawyers.

*Retributive justice, at worst, may endanger reconciliation and democratization processes.*

Many of the other limitations discussed above necessitate even more radical interventions, several of which will be presented later in this and the following chapters.

### International Jurisprudence as a Complementary Instrument

International tribunals, or national trials based on universal jurisdiction, are less vulnerable to intimidation, material obstacles, violation of procedural standards, lack of trained personnel and “victors’ justice”. This makes them seem a perfect complement, or even an alternative, to local trials. But the actual experience of the ad hoc tribunals in The Hague and Arusha suggests that they are constrained by several factors: \*

*Lack of an enforcement mechanism.* Tribunals have the power to issue arrest warrants for perpetrators but do not have the police authority to apprehend those who have been indicted. Lack of enforcement may severely hinder the effectiveness of tribunals, thereby eroding public confidence in their usefulness.

*Tribunals cannot stop a conflict in progress.* Although tribunals may begin their work before hostilities completely cease (as in the case of the former Yugoslavia), they cannot themselves stop a conflict that is in progress. This problem can be alleviated to the extent that tribunals are established before a war arises, as will be the case now that the ICC has been set up. Questions have been raised, however, about the potential for interference by the ICC in delicate local or regional peacemaking: for example, ICC prosecutions might work against local amnesty measures, producing a serious clash of interests.

*The scope of prosecutions depends on whether the conflict is internal or international.* Under the Geneva Conventions, if a conflict is internal, a perpetrator can only be prosecuted for genocide or crimes against humanity but not for grave breaches of the Geneva Conventions on humanitarian law or other war crimes. The ICC, however, will not be hindered by this limitation.

*The danger of imposing retributive justice as the universal response to human rights crimes.* In the course of their vigorous lobbying for an effective ICC and for the extension of universal jurisdiction, international institutions (such as the UN) and NGOs (such as Human Rights Watch and Amnesty International) have tended to put a one-sided emphasis on retributive justice. This has been happening simultaneously with, and in contradiction to, the growing support - particularly but not solely in developing countries - for more informal and mediation-oriented mechanisms of restorative justice (see section 7.3).

*Ad hoc tribunals tend to be costly, time-consuming and too distanced from the population.* The innovation of tribunals that are a mixture of international and national elements (as in the case of the special

\* Parts of the following are based on Michael Lund, “Reckoning for Past Wrongs: Truth Commissions and War Crimes Tribunals”. In *Democracy and Deep-Rooted Conflict: Options for Negotiators*, edited by Peter Harris and Ben Reilly. Stockholm: International IDEA, 1998:291.

courts in Sierra Leone and Cambodia), together with the establishment of the ICC, may eliminate some of these problems. Mixed tribunals are less expensive and closer to the population, can develop a stronger deterrent effect, and have easier access to evidence.

### **7.1.4 The Alternatives**

It is perfectly conceivable that policy makers and civil society, after weighing the pros and cons, will conclude in a particular situation that retributive justice is too dangerous a path or that the obstacles are insurmountable. Various alternative routes are then available. One is amnesty, an approach whose political appeal is often irresistible. Section 7.2 examines this policy option at length. Other options are (a) the use of restorative justice, possibly based on traditional mechanisms of conflict resolution; and (b) the establishment of a truth commission and/or reparation programmes - the two latter being forms of justice without formal punishment. Restorative justice is the subject of section 7.3. Truth-telling and reparation are discussed in chapters 8 and 9.

These alternatives all raise a preliminary but crucial question: how do they relate to the duty under international law to prosecute genocide, war crimes and gross violations of human rights? The spirited debate over this question is still unresolved. Some participants in the debate accept no exceptions to this international obligation. Others argue that a post-conflict society may refrain from the duty to prosecute if certain strict conditions are met. Among the most important conditions are:

- Blanket amnesty must be completely out of the question.
- Irrefutable proof must be given that national courts are unable to prosecute.
- The population in general, and victims in particular, must have a voice in the decision not to prosecute.
- The state authorities must accept the commitment to acknowledge as much as possible of the truth about the past.
- Firm promises must be given with respect to reparation for victims.
- Those who profit from a pardon must express regret.

### **7.2 Amnesty: a Questionable Alternative**

Reconciliation processes are ineffective as long as the vicious circle of impunity is not broken. The nasty reality is that in most post-conflict societies gross atrocities go unpunished, unacknowledged and without redress.

Impunity has many sources. In some countries silence is the main cause. It can be officially induced or simply a case of public amnesia. In Zimbabwe, for example, the army committed gross human rights violations in Matabeleland between 1983 and 1985. This remained unacknowledged until 1997, when two NGOs published a report titled *Breaking the Silence* (see the case study following chapter 2).

*Reconciliation processes are ineffective as long as the vicious circle of impunity is not broken.*

In other societies impunity is the product of a deliberate attempt by the authorities to camouflage certain painful episodes by imposing a selective reading of the past. Post-World War II France is a compelling illustration of this. After the war, the French Government presented a picture of a society that had been united in resistance to the German occupiers and ignored the collaboration of the domestic Vichy regime and its participation in the Holocaust. As a result, high-ranking officials of the Vichy regime went totally unpunished until new trials in the 1990s put an end to this anomaly.

Impunity also occurs when domestic criminal courts, and often military courts, fail to deal adequately with perpetrators.

Immunity is a variant of impunity. It is embedded in international customary practice which provides protection against prosecution for heads of state. In some cases, for instance Burundi in 2002–2003, peacemaking is facilitated by granting leaders of rebel movements provisional and limited immunity through domestic legislation.

However, the most frequent source of impunity is amnesty legislation, an officially declared and imposed forgiving and forgetting. The next two subsections discuss the various forms of amnesty and its close relationship with the notion of “political offence”.

### 7.2.1 Amnesty in its Many Forms

Amnesty comes in a variety of forms. Which particular form it takes depends both on the way it is decided upon and on the range of perpetrators and crimes it indemnifies.

#### The Origin: a Unilateral or Negotiated Decision?

Some sort of self-amnesty accompanied the transitions to democracy in many Latin American countries in the 1980s. The outgoing elites unilaterally pardoned most of their political leaders and senior army officers. For example, in Argentina in 1983 democratic elections were held in October, but in September the military junta had passed the so-called Law on National Pacification, granting amnesty for all political and related crimes by its officials and military. In 1978, years before Chile's transition to democracy, the

Pinochet government unilaterally pardoned all criminal acts committed during the state of siege (between September 1973 and March 1978). In Zimbabwe, after each election in the period 1980–2000 the Zimbabwe African Nationalist Union-Patriotic Front (ZANU-PF) government enacted amnesty laws pardoning violence against opposition parties and their members.

Pre-transitional negotiations between warring parties are a similar source of amnesty laws. This type of reciprocal amnesty became a dominant feature from the early 1990s. The end of the apartheid regime in South Africa was preceded by negotiations that facilitated amnesty for

#### Box 75: The Notion of “Political Offence” in South Africa

The law and practice of states show that there is now a considerable degree of consensus both as to the types of offence which may in principle be classified as “political” and as to the sort of factors which should be taken into account in deciding whether an offence is political or not.

The following factors will be considered when making a recommendation for the grant of pardon or indemnity as may be appropriate in individual cases:

- the motive of the offender, i.e., whether the offence was committed for a political motive (e.g., to further or oppose the aims of a political organization, institution or body) or for a personal motive;
- the context in which the offence was committed, and in particular whether it was committed in the course of or as part of a political uprising or disturbance, or in reaction thereto;
- the nature of the political objective (e.g., whether to force a change in the

policy of or to overthrow or destroy the political opponent);

- the legal and factual nature of the offence, including its gravity;
- the object and/or objective of the offence (e.g., whether it was committed against the political opponent or his property, or directed primarily against private individuals or property; or was committed on the assumption that a particular cause, governmental or otherwise, was being served);
- the relationship between the offence and the political objective being pursued (e.g., the directness or proximity of the relationship, or the proportionality between the offence and the objective pursued); and
- the question whether the act was committed in the execution of an order or with the approval of the organization, institution or body concerned.

Source: South African *Government Gazette*, 7 November 1990.

both sides. The Madrid peace accords of December 1996 between the government of Guatemala and the rebel Guatemalan National Revolutionary Unit (Unidad Revolucionaria Nacional Guatemalteca, URNG) produced a similar result. The 2002 ceasefire agreement between the Angolan government army and the military commanders of the National Union for the Total Independence of Angola (União Nacional para a Independência Total de Angola, UNITA) included the promise of amnesty for former UNITA rebels: a few days before the official signing of the agreement the Angolan Parliament passed an amnesty law. The Nicaraguan “general amnesty and national reconciliation law” of March 1990 was the result of negotiations between the Sandinista government and opposition parties.

### The Scope: Total or Conditional?

Total amnesty is rare. In most legislation, pardon is reserved for crimes that are political in nature.

Limiting conditions can be:

- amnesty after full exposure of the facts by the author of the crime, as in South Africa;
- amnesty reserved for certain perpetrators (for example, child soldiers);
- amnesty reserved for crimes committed during a specified period; or
- amnesty laws which specifically exclude crimes that fall under the country’s international obligations (such as the UN conventions on genocide and torture and the Inter-American Convention on Human Rights). Examples are Peru’s amnesty law of June 1995, Uruguay’s “law of national pacification” of 1995, Suriname’s amnesty act of August 1992, and the amnesty proclamations of 1994 in the Philippines.

However, there are cases where the definition of a political offence is so broad as to produce a de facto total amnesty. The 1993 “general amnesty law for the consolidation of peace” in El Salvador, for example, granted amnesty to all those who participated “in any way in the commission of political crimes or common crimes linked to political crimes or common crimes in which the number of persons involved is not less than twenty”.

### Evaluation

Amnesty legislation - the imposition of official forgiving and forgetting - is, then, a disputed instrument in the context of post-conflict societies. More often than not it obstructs the reconciliation process.

*Amnesty legislation more often than not obstructs the reconciliation process.*

It is a general rule that unilateral amnesties that are total in scope should be avoided. A different situation arises when amnesty is the price to be paid for negotiating a fragile peace. If the end of a violent conflict is otherwise not attainable, amnesty can be a last resort. But even then, according to most observers, strict conditions must be met. These include, among others, a public

debate preceding the enactment of an amnesty law, as much truth-seeking and reparation as possible, and full respect for a state’s international obligations under any human rights treaty.

#### 7.2.2 The Notion of a “Political Offence”

Almost all amnesty legislation explicitly refers to crimes or offences that in one way or another are of a political nature. In many cases, particularly in the indemnity laws of the 1980s, the notion “political” remained extremely vague, allowing authorities to bend the scope of the legislation to their needs. Change has come with the transitions in Mozambique and South Africa. The parties at the negotiation table agreed on a set of guidelines on political offences drawn from extradition law. These criteria are a mix of elements (see box 7.5):

- the subjective dimension - the motive of the perpetrator;
- the objective dimension - the context, nature and intention of the act; and
- the proportionality question: does the objective of the act justify its severity?

### 7.3 Restorative Justice

The growing dissatisfaction with the purely punitive handling of common crimes has stimulated the search for mechanisms that could serve as complements, or even alternatives, to retribution. Inspiration has been found in indigenous mediation-based justice institutions in Africa, Australia, New Zealand and Canada. This led practitioners and scholars to develop a model of “restorative justice”.

*Restorative justice works with the full participation of the victim and of the relevant communities in discussing the facts, identifying the causes of misconduct and defining the sanctions.*

#### 7.3.1 What is Restorative Justice?

Section 7.1.3 discussed the main shortcomings of retributive justice: it is perpetrator-oriented; the whole process may, consequently, frustrate the victim and even lead to re-victimization; and it emphasizes individual guilt and punishment, and thus overlooks the community dimension in conflict, in crime and in the reaction to it.

Restorative justice is thought to handle wrongdoing differently: it works with the full participation of the victim and of the relevant communities in discussing the facts, identifying the causes of misconduct and the defining sanctions. The ultimate aim is to restore relations as far as possible, both between victim and offender and within the broader community to which they belong. Box 7.6 gives a presentation of the underlying values of restorative justice.

One example of an application of restorative justice in the Western legal system is victim–offender reconciliation programmes. These were developed in North America in the early 1970s. Howard Zehr describes them as follows: “In its classic form, it is operated in cooperation with the courts, but often housed in separate non-profit organizations. Upon referral of a case by the court or probation service, trained volunteers separately contact victim and offender to explore what happened and determine their willingness to proceed. If they agree, victim and offender are brought together in a meeting facilitated by the volunteer mediator who serves as a neutral third party. In this meeting, the facts of the offence are fully explored, feelings are expressed, and a written restitution contract is worked out.” The programme has been used predominantly to handle fairly minor crimes, although initiatives in conflict contexts such as Northern Ireland have tried to extend the concept.

#### Box 7.6 : Values of Restorative Justice

- Restorative justice is concerned far more about restoration of the victim and the victimized community than about the increasingly costly punishment of the offender.
- It elevates the importance of the victim in the criminal justice process through increased involvement, input and services.
- It requires that offenders be held directly accountable to the person or community they have victimized.
- It encourages the entire community to be involved in holding the offender accountable and promoting a healing response to the needs of victims and offenders.
- It places greater emphasis on getting offenders to accept responsibility for their behaviour and make amendments, whenever possible, than on the severity of punishment.
- It recognizes a community responsibility for the social conditions that contribute to offender behaviour.

*Source: Umbreit, M. The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research. San Francisco, Calif.: Jossey-Bass, 2001:xxviii–xxix.*

### **7.3.2 Traditional Forms of Restorative Justice**

The Western search for a justice mechanism that can balance a purely punitive approach has generated renewed interest in traditional non-state systems of dealing with crime. Some of these have existed since antiquity in African and Asian societies. In countries like Australia, New Zealand, Canada and the United States, on the other hand, traditional justice systems belong to the aboriginal heritage and have only recently been revived.

It has been argued that traditional forms of justice might be of great value as instruments in the reconciliation processes in developing post-conflict countries. Punitive measures are often a risky and/or unattainable strategy in such societies. Mediation- and reconciliation-oriented procedures have fewer disadvantages. Existing institutions could, it is thought, be adapted to play a role in dealing with past atrocities. There is thus good reason to take a closer look at these mechanisms and their salient features, strengths and weaknesses.

#### **Salient Features**

- The problem is viewed as that of the whole community or group.
- The emphasis is on reconciliation and restoring social harmony.
- Traditional arbitrators are appointed from within the community on the basis of status or lineage.
- There is a high degree of public participation.
- Customary law is merely one factor considered in reaching a compromise.
- The rules of evidence and procedure are flexible.
- There is no professional legal representation.
- The process is voluntary and decisions are based on agreement.
- There is an emphasis on restorative penalties.
- The enforcement of decisions is secured through social pressure.
- Decisions are confirmed through rituals aimed at reintegration.
- Like cases need not be treated alike.

#### **Strengths**

- They are accessible to local and rural people in that their proceedings are carried out in the local language, within walking distance, with simple procedures which do not require the services of a lawyer, and without the delays associated with the formal system.
- In most cases, the type of justice they offer - based on reconciliation, compensation, restoration and rehabilitation - is more appropriate to people living in close-knit communities who must rely on continuous social and economic cooperation with their neighbours.
- They are highly participatory, giving the victim, the offender and the community as a whole a real voice in finding a lasting solution to the conflict.
- They help in educating all members of the community as to the rules to be followed, the circumstances which may lead to them being broken, and how ensuing conflict may be peacefully resolved.
- The fact that they employ non-custodial sentences effectively reduces prison overcrowding, may allow prison budget allocations to be diverted towards social development purposes, permits the offender to continue to contribute to the economy and to pay compensation to the victim, and prevents the economic and social dislocation of the family.

#### **Weaknesses**

- The compromise reached may reflect the unequal bargaining strengths of the parties. While checks

and balances exist (particularly public participation), existing social attitudes may in fact reinforce inequalities on the basis of gender, age or other status.

- Traditional leaders may favour certain parties depending on their political allegiance, or power in terms of wealth, education or status.
- Another major flaw, not mentioned in the report, is that procedural safeguards are often insufficient.

(Reproduced with permission from a study published in 2000 by Penal Reform International.)

### 7.3.3 Restorative Justice in Post-Conflict Societies

Traditional forms of justice may complement and even replace more formal and punitive ways of dealing with past human rights violations. However, many doubts remain. These traditional mechanisms have some significant weak points, resulting in many instances in a denial of fair trial. This has recently been pointed out by the African Commission on Human and Peoples' Rights: "It is recognized that traditional courts are capable of playing a role in the achievement of peaceful societies and exercise authority over a significant proportion of the population of African countries. [However,] traditional courts are not exempt from the provisions of the African Charter relating to fair trial".

Traditional forms of justice are designed to deal with relatively small numbers of cases of minor wrongdoing - theft, conflicts between neighbours and so on. Do they have the capacity to restore years and sometimes decades of oppression? Can they bear the weight of the most serious crimes? This is the most important reservation. The problem in answering these questions is that there are as yet only a few and fairly recent experiences of restorative justice being implemented in post-conflict situations. Box 7.7 gives a brief description of two examples. The most ambitious operation so far is the remodelling of the *gacaca* tribunals in Rwanda with the aims of speeding up the prosecution of suspected perpetrators of the 1994 genocide, increasing the participation of the population, and introducing elements of mediation and reconciliation into the process. The importance of this enterprise and its potential relevance for other post-conflict societies are indisputable. This chapter therefore ends with a case study on the Rwandan experiment.

#### Box 7.7: Restorative Justice in Sudan and Bougainville

"We in the Sudan have a group of experts called *ajaweed*. These are elders, mostly tribal chiefs, who are experienced in mediation. They are usually called upon to mediate in conflicts between groups other than their own. The process of mediation begins with an open discussion in which everything is aired. The parties express their grievances against one another in lengthy and often embittered speeches, which makes one wonder whether an agreement is possible. After an exhaustive exchange, in which the mediators labour against all odds to explore a common ground, there comes a point when the leaders come

together and agree on the principles for resolving the conflict and living together. Rituals of reconciliation are then performed and the conflict is formally declared resolved."

*Francis Deng*

"The civil war on Bougainville (concerning secession of this island from Papua New Guinea, and fighting between different local factions) has been a testing ground for a restorative justice approach to peacemaking. The PEACE Foundation Melanesia, funded by Caritas, The New Zealand Overseas Development Agency and the Princess Diana Fund, has given basic restorative

justice training to 10,000 people on Bougainville, 500 as facilitators, including many traditional chiefs, and 50 to 70 as trainers. Out of this, the PEACE Foundation Melanesia expects to have some 800 active village-based mediators to deal with the conflicts that have arisen in the aftermath of civil war, from petty instances of ethnic abuse up to rape and political killings. The Bougainvillians are discovering their own ways of doing restorative justice consistent with their Melanesian principle of *wan bel* (literally 'one belly') or reconciliation."

*J. Braithwaite*

## 7.4 Concluding Remarks

There are real problems with retributive justice in the context of post-conflict societies - political and legal risks, material obstacles and many more shortcomings (see section 7.1). But amnesty, often proposed as an alternative, is a deeply questionable strategy. As a result, a restorative approach based on existing traditional jurisdictions seems fairly appealing. Together with truth-telling and reparation programmes, it offers an attractive middle way between punitive justice and a blanket pardon. However, a great deal of imagination and creativity will be needed if traditional forms of justice are to be reframed for use in the context of massive

*Recent developments in the international environment almost exclusively favour retributive institutions.*

atrocities such as genocide or prolonged human rights violations. Every initiative will have to take an uncharted path. Furthermore, recent developments in the international environment (the UN, large NGOs and so on) almost exclusively favour retributive institutions (ad hoc tribunals, the ICC, universal jurisdiction). This one-sided approach discourages experiments to develop a restorative approach.

Throughout this Handbook the emphasis is on the need for reconciliation policies which are a mix of culturally appropriate strategies and instruments. This general concern is also valid in the domain of justice. A combination of domestic trials (where possible), of international punitive reactions *and* of justice mechanisms outside the formal criminal system may well provide the richest possibilities.

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