

# Reconciliation After Violent Conflict

 POLICY SUMMARY

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# Reconciliation After Violent Conflict

## POLICY SUMMARY

*This Policy Summary is a distillation of the IDEA publication **Reconciliation After Violent Conflict: A Handbook** (2003). Examples and case-studies have been removed, and supporting arguments shortened. What remains is the gist of the Handbook: a summary of the key points for policy formation in the design of an appropriate process to address the legacy of past violence.*

### INTRODUCTION: RECONCILIATION AND DEMOCRACY

*While democratic compromise produces solutions regarding issues in conflict, reconciliation addresses the relationships between those who will have to implement these solutions.*

An effective post-conflict democracy is built on a dual foundation: a set of fair *structures and procedures* for peacefully handling the issues that divide a society, and a set of working relationships between the groups involved. A society will not develop those *working relationships* if the structures are not fair and, conversely, the structures will not function properly, however fair and just they are, if there is not minimal cooperation in the interrelationships between its citizens.

While democratic compromise produces the solutions regarding the issues in conflict, reconciliation addresses the *relationships* between

those who will have to implement these solutions. This applies not simply to the politicians and the deal-makers who are engaged in the compromise: it applies to the entire population. The very best democratic system in the world produced by the most able democrats will not survive if the general populations to which it applies are not minimally prepared to trust the system and each other and at least try it out.

Reconciliation underpins democracy by *developing the working relationships necessary for its successful implementation*. Likewise, reconciliation also needs the democratic underpinnings of economic justice, of political and social power-sharing, and so on. While there is a moral argument for reconciliation, there is also a powerful pragmatic argument: positive working relationships generate the atmosphere within which good governance can thrive, while negative relations will work to undermine even the best system of governance.

## 1 RECONCILIATION: GENERAL POLICY ISSUES

*Reconciliation is an overarching process, that includes the key instruments of justice, truth, healing and reparation, for moving from a divided past to a shared future.*

Reconciliation is both a *goal* – something to achieve – and a process – a means to achieve that goal. Controversy arises from confusing these two ideas. We focus on the notion of reconciliation as a process. For our purposes, reconciliation is an overarching, inclusive process, including the key instruments of justice, truth, reparation and so on, by which a society moves from a divided past to a shared future.

- **Reconciliation is a long-term process.** There is no quick-fix to reconciliation. It takes time, and it takes its own time: the pace cannot be dictated.
- **Reconciliation is a deep process.** It involves changes in attitudes, aspirations, emotions and feelings, perhaps even beliefs. Such profound change cannot be rushed or imposed.
- **Reconciliation is a very broad process.** It applies to everyone. It is not just for those who suffered directly and those who inflicted the suffering, central though those people are. The attitudes and beliefs that underpin violent conflict spread much more generally through a community and must be addressed at the broad level.
- **There is no single recipe for success.** As every conflict and ensuing democratic settlement is different, so the related reconciliation process will differ from all others in important respects, even as it shares many similarities with them.

- **The donor community is increasingly prepared to assist reconciliation.** Bilateral and multilateral donors, as well as multilateral and regional actors, are realizing the importance of reconciliation as an ingredient in conflict prevention, human development, human security, the elimination of poverty and peace-building.

## 2 THE PROCESS OF RECONCILIATION

There is a risk in simplifying reconciliation into a series of logical stages. At each stage a relapse is a real possibility, and the stages do not always follow after each other in set order. Nonetheless, they remain essential ingredients for lasting reconciliation.

### *Stage 1. Replacing Fear by Non-Violent Coexistence*

When the shooting stops, the first step away from hostility is non-violent coexistence: in a minimal definition, to ‘live and let live’ and to restart basic communication across the divide. Political and community leaders, NGOs and religious institutions must promote such communication. Local and/or international political decision-makers have a responsibility to guarantee the necessary minimum of physical security.

### *Stage 2. Building Confidence and Trust*

This requires that each party, victim and offender, gain renewed confidence in themselves and in each other, and acknowledge the humanity of others: this is the basis of mutual trust. At this stage, also, victims begin to distinguish degrees of guilt among the perpetrators, and to distinguish between individuals and whole communities, thereby challenging pre-existent ideas that all the members of a rival group are actual or potential perpetrators. Physical security, absen-

ce of violence and the beginnings of political development are pre-requisites for confidence-building.

### *Stage 3. Towards Empathy*

Empathy comes with victims' willingness to listen to those who caused their pain, and with offenders' acknowledgement of the hurt of those who suffered. Truth-telling is a pre-condition of reconciliation, creating objective opportunities for people to see the past in terms of shared suffering and collective responsibility.

But peaceful coexistence, trust and empathy do not develop in a sustainable way if structural injustices – political, legal and economic – remain. A reconciliation process must therefore be supported by a gradual sharing of power, an honouring of each other's political commitments, a climate conducive to human rights protection and economic justice, and a general willingness to accept collective responsibility for both the past and future.

### *Ownership of the Reconciliation Process*

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Authorities usually establish reconciliation programmes with either a bottom-up or a top-down approach. The *bottom-up approach* focuses on interpersonal relations among community members. Local, home-grown reconciliation and grassroots initiatives are viewed as the key to success. A *top-down approach* prioritizes actions at the national level which then filter down to create the conditions (and incentives) at the local level. Both top-down and bottom-up processes are essential as long as they complement, rather than compete with, each other. The *international community* also has an important role to play, but it must take a cautious and restrained approach. Lasting reconciliation must be home-grown. However, the international community can help in supporting and monitoring local reconciliation programmes, giving advice, expertise and training, and providing material resources.

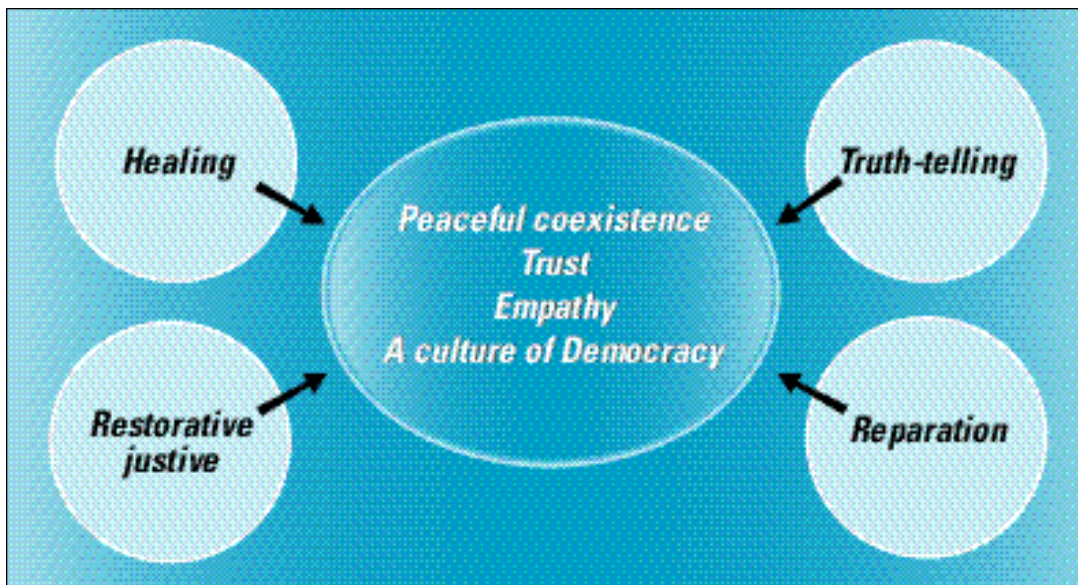
### *Timing*

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#### *Reconciliation is now clearly seen as a crucial dimension of conflict prevention.*

When is the right time for reconciliation? When making this difficult decision, policy makers should consider the following recommendations:

- *Do not delay reconciliation because of political priorities.* Pressures during a transition period mean that often politics and economics are prioritized at the expense of reconciliation. International financial institutions, consciously or otherwise, tend to reinforce that approach. But care must be taken not to damage the prospects of long-term reconciliation by establishing inappropriate political and economic structures, or letting the reconciliation agenda slide. Unaddressed hurts and injustices will fester and grow, and ultimately undermine the best political or economic reforms. If the context prevents an early start, then at least interim reconciliation measures must be adopted.
- *Maintain a long-term view.* However successful in the short- and medium-term, reconciliation must also be acknowledged as working at a long-term, generational pace. Three critical tools in this regard are: education (promoting understanding of conflict and its resolution, and tolerance of differences in experience, ethnicity, religion, political beliefs etc.), memory (for example, permanent monuments to commemorate the fate of victims; places of remembrance; memorial days, plays, poems: all give a collective dimension to private pain, and create a long-lasting healing mechanism) and retrospective apologies (including a sincere acceptance of responsibility and commitment to change).



Source: Adapted from the work of John Paul Lederach.

- **Be aware that time alone will not bring reconciliation.** The quest for truth, justice and reparation – essential stages of reconciliation – does not simply disappear with time. A violent past, left unaddressed, is like a fire that intermittently flares up.

### 3 THE CONTEXT OF RECONCILIATION

*Self-interests that cut across the divide can be very effective in facilitating a reconciliation process.*

Vital factors related to the specific context cannot all be listed in advance, but will include:

- **The legacy of the past.** How far back in history should a reconciliation process reach? Is living memory the realistic limit? Or can, and should, amends be made for historic wrongs? A realistic balance must be struck that takes into account the many layers of a complex social history.

- **The intensity of past violence** directly affects the depth of response of those involved, and partly defines the scale of the problem to be addressed. Intensity may dictate the degree of optimism or pessimism, as well as the public sense of urgency, regarding reconciliation.
- **The extent of physical damage.** Logistical and resource capacities for implementing reconciliation (or any other) initiatives will depend on the economic state of the country, both present and projected. Planning must be realistic, feasible and deliverable.
- **The type of political transition.** Where a formerly oppressive regime has been violently and completely overthrown, or where a civil war has ended through a decisive military victory, this may increase the tendency towards punitive structures for retributive justice. Where transition arrives at the initiative of reformers within the previous regime and those in power take the initiative and play the decisive role in ending the regime, this may encourage self-protecting moves towards amnesty. Where transition results from jointly negotiated action, it may be possible to develop a process through



negotiation between equals. Finally, if the transition produces a new, all-powerful regime, this will affect the reconciliation process too: the new state may have great power to insist on reconciliation and to force the old powers to accept judicial punishment for their acts, although this may simply stoke the former powers' perception that they have now become the victims.

- **Cross-cutting interests.** The existence of the same self-interests among sub-groups on each side of the divide can be harnessed for reconciliation and cross-community co-operation. *Women* from both sides in a war may join together, the better to pursue their demands for an equal share of social power with men. *Labour groupings* may combine to form a more significant pressure group in society. *Business and industrial interests* may be better served by a larger, combined market, complementing each other's human, financial and natural resources. The poor can increase their resources by joining together to fight for more equitable resource sharing. There may be common *religious or linguistic links* that can act as bonds to bring people together across the original divide.
- **The international community** is a potential source of information, expertise and training on reconciliation. Additionally, the gradual development of international humanitarian and human rights law is producing an international legal order, and forming a supportive external consensus on many key justice issues.
- **Culture.** How a community deals with a violent past is intimately linked to its customs and culture. In particular, culture influences the system of collective memory. It is also a rich resource for finding home-grown methods of reconciliation: looking 'within' for tools and solutions, rather than looking outside for ready-made answers.

## 4 VICTIMS

Victims are at the heart of the reconciliation process. But who are they? While they have much in common, they also differ widely in their experiences, needs and capacities. *Direct victims* have suffered the direct effects of violence. *Indirect victims* are linked to direct victims in such a way that they also suffer because of that link. *First-generation victims* are those who have been affected during their lifetime. But their children – the '*second generation*' – also absorb the pain and grief, keeping it alive to threaten the future of a society. Brutal conflict also has a different impact on men and women, because victimization is partly *gender specific*. Children are the most defenceless victims, especially *refugee children and child soldiers*. Each category may need different kinds or versions of reconciliation.

**The Definition of Victims.** Defining who exactly qualifies as a victim has three complex components:

- **Socio-political factors.** Official agencies define victims, but always exclude many whose pain falls outside the terms of reference, due to political, time and economic restraints. In reality, only a section of all the injured parties get attention or recompense. NGOs, both local and international, also contribute to the definition of victims. While they may help to give silenced and invisible victims a voice, their engagement is not always neutral.
- **Legal definitions.** A key international definition is given by the UN Commission on Human Rights' *Declaration on the Right to Restitution for Victims of Gross Human Rights Violations* of 1999. The statutes of the ad hoc international tribunals for Yugoslavia and

Rwanda, and of the International Criminal Court (ICC), also contain formal definitions. The criminal legislation of a post-conflict state, combined with international humanitarian and human rights law and the state's customary, indigenous and religious law, also contributes importantly towards an appropriate definition. In national and international tribunals, judges decide formally who is a perpetrator and who is their victim.

- **Culture.** Culture influences how we define indirect victims by, for example, defining the scope of 'family' and 'community'.

**Victim mobilization.** (Re-) empowering victims is vital. Victim Associations are the key to this. They act as pressure groups, inform public opinion, offer legal aid, and restore dignity and self-confidence. But they can also become an obstacle, lobbying against reconciliation measures such as conditional amnesties or reintegration of offenders, or become trapped in the past with little vision of the future.

**Interchangeable roles.** There are circumstances, e.g., Burundi and Bosnia, where the roles of victim and offender have been exchanged, often more than once, over a long time, producing alternating roles of victims and aggressors. This crucial dynamic, which leaves everyone feeling like a victim, must be recognized.

***The alternation of roles between victims and offenders is an important consideration in preparing and implementing reconciliation programmes.***

In general, experience recommends that policy-makers:

- Be aware of the consequences of selecting a particular definition of 'victim'.
- Respect the victims' very personal perception of what has happened to them.
- Recognize that a victim's recovery proceeds through several different stages.
- Provide for collective measures in the areas of health care, education and housing that assist whole communities and thus include the many who fall outside reparation programmes.
- Listen to the needs of victims who stay as refugees in neighbouring countries.

## 5 OFFENDERS

Understanding the 'why' and 'how' of offenders' actions is not the same as excusing them, but it is a precondition of any reconciliation policy. The diversity of their guilt, their motives and their offences demands that a reconciliation policy reflect a similar diversity of approach.

### ***'Primary' and 'Indirect' Offenders***

**Primary** offenders are those who can be charged with specific criminal acts. **Indirect** offenders, whose guilt is of a more political or moral nature, offend (a) by the advantages they enjoyed as a result of the offences of others, (b) by inaction when witnessing violations, or (c) by unintentional harmful action.

Silent, indirect **beneficiaries** do not kill or abuse. But they profit from the past, whenever scarce resources are allocated – jobs and income, housing and education, status and political power, etc. Often, the benefits continue into the present and future. Their accountability must



be addressed in reconciliation processes, otherwise distributive and social justice will remain distant goals.

Bystanders and onlookers are complicit through their inaction when confronted with acts of violence. They know what happens, or choose not to know, and remain silent. Sometimes bystanders belong to the international community.

Criminal courts deal with *individual* guilt, while truth commissions can look at *collective* guilt. In many contexts, religious organisations, the judiciary, the medical profession, business and the media have contributed collectively to human injustice, at the least as beneficiaries and bystanders.

### *Classifying Offenders*

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Information on offenders must be processed. A first step is to classify offenders according to the gravity of the crimes. This can be difficult: the majority of the population may have participated in human rights violations; records may have been destroyed; and the new regime may lack the required logistical capacities. The box below shows examples of categorisation.

## Categories of Offence

*International Crimes* (crimes posing a threat to international security and the safety of humankind; these cannot be modified by any treaty or domestic law):

- *Crimes against humanity* as defined in the 1998 Statute of the ICC (article 7) are crimes committed as part of a widespread or systematic attack directed against any civilian population: murder, extermination, enslavement, deportation, severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sex slavery, forced pros-

titution, forced pregnancy and sterilization, and all other forms of severe sexual violence, persecution, enforced disappearance of persons, apartheid or other inhuman acts of a similar nature.

- *Genocide* (ICC Statute, article 6) means acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, by killing members of the group, causing serious bodily or mental harm, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent birth within the group or forcibly transferring children of the group to another.

- *War crimes* (ICC Statute, article 8) are defined as severe violations, committed during an international or domestic armed conflict, of the Geneva Conventions of 12 August 1949 and of other international humanitarian laws, in particular if these acts are directed against people not actively participating in combat (e.g., civilians or prisoners).

*Gross Violations of Human Rights* (severe violations of human rights (e.g., torture, disappearances committed by state or non-state agencies). This category entails (isolated) acts that are not necessarily part of a widespread or systematic attack, hence the difference with crimes against humanity.

### *Associated Violations*

These are not gross violations of human rights but cause all the same victimization (e.g., violating a corpse after death, sexual harassment including threats of rape, deprivation of essentials such as medical attention, ruin of business, intimidation by dismissal from work).

## *The Motives of Offenders*

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Offenders may have acted under orders or under threat. Or their actions may not have been unlawful at the time. They themselves may have been ‘victims’ of hate speech, a technique for turning ordinary citizens into violators of human rights. The existence of a culture of impunity can also make some forms of violence ambiguous.

A frequent excuse is that “we were at war”. Ideology and a true ‘belief in the cause’ can operate in the same way. In a cycle of violence, revenge becomes the motive: new violence is justified, even demanded, in retaliation for previous violence.

Non-state actors will often justify their acts as ‘politically-motivated violence’, unavoidable in response to state violence in their fight for freedom. Setting aside for the moment the question of the morality of violence in general, this is a genuine explanation of why many ‘ordinary’ people feel compelled to engage in ‘extraordinary’ acts, seeing themselves as freedom fighters and reluctant heroes.

Political motives can of course camouflage criminal purposes, to protect control over drug traffic, illegal migration routes or smuggling operations.

## *Offenders and Reconciliation*

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*A ‘magnitude gap’ exists between the perspectives of victims and perpetrators on the importance of the violence that took place.*

What can facilitate the reconciliation of offenders with their victims and with their society? Much depends on the context, and on the motives and perspectives of offenders. Sometimes these raise serious obstacles to reconciliation. When carried out carefully and under the right

circumstances, however, the reintegration of offenders is a critical step towards reconciliation.

## **Obstacles to Reconciliation**

- *Denial of guilt.* Rejection of guilt and responsibility is based on a variety of discourses (see ‘motives’ above).
- *The ‘magnitude gap’* is the disconnect between the perspectives of victims and perpetrators on the importance of the violence that took place. Offenders generally undervalue the significance and consequences of their acts, while victims feel the full weight of their suffering.
- *Apologies without accountability.* Apologies by offenders can be crucial, but apologies without admitting responsibility to the victims will not lead to genuine reconciliation. Many victims find incomplete apologies insulting.

## *Reintegration of Perpetrators*

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Offenders ideally should be reintegrated into their community. Their continued exclusion from the community threatens the overall integration and reconciliation of the society.

## **Why Reintegrate?**

Sooner or later most offenders will return to their community of origin. This homecoming can become a source of retraumatization of the surviving victims if no explicit reintegration measures are taken. More specific reasons for reintegration include:

- Prisons often have to cope with overpopulation, exerting untenable pressure on public resources.
- Punishment of administrative and managerial staff may remove the human resources necessary for the political and economic reconstruction of the country.
- Continued external threats may increase the need for speedy reunification of the

- population through national reconciliation.
- The prolonged physical and social exclusion of certain sections of the population may drive them into social and political isolation, ultimately creating subcultures and networks hostile to democracy.
- Reintegration includes disarming, one key factor in defusing a highly explosive situation.

### How to Reintegrate?

- **Remove legal and administrative obstacles:** These include release on parole, reduction or remission of sentences or financial sanctions, restitution of office and of civil rights and rehabilitation.
- **Actively promote re-socialization:** Instilling democracy and human rights values requires long-term education programmes.
- **Reintegrate offenders at the local community level:** NGOs, religious institutions, other civil society groups and local authorities may involve offenders in community-based projects, where they rebuild schools, hospitals, roads and so on.
- **Incorporate traditional practices:** Reintegration initiatives are often based on traditional rituals which express the acceptance of offenders back into the community. The philosophy is that modern criminal justice systems have disempowered local communities and given all the power to professionals. Rituals place the crime back in the context in which it happened. This approach is part of the broader perspective of restorative justice (see section 7).

There is no guarantee that reintegration programmes will convince offenders to reconcile with their victims, or vice versa. But they create opportunities for offenders to break out of their isolation and, in the case of community-based initiatives, to realize the harmful impact their behaviour has had on the victims and thus to consider how they might respond.

## 6 HEALING

*It is not only important to help people deal with the impact of the conflict on them, but it is also essential to deal with the causes of the distress.*

Trauma is the destruction of individual and/or collective structures of a society. It is important to help people deal with the impact of the conflict on them – through, for example, a grieving process. But it is also essential to deal with the causes: what needs to be ‘healed’ are the individual, political, social and cultural responses to a traumatic situation and its aftermath. Repression of culture and expression, ethnic intolerance and discrimination can severely undermine or destroy feelings of identity, belonging and trust in institutions.

### *Reconciliation and Healing*

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Healing should be sought at the individual level but inter-related with the social context. While political processes and strategies aimed at reconciliation are important in establishing the context for individual healing and coming to terms with violence, each individual’s healing path is personal and unique. Often the politicians and the political processes are ready to move on before those who are the direct survivors of political violence.

### *Approaches to Healing*

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There is no single healing process, but a blend of transforming the social world that causes distress, while attending to individuals’ needs:

- **Understand the context:** Healing must acknowledge the social and cultural context

and address the individual as a whole. Context should always be the starting point for developing a healing strategy.

- **Use local resources:** Some communities and individuals are extremely good at coping with adversity. Localized coping mechanisms should be supported and built upon where possible. At the same time, one needs to guard against overvaluing existing mechanisms. Often, traditional mechanisms are destroyed in the violence.
- **Link healing with broader reconstruction programmes:** Truth, acknowledgement and justice cannot be separated from the healing process. Those working with individual victims also need to be aware of broader processes. Healing initiatives need to be part of socio-economic and cultural reconstruction in the post-conflict phase, re-establishing a socio-political context to help victims reclaim their sense of identity and dignity.

### **Healing Strategies**

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All strategies should grow out of the local context; and multiple strategies should be undertaken simultaneously.

- **Psychosocial programmes:** These promote and rebuild the social and cultural context. Methods include arts and story-telling; self-help groups; grieving and reburial rituals; re-training, education and re-skilling; the reintegration and reunion of individuals with communities and families; counselling and group support; information dissemination; and creating a safe environment to meet, network, share experiences and establish new routines. Programmes may operate within one community or group, but bringing together victims from different sides of the conflict can often help turn the healing process into a more proactive resistance to armed conflict. Not all levels of intervention suit all contexts, but addressing traumatic

situations in a multifaceted way is generally most effective. Guidelines for running psychosocial programmes have been published, e.g., by the Netherlands Institute for Care and Welfare, and the WHO's 2000 *Declaration of Co-operation: Mental Health of Refugees, Displaced and Other Populations Affected by Conflict and Post-Conflict Situations*.

- **Counselling:** Psychotherapy, group work, family therapy, counselling or support from the community need not only be professional services: they may simply involve survivors gathering and sharing (with or without a trained professional) in a familiar space. Trauma counselling can be very effective, but only if done appropriately and in the relevant context.
- **Training local communities in psychosocial support skills:** Involving health care professionals in the training of local people in trauma counselling can be wholly inappropriate if those trained are left with little back-up support. But training programmes for local people built on the interplay between different methods and ideas, local and borrowed, can be valuable. Participants themselves must play a decisive role in defining activities and implementing them.
- **Self-help support groups:** These offer emotional or practical help. Members share a common problem and pursue their goals through mutual aid. The groups are normally member-led. While many offer direct support and services (e.g., counselling and befriending), most have broader goals of continuing the fight for recognition, acknowledgement and justice. Self-help victim support groups generally serve as forums for sharing experience, problems and solutions, for raising public awareness and lobbying for change, and for information exchange.
- **Symbolic forms of healing:** Symbolic acts, objects and rituals can help concretize a tra-

# 7 JUSTICE

matic incident, serving as a focal point in the grieving process. Such symbols are most effective if they are personalized and culturally relevant. They can also have a wider benefit, as markers to remind society of the lessons of the past:

- Memories of the past can be housed in symbols such as monuments, museums and plaques, peace parks and sites of dignified burial. The ideals, rights and aspirations of those who suffered can be acknowledged through official statements, or naming official places, streets or buildings after them.
- Apologies, if genuine, can also have a significant impact.
- Reparation and compensation awards can demonstrate the state's acknowledgement of wrongdoing, restore survivors' dignity and raise public consciousness about the general population's moral responsibility to participate in healing the wounds of the past, as also do symbolic acts of reparation (such as reburials) and material acts (e.g., payments).
- Specific rituals and ceremonies can also have powerful symbolic and healing value.

The process of healing occurs not through the delivery of an object – a pension, a monument or an exhumation – but through the process that takes place around this, such as the reburial ritual. Symbolic forms of healing cannot be separated out completely from the broader context. Acknowledgement, apology, recognition and even substantial material assistance can never bring back the dead or alleviate all the psychological pain suffered. In accepting the reparation or apology, survivors may feel ambivalent about putting their loved ones to rest. And if symbolic acts are not linked with the delivery of truth, justice and social change, they can be seen as a government strategy to close the past prematurely, and 'buy off' the survivors.

## *Retributive Justice*

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*Retribution has the potential both to deliver satisfactory and reconciliatory justice or to endanger reconciliation and democratization processes.*

Acknowledging and punishing the crimes of the past demands that 'justice be done'. 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. While the tendency is to focus on the retributive dimension – out of a concern that perpetrators should not go unpunished – a few cautionary notes are nonetheless necessary. The crucial challenge is to strike a balance between moral imperatives and political realities. Retribution has the potential both to deliver satisfactory and reconciliatory justice or to endanger reconciliation and democratization processes. Political or economic circumstances may mean that a focus on retributive justice is simply not possible as a post-conflict strategy. Retributive justice tends to focus on the offenders and ignore or sideline the real feelings and needs of victims. In addition, trials can sometimes emphasize antagonisms and hinder reconciliation processes.

### **Benefits of Retributive Justice**

- It reduces the risks of private revenge (vigilantism, summary justice, etc).
- It prevents the return to power of perpetrators, so building public confidence that the past will not be repeated.
- It fulfils an obligation to the victims, healing

their wounds and restoring their self-confidence because it publicly acknowledges who was right and who was wrong.

- It individualizes guilt. Criminal courts establish individual accountability, thus eradicating the dangerous perception that a whole community is responsible.
- It strengthens legitimacy and the democratization process, paving the way for an ethical and political renaissance. It also consolidates the values of democracy, and instils public confidence in the capacity of the new regime to implement them.
- It breaks the cycle of impunity, and deters future abuses of human rights.

#### Limits and Risks of Retributive Justice

- **Priorities.** In the particular conjunction of post-conflict political, cultural and historic forces, sometimes other needs could be even more urgent than seeking justice through trials.
- **Destabilizing a fragile peace settlement.** Former military leaders may respond to the threat of prosecution with a renewed coup or a rebellion.
- **Provoking hostile subcultures and networks.** Criminal court decisions may obstruct democratic consolidation by stimulating the growth of destabilizing subcultures and networks hostile to democracy.
- **Crippling governance.** A far-reaching purge of administrative and managerial staff can have crippling effects on governance and endanger vital political and economic development.

#### Material Obstacles to Retributive Justice

- **Evidence may have been destroyed.** Lack of proof can lead to acquittals of well-known perpetrators, seriously damaging victims' trust in the whole system.
- **The criminal justice system may be incapable of delivering.** The judiciary may have been one of the sources of injustice and/or

the infrastructure may be badly damaged. Nothing is more damaging than ineffective justice.

- **Criminal prosecutions may block or reverse a reconciliation process.** Sometimes leaders choose not to bring perpetrators to court, fearing that prosecutions would endanger reconciliation initiatives. There can be a variety of reasons for this. First, because of resource issues or the prevailing social climate, the system may not yet be capable of producing measured, fair and effective rulings. Second, retributive justice after violent conflict often necessarily trespasses on rule-of-law norms and human rights, risking a perception of 'victors' justice', of settling old personal and political vendettas. Third, since most post-conflict justice systems are not well resourced to deal with large numbers of crimes, only a small percentage of perpetrators may be prosecuted and punished, so that the process appears arbitrary.
- **Trials identify individual guilt,** and not the broader patterns of multiple causes and practices that contributed to violence and terror. Moreover, trials only recognize criminal guilt, not political or moral responsibility.

#### International tribunals

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***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 principle of universal jurisdiction argues the duty to prosecute gross human rights violations, if necessary by courts outside the country where the crimes were committed. International jurisprudence takes a number of forms:



- *Ad hoc tribunals.* The UN Security Council has established two international criminal tribunals: the International *Criminal Tribunal for the Former Yugoslavia (ICTY)*, created in 1993, and the *International Criminal Tribunal for Rwanda (ICTR)* in 1994.
- A new departure in international jurisprudence is the creation of *hybrid national-international criminal courts*. Sierra Leone, for example, has a tribunal that is a mixture of international and Sierra Leonean law and judges.
- The establishment of a permanent *International Criminal Court* (the ICC) will effectively supplant temporary mechanisms used to prosecute crimes against humanity, such as the Nuremberg and Tokyo war crimes tribunals and the ICTY and ICTR.

Consequently, international tribunals, or national trials based on universal jurisdiction, seem a perfect complement, or even an alternative, to local trials. They certainly are less vulnerable to intimidation, material obstacles, violation of procedural standards, lack of trained personnel and accusations of ‘victors’ justice’. But the actual experience of the ICTY and ICTR suggests that they, too, are constrained by several factors:

- *Lack of an enforcement mechanism* can undermine effective and public confidence: tribunals can issue arrest warrants, but do not have the police authority to apprehend those indicted.
- Although they may begin their work before hostilities completely cease, *tribunals cannot themselves stop a conflict that is in progress*.
- *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, is not hindered by this limitation.)

- *The danger of imposing retributive justice as the universal response to human rights crimes.* In lobbying for universal jurisdiction, international institutions and NGOs have tended to put sole emphasis on retributive justice. This has occurred simultaneously with, and in contradiction to, the growing support – especially in developing countries – for more informal, mediation-oriented mechanisms of restorative justice.
- *Ad hoc tribunals tend to be costly, time-consuming and too distanced from the population.* Tribunals that are a mixture of international and national elements and also the ICC may eliminate some of these problems.

### *Alternatives to Retributive Justice*

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It is very rare to wholly exclude any form of retributive justice from post-conflict justice systems.

If, however, retributive justice seems too dangerous or difficult a path, various alternative or supplementary routes are available. One is *lustration*, a second is *amnesty*, a third is the use of *restorative justice*, and a fourth is the establishment of a *truth commission and/or reparation programmes* – the two latter being forms of justice without formal punishment. Truth commissions and reparation are dealt with in Sections 8 and 9, so here the first three alternatives are considered.

#### **Lustration**

Disqualification (or ‘lustration’) of agents of the former state punishes those who are responsible for aggression and repression. Such non-judicial disciplinary measures come in various forms: political disqualification, loss of suffrage; exclusion from public service in the police, army and state administration; and softer types such as forced early retirement or transfer to less strategic posts.

## Amnesty

Reconciliation is fundamentally undermined if the vicious circle of impunity is not broken. 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, peacemaking is actually facilitated by granting leaders of rebel movements provisional and limited immunity through domestic legislation. The most frequent source of impunity is amnesty legislation.

Amnesty comes in many forms, but is almost always a very high-risk option, with the potential to alienate many, heighten suspicion and encourage public disillusion with the whole reconciliation process. It is a disputed instrument in the context of post-conflict societies. Usually it obstructs the reconciliation process. Unilateral amnesties, total in scope, should be avoided. However, if the end of a violent conflict is otherwise not attainable, amnesty can be a last resort. But even then, 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.

## Restorative Justice

*Restorative justice works with the full participation of the victims and of the relevant communities to restore relationships.*

Growing dissatisfaction with the purely punitive handling of crimes has stimulated the search for mechanisms that could serve as complements, or even alternatives, to retribution.

Restorative justice handles wrongdoing differently: it works with the full participation of the victim and of the relevant communities in dis-

cussing the facts, identifying the causes of misconduct and 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, a more comprehensive (but perhaps more ambitious) goal than simply punishing the guilty – an aim that, at least in theory, clearly resonates with the broader goals of a reconciliation policy.

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. Usually they were originally designed to deal with relatively small numbers of cases of minor wrongdoing – theft, conflicts between neighbours and so on. Can they bear the weight of the most serious crimes on a vast scale? There are as yet only a few experiences of restorative justice being implemented in post-conflict situations. The most ambitious so far is the remodelling of the gacaca tribunals in Rwanda to speed up the prosecution of suspected perpetrators of the 1994 genocide, increase the participation of the population, and introduce elements of mediation and reconciliation into the process. Restorative justice mechanisms have 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.

### Strengths

- They are accessible to local (and rural) people, carried out in the local language, within walking distance, with simple procedures and few delays.
- 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 continuing co-operation with their neighbours.
- They are highly participatory, giving the victim, the offender and the community 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.
- Their non-custodial sentences reduce prison overcrowding, allow prison budget allocations to be diverted towards social development purposes, permit the offender to contribute to the economy and to pay compensation to the victim, and reunite prisoners and their families.

### Weaknesses

- The compromise reached may reflect the unequal bargaining strengths of the parties. Prevailing social attitudes may in fact reinforce inequalities on the basis of gender, age or other status.

- Those who lead the process may be biased towards certain groups.
- Because of procedural flexibility procedural safeguards may be insufficient.

## 8 TRUTH TELLING

### *Truth Commissions can signal a formal break with the past, and the transition to a more open, peaceful and democratic future.*

In the context of truth commission work, perhaps the most important distinction is that between individual reconciliation and national or political reconciliation. Truth commissions focus on the latter, although they may also indirectly assist the former. Truth may be only one of many elements in the pursuit of reconciliation, but a vital one.

### *Instruments of Truth-Seeking*

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Transitional societies today are almost certain to consider establishing truth commissions. Truth commissions, however, are not a replacement for judicial trials: they are non-judicial bodies and so have fewer powers than do courts. There are at least three other kinds of truth-seeking inquiries into human rights violations, and which is or are most appropriate depends on the context. In some countries, governments have established historical commissions. These are present-day inquiries into state abuses that took place and ended many years ago. They are not established as part of a political transition and may not even pertain to today's political leadership or practices. Some official or semi-official inquiries into past human rights violations share the main characteristics of truth commissions but are less independent of political processes, or more limited in scope or authority, or

undertaken only as a precursor to a fully-fledged truth commission. And there have been many *non-governmental projects* which have documented violations and patterns of abuse of a previous regime. These projects are usually undertaken by national human rights organizations, sometimes with church backing, and have sometimes produced remarkable results.

### *What is a Truth Commission?*

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#### **Truth commissions generally:**

- are temporary bodies, usually in operation from one to two years;
- are officially sanctioned, authorized or empowered by the state and, in some cases, by the armed opposition as well as in a peace accord;
- are non-judicial bodies that enjoy a measure of *de jure* independence;
- are usually created at a point of political transition, either from war to peace or from authoritarian rule to democracy;
- focus on the past;
- investigate patterns of abuses and specific violations committed over a period of time, not just a single specific event;
- complete their work with the submission of a final report that contains conclusions and recommendations; and
- focus on violations of human rights and sometimes humanitarian norms as well.

### **Potential Benefits**

Truth commissions can generate many benefits:

- ***Help to establish the truth about the past.*** They can establish a record that is accurate, detailed, impartial and official, countering other one-sided accounts, and raising public consciousness about the real scale and impact of a violent past.
- ***Promote the accountability of perpetrators of human rights violations.*** They can complement the work of criminal prosecutors by gathering, organizing and preserving evidence. They can recommend non-custodial forms of accountability: civil liability, removal from office, restitution or community service schemes.
- ***Provide a public platform for victims.*** They can put victims at the forefront of the transition process, helping to heal them, supporting their cause, giving them a sense of personal vindication, and educating the public about the individual human impact of past crimes.
- ***Inform and catalyse public debate.*** They can help stimulate public deliberation on the moral, political and legal issues that must be addressed during a transition process.
- ***Recommend victim reparation.*** They can promote reparation for past abuses and for ongoing psychological, physical and economic injuries, and establish fair and effective definitions and categories of 'victim' for such purposes.
- ***Recommend necessary legal and institutional reforms.*** They can provide clear evidence of failures of human rights protection, and recommend legal and institutional reforms.
- ***Promote reconciliation.*** They can promote tolerance and understanding by allowing conflicting parties to hear each other's grievances and suffering. They can provide a safe and impartial forum for the mediation and resolution of grievances. They can recommend measures for reintegrating offenders into society.

■ ***Help to consolidate a democratic transition.***

By all the above means, they can signal a formal break with the past, and the transition to a more open, peaceful and democratic future, thus weakening actors who might pursue their goals outside the democratic process.

**Reasons Why Truth Commissions Are Not Always Used**

■ ***Fear of ongoing or renewed violence or war.***

There is a perception that violence would increase, or war could return, if old crimes and wounds were revisited.

■ ***Ongoing conflict.*** In intense armed conflict it will be virtually impossible to achieve neutrality, ensure victim and witness participation and security, or gain reliable and equal access to all participants and to key information.

■ ***Lack of political interest.*** There is little or no interest by the political leadership in truth seeking, and a lack of pressure from significant non-governmental actors.

■ ***Other urgent priorities.*** There is a widespread wish to focus on survival and rebuilding in the aftermath of extensive destruction.

■ ***Insufficient capacity.*** There is a lack of resources or basic institutional structures.

■ ***Alternative mechanisms or preferences.*** The national culture avoids confronting past crimes, or existing community-based mechanisms can better respond to the violence.

These all appear to be reasons why societies in transition forgo official truth-seeking and why it may be preferable to focus instead on non-governmental mechanisms. But one should treat with considerable scepticism any decision against official truth-seeking that is taken with little or no public consultation, or by parties who have an interest in preventing investigation of the past.

**Potential Risks**

■ ***Improper motives.*** A government may aim to use a truth commission to pursue political vendettas or to avoid its own responsibility for difficult tasks. It may make the commission deliberately weak, and thus easier to challenge or reject the results later. Cynical governments may use truth commissions to insulate themselves against criticism from victims that not enough has been done to redress the past.

■ ***Bias.*** Commissioners themselves may work with a bias that would make an objective and complete account of the past impossible.

■ ***Unrealistic expectations.*** Commissions may foster unrealistic expectations on the part of victims and the public, generating renewed frustrations and further distress.

With a strong civil society and independent media, many of these risks can be reduced through public pressure. If they are absent, however, the risks must be understood in advance by those who would, in good faith, advocate the use of a truth commission.

**The Political Context**

Factors arise from the transitional context to affect the establishment and operation of a commission. Public 'ownership' and active participation are critical ingredients in ensuring a successful commission.

***Constraining Factors:***

■ Many political transitions are the result of bitter negotiation and may depend on the opposition conceding amnesties, etc. to obtain formal control of the state.

■ There is often widespread destruction of evidence of crimes by the outgoing regime.

■ There may be public fears – for example, of individual intimidation – about testifying which hamper the commission's ability to get to the truth.

- Weakness or corruption in the administration of justice, and lack of co-operation from the police or army, will undermine the work.
- There are often widespread fears that a commission's hearings will undermine a fragile process of demobilization, disarmament and reintegration.

#### *Enabling Factors:*

- Strong public support for the establishment of a truth commission.
- The presence of a vigorous and engaged civil society (and in particular of strong victims' groups, human rights groups, religious leaders and intellectuals).
- Widespread social identification with the victims of the abuses.
- Vocal and independent media.
- Persistent international attention and pressure.

#### Composition

*A commission will generally garner greater public and international support where its members are selected through a consultative process and where an honest attempt is made to ensure a fair balance.*

The persons selected to manage a truth commission will determine its ultimate success or failure. Several commissions have run into problems rooted in weak management by commissioners. Although commissioners are generally not involved in the day-to-day administration of a commission, they usually direct investigations, shape commission policy and have the last word regarding the final report. As the public face of the commission, the commissioners' personal and political authority can also be critical in dealing with recalcitrant authorities. A commission will generally gain greater public and internatio-

nal support where its members are selected through a consultative process that ensures a fair balance in the representation of political views, ethnic or religious groups and gender.

#### Mandate and Powers

- **Objectives.** The terms of reference should set out the main objectives: establishing the truth about the past, contributing to national reconciliation, making recommendations to help victims, and preventing a relapse into war or authoritarian rule.
- **Period of operation.** Start and end dates can be flexible, allowing for short-term extensions. However, the total possible period of operation must be fixed; otherwise the commission can go on for too long, lose focus and ultimately cease to interest the public. 1–2 years of operation is generally desirable.
- **Types of violation under investigation.** Human rights violations, of course, tend to be the focus of the work; however, there are many different types of human rights violations and often too many for a single commission to tackle meaningfully in a short period of time.
- **Period of time under consideration.** This should be clear from the start. It is often controversial. The time-span will generally relate to those periods of history when the worst or the greatest number of violations took place, and this often corresponds to periods of civil war or authoritarian rule.
- **Functions of the commission.** The key functions through which a commission pursues its objectives normally include publicizing its mandate, carrying out research and investigation, and submitting a final report of findings and recommendations.
- **Powers.** Minimally, commissions must be able to interview anyone who can provide relevant information, receive the full co-operation of public authorities and carry out any necessary on-site visits (ideally unannounced). Increasingly, commissions'



powers also include powers of subpoena, search and seizure powers, and in some cases witness protection. The conferral of such powers must be carefully balanced: each addition moves the process further away from a truth commission towards a court process.

- **Sanctions.** The commission should generally be given sufficient power to ensure that sanctions – perhaps fines, imprisonment or both – can be brought against those who do not co-operate.
- **Follow-up.** What obligations, if any, will the government have to publicize the commission's final report and to implement its recommendations? Consideration must also be given to the auditing, safekeeping and subsequent use of the commission's files and records after it has ceased operations.

### Resource Issues

Even the best-designed mandate will not ensure a successful truth commission if it lacks adequate resources. The average budget of new commissions has risen to USD 5–10 million. The trend is to combine national government funds with funds received from donor states and private foundations, where available.

### Truth Commissions in Operation

#### *Preparatory tasks:*

- developing a staffing plan and hiring staff;
- drafting internal regulations and policies;
- adopting a work plan;
- designing and installing an effective database for the storage, organization and retrieval of records and data;
- preliminary background research;
- collecting existing documentation from national and international NGOs, the UN, foreign governments and other sources;
- designing a public education campaign; and
- fund-raising and budget preparation.

#### *Principal Activities Of A Truth Commission During Its Lifetime*

- **Outreach.** Public outreach by a truth commission is critically important, and will profoundly affect its access to information, effectiveness in addressing needs, ability to manage public expectations and general public reputation. Outreach can be carried out through public information meetings, publications, pamphlets, videos and so on, explaining the commission's role and mandate.
- **Statement-taking.** Most information is collected through private meetings, where staff take testimony from individual victims and fill out a statement form. Statement-taking furthers the goal of establishing the truth about the past, and it provides an opportunity for victims to recount their traumatic experiences in a sympathetic and safe environment. For most victims and witnesses, statement-takers will be their only personal contact with the commission, and so the impressions they leave on deponents and communities are especially significant and enduring.
- **Research and investigation.** Research units and police-like investigation units are increasingly becoming a part of the structure of truth commissions with large budgets and robust mandates. Many commissions combine research and investigation into one department.
- **Data processing.** Truth commissions deal with enormous volumes of information. This requires an effective database for storage, organization and retrieval. A strong data management system will help in achieving a 'big picture' analysis of important historical patterns.
- **Public hearings.** These are a relatively recent development. There are persuasive arguments for holding public hearings. By giving victims and survivors a chance to tell their story before a public audience a commission

can formally acknowledge past wrongs, encourage public understanding and sympathy for victims, reduce the likelihood of certain sectors of society continuing to deny the truth, and enhance the transparency of its work. Public hearings can also help to shift a truth commission's focus from product (i.e., its final report) to process, by stimulating an authentic national discussion about the past. But security risks for commissioners and victims, time and resource constraints, and concerns about 'judicializing' commission proceedings may require that hearings be held in camera.

- **Emotional support.** For some victims, the experience of testifying to a truth commission can lead to re-traumatization. Recent truth commissions have begun to realise the importance of protecting against, or dealing with, this issue.
- **Final reports.** These often constitute the enduring legacy of commissions and become a resource for human rights education or subsequent prosecutions. Well documented and methodologically sound final reports can serve as a crucial safeguard against revisionism. However, the impact of a final report may depend more on surrounding factors: when and how the report is publicized and distributed, how much media coverage it receives, and whether there are both traditional and alternative presentations of the findings.
- **Naming names and due process.** Some truth commissions have had the power to publicly name those individuals found to be responsible for human rights crimes. Others have not been expressly granted this power but have been creative in finding indirect ways of naming individuals. The issue remains a point of tension. The disagreement is between two contradictory principles: that due process requires that individuals accused of crimes be allowed to defend themselves before being pronounced guilty; and that

telling the full truth requires naming persons responsible when there is clear evidence of their culpability. The best practice is to allow commissions to name names but ultimately to leave it at their discretion whether or not to do so. There may be a range of legitimate reasons for not naming names: security risks for commissioners, victims or witnesses, a lack of sufficient evidence, or an inability to give proper notice or safeguards for those accused. If a commission decides not to name perpetrators, it should at least set out reasons that are politically, morally and legally defensible. Where it does name names, it must clearly state that its findings do not amount to a finding of legal or criminal guilt.

- **Engaging perpetrators in the process.** Past truth commissions have failed to secure meaningful co-operation from perpetrators, except for the TRC in South Africa, which had the power to grant individual amnesty. Such a 'truth-for-amnesty' formula raises difficult moral, legal and political issues.
- **Follow-up efforts.** Once a truth commission submits its final report, archives its files and is formally dissolved, carrying out its recommendations will naturally fall to others. Unfortunately, this has frequently been a major shortcoming, even where there is a legal obligation for the government to do so. The cause may be insufficient political will, or insufficient institutional capacity or funds. Whichever is the case, however, truth commissions must suggest mechanisms to ensure proper monitoring and follow-up.

A truth commission is only one of the many mechanisms available to countries in transition that are seeking to consolidate democracy, human rights and the rule of law. Other possible components of a full programme of transitional justice could include trials, vetting programmes, legal reform, victim reparation, and restitution and reintegration measures. There

appears to be a new trend towards the integration or synthesis of these different elements of transitional justice.

## 9 REPARATION

*Reparation acts as a bridge between the past and the future. It combines the backward-looking objective of compensating victims with the forward-looking objectives of political reform.*

Transitional justice has reshaped the notion of reparation. The concept was oriented to compensation and to the past. Today, however, it also includes important symbolic and future-oriented measures. There are four basic types of reparation:

- **Reparation rights and policies**, where victims can claim a right to reparation through national and/or international laws, and where this leads to the development of reparation policies.
- **Individual and collective measures**: Individual measures will consider specific cases of individual victims, but very often this needs to be supplemented by collective reparation measures (for example, medical services, education or employment) for entire ethnic, religious or other groups who have suffered collectively because of their group membership.
- **Financial and non-financial measures**: Financial compensation is the most obvious form of reparation, but can often be (or must be, because of resource limitations) supplemented by non-financial measures: restoration of citizenship, issue of death certificates for those who ‘disappeared’, cancelling of

criminal records, facilitation of exhumation and burial, etc.

- **Commemorative and reform measures** can be backward-looking projects which acknowledge the barbarity of prior history, or more present-tense measures that address continuing economic disadvantage.

### *Why Reparation?*

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Reparation acts as a bridge between the past and the future. It combines the backward-looking objective of compensating victims with the forward-looking objectives of political reform. A new post-conflict state should immediately show its seriousness by a commitment to provide reparation. In international legal terms, the responsibility of a successor regime or government for abuses committed by the previous regime is beyond any doubt.

Claims for reparation are most often based on two different, often mutually reinforcing, sources: morally, fundamental feelings that justice must be done and that harm must be undone; and legally, through international and national law.

### *Judicial and Non-Judicial Approaches*

#### *The Judicial Approach*

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##### *Limitations*

- A judicial approach presupposes the existence of a properly functioning system of justice. This is rarely the case in post-conflict societies.
- Criminal justice systems are not designed to deal with large numbers of violations or of perpetrators, or to accommodate the differences between direct and indirect victims.
- A judicial approach is designed to deal with individual guilt. In a transitional context, the issue of guilt is much more complex and may thus require a broader, collective approach.
- In a judicial process the human rights of sus-

pected perpetrators must be respected, whereas a compensation commission is not obliged to establish an individual's legal guilt.

- Under a judicial procedure it may be difficult to prove responsibility 'beyond all reasonable doubt'. A non-judicial body can give the 'benefit of the doubt' to claimants in awarding reparation.
- Asking beneficiaries – offenders who are not legally responsible for the violations – to contribute to reparation is normally impossible using a judicial approach. It may be easier to involve beneficiaries through a non-judicial mechanism, as part of a wider effort to promote reconciliation and unity.
- Judicial proceedings may in practice not be an option because of prior provision for amnesty, immunity or statutes of limitation.
- Many victims will often lack the wherewithal to initiate civil claims or to participate in criminal proceedings.

### *Merits*

- A judicial decision sends a very strong signal that a certain practice will not be tolerated and that victims are entitled to redress.
- A successful legal claim may be the most convincing argument for a government to acknowledge suffering and instigate reparation.
- Even if other mechanisms are created, the judicial right to reparation should remain an option for those victims who demand it.

## *The Non-Judicial Approach: Three Examples*

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### *1. The UN Compensation Commission (UNCC)*

The UNCC was created by the UN to pay compensation for losses suffered in Iraq's 1990 invasion of Kuwait. The funds are raised through a tax on Iraqi oil exports. Reparation is strictly limited to compensation. As of July 2001, most of the 2.6 million claims filed with the com-

mission had been processed, the awards amounting so far to USD 35.4 billion; a remaining 10,000 claims represent requests for over USD 200 billion.

The UNCC shows that, with sufficient political interest, it is possible to run an effective scheme even on a huge scale: establishing a normative framework, a secretariat and a funding mechanism, including standard submission procedures, classification, a scale of fixed sums for types of injury, and compensation ceilings. However, the objectives of reparation and reconciliation remain completely disconnected. Reparation has been reduced to a technical, financial operation that is exclusively backward-looking.

### *2. Truth Commissions*

The work of an effective truth commission automatically leads to some broad form of reparation. Public acknowledgements, apologies, or expressions of regret, memorials, recommendations for reform – all are important aspects of a full reparation package. But payment remains a key element. The South African TRC recommended a policy of five components: (a) urgent interim reparation payments; (b) individual reparation grants over a period of six years; (c) symbolic, legal, and administrative reparation measures; (d) community rehabilitation programmes; and (e) institutional reforms. The TRC Act provided for the establishment of a President's Fund to administer the individual reparation grant system. Contributions to the fund are supposed to come from the national budget, international and local donations, and interest earned on the fund.

Reparation must be linked to truth and justice: if compensation is used merely to buy the victims' silence in the absence of truth, their psychological rehabilitation will be impeded.

### *3. National Administrative Bodies*

Several countries have established reparation funds or commissions to compensate victims of a previous regime. They may be the result of

a truth commission, or established independently. Examples include:

- In 1995 Brazil established a Reparations Commission to compensate the relatives of 135 members of an armed rebel movement who disappeared under Brazil's military rule.
- A 1991 Hungarian law established a National Damage Claims Settlement Office to make lumpsum compensations for unlawful harm caused by state seizure of property.
- In 1991 Argentina adopted reparation legislation to compensate victims of specific human rights violations, focusing especially on disappearances. The government's Human Rights Office was the implementing body.

### *The Beneficiaries of Reparation*

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If an integrated approach is adopted, the classification of beneficiaries must be defined in parallel with that of victims used under other justice and reconciliation mechanisms. First, reparation should not be seen as a 'reward' for testifying in a court or to a truth commission. Second, victims of practices which have not been included in criminal justice or truth commission mandates or in mediation programmes may have valid and unmet reparation needs. To exclude them from a reparation programme may create feelings of resentment. Third, attention should be paid to victim competition: some categories of victim may make themselves heard better than others.

The registration of victims as beneficiaries of reparation can build on a truth commission or justice system, but should ideally go beyond that. In any case, it should be depoliticized and nondiscriminatory. Further, the criteria for reparation for all victims should be sufficiently low.

The reparation programme should consider indirect victims, and whether they will receive compensation for the suffering of the direct victim only, or also for their own mental suffering

and financial damage. Victim support groups may find arguments in international human rights law which clearly affirm a state's obligation to repair an indirect victim's own suffering.

Whichever categories of victim qualify, it is extremely important to provide adequate information and avoid creating unrealistic expectations.

### *The Range of Reparation Measures*

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A decision needs to be taken whether to offer cash, services or a combination of the two. It is important to design a balanced reparation package which considers all the practical and financial factors affecting victims' access to basic services as well as their own preferences. It may be unrealistic to aim for financial compensation proportionate to the suffering of each individual victim, but any payment made should be enough at least to make some difference. Such awards can either be determined individually or on the basis of fixed compensation schemes, with regulations laying down certain amounts of damages for each type of injury.

Full individual reparation after mass victimization will be neither sufficient nor possible, so collective measures will also be necessary. To be effective, the threshold for collective reparation measures will necessarily be low. Collective measures have the advantage of reaching a larger number of victims, and are better suited to offering a remedy for a past in which certain groups have been victimized collectively.

Ideally, some combination of the individual and the collective dimensions should be achieved. Providing better and more easily accessible health services to previously oppressed minorities in remote areas, for instance, is likely to be a useful collective reparation measure. However, for this to be psychologically restorative at the individual level it may need to be personalized, offering, for example, free personalized counselling services. It is important to have a balanced package of individual and collective, pecu-

niary and non-pecuniary, and commemorative and reformative reparation measures.

### ***Reparation vs. Other Development/Humanitarian Needs***

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Any serious reparation programme will have important budgetary consequences. This raises the issue of priorities. Striking the right balance between reparation and other needs is a difficult exercise:

- A successful reparation claim before a judicial body, resulting in the state's being obliged to provide compensation to victims, is an important lever for victim support groups. Judicial awards have to be implemented irrespective of other needs.
- One way for the government to express its sincere commitment to providing reparation to victims is for it to review its overall policy goals in the light of victims' collective reparation needs. As a consequence, budget allocations to the justice, health, education and housing sectors will logically take priority, for example, over defence budgets and income tax reductions. This should also be part of the public political debate.
- Distinguishing between urgent humanitarian and other reparation needs may require a two-track approach. Rwanda established a National Fund for Assistance to Survivors of the Genocide and Massacres, and also intends to establish a Compensation Fund for Victims to deal with the implementation of judicial awards. The National Fund is of a more humanitarian nature: the most economically disadvantaged victims of the genocide are eligible for assistance with housing, education, health and social reintegration, irrespective of judicial recognition of their right to reparation.

### ***Financing a Reparation Programme***

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State responsibility for injustices committed under a previous regime lies with the new regime. In most cases, however, there will already be other enormous political challenges which go well beyond the state's financial resources. How, then, can additional funds be found for a reparation programme?

- Civil responsibility should lie with former leaders and other perpetrators individually. However, it is the responsibility of the state to secure reimbursement from perpetrators for reparation payments to their victims. Governments of foreign countries where perpetrators have assets can help here.
- A further contribution may come from a 'reparations tax', although careful thought should be given to designing a tax scheme aimed primarily at the least vulnerable, while not financially 'chasing' them out of the country.
- When designing a reparations process, the inclusion of indirect offenders among those who bear responsibility should be one of the core issues considered. Some indirect offenders are companies that have benefited from the abusive policies of the past. Should corporate conduct under the former regime qualify as corporate complicity in past abuses and therefore lead to legal responsibility? Another option is to advocate indirect offenders' financial involvement through voluntary contribution schemes.
- Can successor generations of perpetrators and beneficiaries be expected to pay for wrongs to successor generations of victims? Legally speaking, there is no such claim. However, the continuing moral and political duty of the state to provide redress may lead to a policy that obliges them to pay. In this context, reparation will likely take a collective form as social redistribution policies or affirmative action programmes.



- To ease some of the immediate budget constraints, one option is a system of compensatory payments through periodic instalments, or pension plans.
- Although the political and legal responsibility of foreign states may be unquestionable, it may be highly problematic for a newly democratic state to claim compensation from other states through legal proceedings. The contribution of foreign states can also, obviously, be other than merely financial: any truth-telling exercise may require information to be provided by third countries or former allies of the past regime.

### *Logistics*

The decision to recognize and award reparation can be carried through by a classical criminal tribunal or a truth commission. However, the actual implementation will be better undertaken by a separate reparation body. The operational requirements in terms of logistics alone are completely different from those required of institutions dealing with truth-telling or criminal prosecution:

- Listing the victims who qualify is a first logistical challenge. This work may be based on the activities of the courts, a truth commission, etc., but the reparation programme should also be open to those who do not participate in such mechanisms. Listing the victims presupposes nationwide information campaigns and easily accessible registration mechanisms.
- Statement-takers need to be recruited and trained in registering victims' reparation needs and in explaining the limitations of the reparation programme.
- A preliminary assessment of damages or verification that the damage has been suffered as a result of the past oppression requires very time-consuming corroboration of victim statements.

- Sufficient time and personnel are needed to undertake the administrative processing of claims.
- Appropriate payments procedures need to be developed, in particular for people who do not have bank accounts.

## 10 THE INTERNATIONAL COMMUNITY: RULES OF ENGAGEMENT

*The international community must not demand what cannot be done. International support must include a realistic assessment of what is possible.*

Reconciliation cannot be imported or imposed from outside. Foreign actors must offer support and facilitation of domestic policies, and follow three simple principles:

- ***Sensitivity to the Particular Context of a Post-Conflict Transition.*** Trials and truth commissions have become increasingly popular with international donor communities and NGOs. The result is often automatic external pressure or aid incentives for their establishment. But the international community must avoid such a knee-jerk approach. Each transition from violence to peace is almost unavoidably unique. In addition, the strength of the political will to tackle the question of reconciliation may vary considerably. So do capacities and resources, both inside the political leadership and in civil society. The international community must not, therefore, demand what cannot be done. International support must be based on a realistic assessment of what is possible – politically, financially and socially.

- **Acceptance of Local 'Ownership' of the Reconciliation Process.** Durable reconciliation must be home-grown. Only the victims and the perpetrators can reconcile themselves with one another. It follows that the international community must facilitate instead of impose, empower the people, support local initiatives instead of drowning the post-conflict society in a sea of foreign projects (as happened in Kosovo), and choose capacity building above importing experts. Even if a society is so weak that external support needs to be much more extensive and far-reaching, mixed projects, where domestic and foreign agencies and NGOs share responsibilities and workloads, remain preferable.
- **Adoption of a Realistic Time Frame.** International peacemakers and facilitators tend to advocate a rushed approach to reconciliation. This is often a reflection of their own short-term interests and/or based on the unfounded conviction that the success of a transition depends on a rapid move towards national unity. This is counter-productive. Unhurried reconciliation activities may seem to be a hindrance to establishing a working democracy, but in fact they are a necessary requirement for its survival. An adequate time frame also involves foreign actors, governmental and non-governmental, ensuring a long-term engagement, with a continuous evaluation of past international projects and interventions. International agencies are inclined to suggest – even force – a prioritising of political and economic reforms at the expense of reconciliation programmes. But it is essential not to damage the prospects of long-term reconciliation by establishing inappropriate political and economic structures.

### ***Areas Where International Support Can Be Useful***

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Justice is the predominant domain where the international community is directly involved in processes that have a reconciliation potential (ad hoc tribunals, the ICC, etc., and the implementation of the principle of universal jurisdiction). Truth-telling is another field where foreign agencies and NGOs are prominent. Other forms of support aim at generating opportunities, and/or creating favourable conditions, for reconciliation processes:

- **Generating Opportunities.** Information and expertise on healing, truth-seeking, justice and reparation programmes has grown considerably. Resources to be offered can include: information networks, international NGOs who sustain reconciliation activities in post-conflict countries, forensic experts, supporting the publication of a commission's reports, backing funds for restitution, assisting with witness protection, etc. But such interventions always require co-ordination between donor countries and NGOs or risk reduced efficacy and impact. Additionally, the international community has been guilty of a preoccupation with the material consequences of a violent conflict, reflecting the priority it gives to easing the effects of civil war and oppression. Much more attention must go to targeting the roots of human rights violations.
- **Creating Favourable Conditions.** The international community is often involved in the processes that lead to the end of a civil war. It thus has an opportunity to negotiate reconciliation programmes into peace agreements, to help in the drafting of suitable domestic legislation, and in providing protection for those, such as the members of a truth commission, who will be locally responsible for the implementation of such

programmes and legislation. Outside actors can put pressure on groups who threaten to renew hostilities. Where trials are a crucial step towards reconciliation, foreign states may facilitate extradition. Transnational NGOs and official agencies can engage in drafting international guidelines (e.g., the UN guidelines on the fight against impunity) which will underpin and legitimise the initiatives of local political and civil leaders. International reporting and monitoring mechanisms are most useful instruments. For criminal proceedings, outside agencies can support the computerized storage of evidence. States can open up their own archives, when relevant for the collection of evidence.





