

# Supporting Justice, Co-existence and Reconciliation after Armed Conflict: Strategies for Dealing with the Past

Gunnar Theissen

<http://www.berghof-handbook.net>

1

<b>1. Introduction</b>	<b>2</b>
<b>2. Instruments</b>	<b>2</b>
International Criminal Tribunals, National Prosecutions and Community Courts	
Amnesty Laws and Release of Political Prisoners	
Disciplinary Measures	
Truth Commissions	
Land Commissions and Courts	
Reparations	
Grassroots Reconciliation Work	
<b>3. Principles and Strategies for Supporting Justice and Reconciliation</b>	<b>10</b>
Ethical Standards and Official Guidelines	
Local, Contextual and Combined Approaches	
Proper Sequencing	
Outsider Restraint	
Possibilities for Third Parties	
<b>4. Open Questions and Perspectives</b>	<b>15</b>
Resolvable Problems	
Challenging Dilemmas	
<b>5. Reference and Further Reading</b>	<b>16</b>

# Supporting Justice, Co-existence and Reconciliation after Armed Conflict: Strategies for Dealing with the Past

Gunnar Theissen

## 1. Introduction

Civil wars and state repression have left many societies traumatised and shattered. Unsolved atrocities and injustices can easily provoke new cycles of violence. Impunity may undermine trust in the legal system, increasing the risk that vigilante justice will be resorted to and encourage further atrocities. Mistrust and hatred between former adversaries inhibits reconstruction, decision making and economic development. An amnesty deal may be required to end violence and enable a peace treaty. The call for compromise and national reconciliation may be necessary to ensure an end to hostilities, but past injustices that are never addressed can easily become a source of renewed violent conflict. Often victims can only make peace with their perpetrators if they know their own suffering and that of their loved ones is officially acknowledged. Furthermore, for the reintegration of perpetrators and victims into society they must be commonly accepted.

The first section of this chapter reviews various instruments and institutions that have been established to support peaceful coexistence and the restoration of law. It addresses the following questions: Under which conditions can criminal tribunals, truth commissions or amnesty laws be helpful in dealing with past atrocities? How can property issues be solved through mediation or in community courts? The chapter then outlines some general considerations as to the principles and strategies that should be followed by third parties who seek to support such institutions and instruments. Arguing for a long-term approach, the final section summarises some issues for further debate, pointing to some problematic assumptions and developments that have so far gone hand in hand with the current enthusiasm for international criminal law and truth commissions.

2

## 2. Instruments

### 2.1 International Criminal Tribunals, National Prosecutions and Community Courts

The criminal justice system may well serve an important function in efforts to regulate past injustices and transform potentially violent conflict into peaceful settlement. There is an increasing international consensus, supported by international law, that gross human rights violations, genocide, war crimes and crimes against humanity must be investigated and punished (*see* Box 3 for definitions). However, it may sometimes be impossible to pursue criminal prosecutions in the immediate aftermath of civil strife, or they may, if procedural standards cannot be maintained, provoke renewed violence or lead to new injustices. It must also be recognized that the impact of criminal prosecution on exposing truth, educating the public about past injustices and achieving conflict transformation is likely to be limited (Osiel 1997). The central arguments both against and in favour of criminal prosecutions are summarized in Box 1.

Since national criminal justice systems have often been either incapable or unwilling to bring genocide, war crimes and crimes against humanity to trial, the UN Security Council has recently established the International Criminal Tribunals for the Former Yugoslavia and Rwanda (Morris and Scharf 1995; 1997). Moreover, significant progress has been made in establishing a *permanent* International Criminal Court (ICC) to hear the most heinous crimes (Cassese 1999).

**Box 1: Potentials, Shortcomings and Risks of Criminal Trials as Tools for Conflict Transformation**

The key potentials of criminal trials lie in the fact that they...

- may break the culture of impunity, prevent future human rights abuses and increase awareness of human rights and humanitarian law;
- send a clear message that past atrocities are not legitimate (as is often claimed by the relevant parties to the conflict) but rather criminal acts;
- may provide victims with a certain satisfaction and prevent them from taking the law into their own hands;
- individualise accountability and guilt: Instead of portraying entire population groups as inhuman villains, those who were responsible for specific atrocities are made accountable for their actions. Suspected violations can thus be either substantiated or refuted and the reintegration of guiltless suspects accelerated.

However, there are limits and risks attached to criminal prosecutions – for example:

- The criminal justice system may be in shambles and lack critical resources.
- The accused may not be properly represented and procedural standards not maintained.
- Criminal trials may provoke violent resistance from former combatants or the potential accused and their supporters, and thus may contribute to increased support for presumed ‘martyrs’ who claim to be subjected to ‘victors’ justice’.
- Criminal prosecutions are often costly and time-consuming, and may thus fail to satisfy demands that some justice be done immediately.
- Suspects are only brought to trial selectively. Many crimes remain obscure, because perpetrators are not identified, have fled the country, have died or cannot be charged due to lack of evidence.
- Criminal prosecutions may be hampered, as victims may not trust the criminal justice system or be afraid to bring charges. The judiciary may also be viewed as partisan to one particular party to the conflict.
- Criminal prosecutions usually give more public attention to perpetrators than to victims.
- If well-known suspects are not found guilty because of lack of evidence, procedural errors or failure to call important witnesses, criminal trials may send a wrong signal that certain people remain above the law.

International criminal tribunals are usually able to establish high procedural standards and thus ensure a certain degree of neutrality. By serving as a yardstick for national tribunals, they may also encourage local efforts to prosecute past atrocities. However, their direct impact on local conflict transformation is likely to remain rather slim, since they are usually costly, only able to bring a small percentage of suspects to trial and often geographically and culturally removed from the communities that have suffered under past conflicts (Akhavan 1998; Alvarez 1999). Even the future permanent ICC is only constructed as an emergency tool, for the cases that national criminal systems

fail. The court will only be able to hear a small percentage of atrocities that have taken place in conflict-ridden societies.

Sustainable conflict regulation and transformation in war-torn societies necessitate a (re-)construction of properly functioning local justice systems. Consider the International Criminal Tribunal for Rwanda: it has received international funding which was twice the amount of the total support given to the national criminal justice system in Rwanda. However in the five years since its establishment only about thirty cases have been heard compared to the daunting task which faces the national system of prosecuting around 120,000 suspects of genocide. This demonstrates that the effectiveness of international criminal courts is reduced when they are not accompanied by parallel efforts to build up local institutions.

Moreover, many developing countries are characterised by legal pluralism, that is, a rudimentary formal justice system exists along with traditional institutions to distribute justice and solve conflicts (Weilenmann 1999). Reactivating these communal courts by allowing them to handle less severe crimes or to arbitrate property and land issues may be one strategy to deal with past injustices: their procedures may better reflect culturally accepted practices or rituals and therefore local courts can more easily ensure strong community participation. They may thus be more capable of reintegrating wrongdoers into communal life (Pankhurst 1999). Instead of sending perpetrators to overcrowded jails, local institutions can order criminals to compensate their victims or to serve the community in some other appropriately reparatory way. One such example is the planned re-establishment of local community courts in Rwanda, known as *gacacas*, to deal with 'minor' crimes of the 1994 genocide.

There are, however, some major risks in such decentralised approaches with strong lay participation:

- After armed conflict, local justice systems are unlikely to be 'traditional'. Instead, they will probably reflect newly established power structures dominated by warlords or vigilante groups.
- Procedures and penalties may be incompatible with human rights standards and strengthen traditional patriarchal structures, instead of securing participation of women and young adults.
- Support for local, alternative justice systems may reinforce the dichotomy between customary legal systems and the formal legal sector, instead of increasing the linkage and co-operation between the two.
- State structures may prove to be incapable of supervising the work of local courts and thus fail to ensure due process.

## 2.2 Amnesty Laws and Release of Political Prisoners

Political prisoners detained in violation of fundamental rules of international law must be released immediately. Their release usually increases the ability of the society to regulate conflicts by means of civilian actors rather than armed forces. Often there is no agreement on who should be regarded as a political prisoner; however, the principles for the release of political prisoners in Namibia developed by the then-president of the European Court on Human Rights, Carl Aage Nørgaard have established some precedent (Boraine and Levy 1995, pp. 156-60). More generally, international humanitarian law states that prisoners of war must be released after an internal armed conflict (*see e.g., Article 6 (5) of the 2nd Additional Protocol to the Geneva Conventions*). However, amnesty should be limited to combatants who have participated only in armed conflict, but not in genocide, war crimes, crimes against humanity or other gross violations of human rights such as torture or enforced disappearances. General amnesties, granting impunity for gross human-rights

violations without investigation, such as the Argentine *Full Stop Law*, are thus incompatible with international law.

However, general amnesties for minor offences may be necessary to better enable the criminal justice system to prosecute more severe crimes. Amnesty for gross human rights violations should only – if at all – be an option after the individual perpetrator has appeared before an amnesty panel or a (community) court and made a full disclosure of his crimes. Victims should be allowed to participate in these amnesty procedures, as was done in the example of the amnesty proceedings of the South African Truth and Reconciliation Commission (*see* Box 2). Amnesty should, however, be limited to criminal liability, without automatically cancelling all obligations of the perpetrator to compensate the victim or his family. By passing legislation offering reduced or suspended sentences for those perpetrators confessing to their crimes, states may further speed up the investigation of past atrocities.

### 2.3 Disciplinary Measures

In order to restore public confidence in the criminal justice system, those responsible for war crimes or gross human-rights violations should be barred from public office in the police and military. Furthermore, the activities of informal networks responsible for fostering violence should be monitored and suppressed. In several East European countries, for example, high-ranking officials of the communist regimes were automatically disqualified from holding public office on the basis of so-called ‘lustration laws’ (Boed 1998). However, collective disqualification from public office, without the hearing of each individual case, violates the principle of due process and the right to a free choice of workplace. Moreover, lustration policies may lead to a complete breakdown of the public administration, or even provoke violent resistance by public officials and members of the security forces. In these situations, soft approaches, like transfers, early retirement or the appointment of new officials to strategic posts, are more suitable to ensure that unreliable officials are replaced. Rather than passing new legislation specifically aimed at members of the former regime, emphasis should be placed on the enforcement of ordinary disciplinary law.

### 2.4 Truth Commissions

In several Latin American and African countries, truth commissions have documented past human-rights abuses. Their mandate, powers and activities have varied from country to country (Hayner 1994). As a rule, truth commissions are based on a peace agreement, on governmental decrees or laws of parliament. Usually they are instructed to record human rights violations of a given period by collecting documents relating to these atrocities and by hearing victims as well as perpetrators. They usually have to provide the public with a detailed report about what has happened in the past and how such atrocities can be avoided in the future. In addition, churches and local human rights organisations often make similar efforts to document past human rights abuses, as, for example, in Brazil, Guatemala and Zimbabwe (Dassin 1986; REMHI 1998; Carver 1993).

The advantage of truth commissions supported by the government is that they can officially acknowledge and document past human rights violations. Furthermore, they can also be endowed with the powers of search and seizure and can subpoena suspects. On the other hand, if their mandate is too weak, and if they lack the necessary resources to work independently, official truth commissions may well risk becoming a mere exercise in governmental public relations.

Projects by non-governmental organisations (NGOs) to document past atrocities should be supported, particularly in situations where the executive will and capacity to do so is lacking.

Profiting from closer links to victims, these projects can strengthen civil society and thus increase pressure on the government to launch its own investigations. More likely, however, their findings will be ignored, or may even provoke government repression, including the assassination of human rights activists. NGOs are not necessarily more impartial than official enquiries by the government. NGOs may be perceived as allied to one particular party to the conflict as may be the case with official truth commissions supported by the government. The Guatemalan experience shows that both non-governmental and official attempts to document past atrocities have their advantages and can, ideally, mutually support each other's efforts (Salazar Volkmann 1999).

As an instrument for post-conflict rehabilitation, truth commissions are especially appropriate in situations in which:

- criminal prosecutions would inhibit an end to hostilities, prevent a peace agreement or even provoke new violence;
- most victims would not be able to successfully charge their offenders or secure reparations through criminal and civil proceedings;
- the criminal justice system fails to guarantee fair procedures, is overburdened or is mistrusted by the majority of victims;
- the judiciary is unwilling or lacks the necessary independence to investigate and prosecute past human-rights violations;
- judicial enquiries would be too slow or too costly;
- evidence is destroyed and is insufficient to ensure a reasonable chance to secure convictions.

Truth Commissions have the advantage that they:

- break the silence about past human-rights violations, and encourage people to speak out about past atrocities, since the risk of repression decreases as more people go public;
- leave space for informal communication between victims and perpetrators;
- expose past atrocities from a victim perspective, turn the public against the perpetrators and thus decrease their credibility and power in society;
- provide a comprehensive and well-written account of past human-rights abuses, and encourage public debate as to how peaceful co-existence can be secured in the future;
- identify victims and their needs for rehabilitation and reparation;
- increase empathy for victims and survivors of past human-rights violations. Public attention is focused on the needs and experiences of victims, without subjecting them to undignified cross-examination. Victims are no longer portrayed as legitimate targets and alleged terrorists, but personalised as human beings and innocent victims of arbitrary and inhumane cruelty.

Truth commissions may also:

- inquire into the causes of past injustices that cannot be fitted into the categories of criminal law, such as the failure by professional organisations to speak out against atrocities or their tacit support of human rights violations;
- investigate human rights abuses for which local courts lack jurisdiction, as the statute of limitations may apply, or the violations were not criminal under national law, or committed extra-territorially;
- record atrocities whose perpetrators remain unknown;
- provide the judiciary with well-documented evidence for follow-up prosecutions.

Past experience shows, however, that the recommendations of official and non-governmental truth commissions have all too often been ignored, and that their work has often failed to meet the expectations of victims. In many countries, well-known perpetrators of such offences remained in public office or were never even charged. In El Salvador, for example, the publication of a UN-sponsored truth commission report was used as an excuse to grant former perpetrators

immunity by means of a general amnesty. Whereas Chile implemented a comprehensive reparation system for relatives of those who were murdered or who disappeared, and provided torture victims with health care, other governments never provided any substantial reparation to abused victims.

### **Box 2: The South African Truth and Reconciliation Commission**

The most sophisticated truth commission to date has been the South African Truth and Reconciliation Commission (TRC), which was given the task of inquiring into gross human rights violations committed in that country between 1960 and 1994. The mandate of the TRC covered killings, acts of torture, abduction and severe ill-treatment, but excluded the legalised injustices of the apartheid system, such as prolonged arbitrary detention, systematic persecution on racial grounds and forced removals. In contrast to other truth commissions, the South African TRC held its hearings in public. The media, including national television, covered them extensively. To date, the South African TRC is the only truth commission that managed to combine the collection of statements by more than 23,000 victims with a unique amnesty process. Perpetrators could be granted amnesty provided that they made an application before 16 December 1997 to the Amnesty Committee of the TRC; but only on the basis that the applicant also offered a full disclosure of his deeds. Suspected perpetrators who failed to apply for amnesty or who were refused amnesty could then be prosecuted in court. The Amnesty Committee thus had the difficult task to decide on about 2500 applications related to politically motivated gross human rights violations. Whereas its amnesty provisions satisfied the state's obligation to investigate past human-rights violations, it is doubtful whether these provisions are in fact compatible with international law, as they allowed indemnity for unpunished acts amounting to crimes against humanity, such as widespread or systematic torture and murder. Compatibility with international law could have been increased by also granting partial amnesties, such as reduced or suspended criminal sentences. Although most black South Africans embraced and accepted the TRC's work, the promise of truth could not always be fulfilled. Instead, time pressure and the need to first investigate amnesty applications created a situation in which the Commission was able to do no more than corroborate most victims' statements, without investigating them in full detail. Whereas the Commission recommended a comprehensive reparation policy to Parliament, it was not itself empowered to provide any substantial level of financial support to victims. This led to the travesty that some perpetrators began to benefit from amnesty, while victims and survivors were left with little more than a public acknowledgement of their suffering.

Truth commissions should preferably be based on a parliamentary law that has been drafted with the participation of all relevant actors, including former adversaries, human rights groups and victims' organisations. Commissioners and staff should evidence integrity, be representative of all political organisations, religious communities and population groups, qualified in law, psychology or other relevant fields, and able to communicate in the languages of both victims and perpetrators. The mandate should be broad enough to include war crimes, gross violations of human rights and crimes against humanity, including human rights violations that were legalised under previous national laws. It should cover all important acts committed during the past conflict, and enable the commission to investigate abuses of all parties to the conflict. A specified time frame and sufficient financial resources should allow the commission to first establish itself (staff, offices, etc.) and then to conduct its work (Hayner 1996).

Although most truth commissions have made substantive recommendations to ensure that past atrocities are not repeated, more attention should be given to initiating an official review mechanism after the commission has published its report. Victim and perpetrator hearings should preferably be held in public, provided that the personal security of those testifying can be guaranteed. If their security is in danger, the commission should have the power to exclude the public. Truth commissions should open regional offices that are accessible to all victims and preferably hold hearings throughout the country. The final report, with its findings and recommendations, should be published and translated into all relevant languages. Truth commissions should also involve the local media and non-governmental organisations to report on and support its work.

If the commission is entitled to identify perpetrators, the implicated person should be given the opportunity to be heard (under the maxim *audi alterem parte*) and respond to the allegations before he or she is named in the report. The commission should have the power of search and seizure, to call witnesses and alleged perpetrators to a hearing, as well as to grant partial amnesties, such as reduced or suspended sentences. At the same time, if entitled to grant amnesty, a truth commission should also ensure that victims receive some compensation and psychological or medical support before perpetrators are granted amnesty or pardon.

## 2.5 Land Commissions and Courts

After civil strife, expulsion from land and housing is often a primary source of potential new conflict. Refugees may return to their old dwellings and find them occupied by new inhabitants, who may themselves have fled from other places or even been responsible for the eviction of the former owners. These problems may be further aggravated by a shortage of housing and shelter, so that sometimes many different parties, descendants or former owners, will have claims to the same property. The recent land occupations in Zimbabwe have demonstrated all too clearly how unresolved land issues can be politically utilised and threaten peace and stability even decades after the end of a liberation war.

One option to address this problem is the establishment of land or housing commissions that are empowered to mediate between old and new owners in order to find a compromise. If the return of property, payment of compensation or provision of alternative land or housing cannot be thus achieved, specialised courts should be established to make an appropriate ruling. The judgement or compromise thus reached should be officially documented, in order to defuse future conflicts about ownership. These efforts can only be successful with unequivocal and widely accepted regulations concerning how land and property issues are to be arbitrated. Compromise can be encouraged by the granting of housing subsidies, building materials or other support, but only on the condition that former owners be allowed to return to their property or be given adequate compensation.

## 2.6 Reparations

Reparations may contribute to the reintegration of victims and reduce the likelihood of renewed armed confrontation, by officially recognising the harm victims had to endure. They may even prove to be essential for many victims' survival. Besides restitution, special compensation laws should be implemented for those cases in which compensation can be achieved only very slowly or selectively by means of civil litigation. Compensation should be granted on an individual basis for physical, psychological and material damages, including medical and legal costs arising from gross human-rights violations (UN Secretary General 1997). According to established rules of state

responsibility, states remain responsible for the damage caused by them or by their officials – even if a new government comes to power. In the case of whole communities that were victimised and torn apart by past violence, emphasis should also be placed on symbolic and communal forms of reparation.

After mass atrocities, states often have only limited capacity to compensate victims. Moreover, these restricted resources are very often spent unequally: former public officials and combatants are supported by costly pension schemes, while victims and survivors of human-rights violations receive very little or nothing at all. Third-parties should therefore insist that specific victim's groups are not excluded from official reparation policies and should further strengthen the self-organisation of marginalized victims. Compensation laws should be easy to understand and should not discriminate against any one group of victims. An efficient, transparent and fair administrative process with competent and trained staff, who respect the needs of victims, is as essential to this effort as are the actual amounts paid.

Occasionally, victims will refuse financial compensation if they feel that the government is attempting to buy their silence. Similarly, victims may also feel betrayed if instead their suffering or heroism is repeatedly acknowledged in official speeches and symbolic ceremonies, but hardly any material or financial effort is made to rectify the situation.

## 2.7 Grassroots Reconciliation Work

While most of the activities mentioned require the involvement of government and public administration, there is also ample room for non-governmental organisations to support processes of increasing mutual understanding and reconciliation. Besides lobbying governments or public administration to address past injustices and also assisting and complementing the work of official institutions, NGOs can run their own projects and programmes to increase trust and understanding between former adversaries. These programmes are often more successful if they are not aimed specifically at reconciling former enemies, but rather constitute practical steps supported by all parties: third parties, for instance, may provide neutral ground for former adversaries to meet. They may organise tours for representatives of former conflict parties to inspect specific problem zones that require attention. Ordinary citizens can be involved in programmes to rebuild destroyed buildings together, through youth exchanges and work camps and with the support of local community newspapers or radio stations. These activities should include people from all backgrounds and aim at enhancing co-operation. The attraction of such initiatives can be increased if they properly address the needs of all conflict parties and if they are built on identities that cross former conflict lines, such as gender or profession.

Local NGOs or churches can organise workshops to help deal with past trauma and to provide space to talk about past experiences in order to further mutual understanding and empathy across former conflict lines. Activities of this kind that use traditional frameworks and institutions are usually widely accepted by the community.

Sites of historical relevance, including atrocities or prisons, may be converted into places of remembrance, the importance of which can be explained by survivors to visitors and schoolchildren. Such projects should enlist community participation by encouraging those who were imprisoned or suffered violence there to contribute pictures or symbolic personal belongings.

Local initiatives to remember the victims of past conflicts in the form of common memorials, prayers or commemorations that are inclusive and pay respect to all victims may also help to demonstrate unity, or at least the end of hostilities. The way in which the past is remembered

is essential, as such commemorations can unfortunately always be exploited for further hostility and resentment.

## 3. Principles and Strategies for Supporting Justice and Reconciliation

### 3.1 Ethical Standards and Official Guidelines

Neither states nor practitioners in the field of conflict resolution or development co-operation should support policies that fundamentally disregard international standards of human rights. Their work should always be guided by the basic assumption that states have a duty under international law to investigate, punish and compensate gross violations of human rights, war crimes and crimes against humanity. These duties are enshrined in the four Geneva Conventions, the *Genocide Convention*, the *International Convention on Civil and Political Rights* and the *Convention against Torture*, as well as in various regional human rights conventions (see e.g., Orentlicher 1991; Roht-Arriaza 1995; Randelzhofer and Tomuschat 1999).

The current state of international customary law is reflected in the *Rome Statute of the International Criminal Court*, which reiterated in its preamble the duty of nation-states to exercise appropriate criminal jurisdiction for international crimes (see Box 3).

Furthermore, the Sub-Commission for the Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights developed the *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (UN Commission on Human Rights 1997a) and the *Draft Basic Principles and Guidelines on the Right to Reparation of Victims of [Gross] Violations of Human Rights and International Humanitarian Law* (UN Commission on Human Rights 1997b 1997). Both documents are based on an international review of various attempts made by nation-states to deal with past injustices and give practitioners a basic orientation as to which principles should be maintained.

#### Box 3: Definitions

##### **‘International crimes’:**

According to international law ‘aggression’, ‘genocide’, ‘crimes against humanity’ and ‘war crimes’ are regarded as international crimes since they pose a threat to international security and to the safety of mankind. They are breaches of fundamental norms of general international law, which cannot be modified by any treaty or national law (see *ICC-Statute 1998, Preamble, Article 5*).

**‘Crimes against humanity’:** Murder, extermination, enslavement, persecution, deportation, severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sex slavery and forced prostitution, sterilisation and forced pregnancy, enforced disappearance of persons, apartheid or other inhumane acts of a similar character, if they are committed as part of a widespread or systematic attack directed against any civilian population involving the multiple commission of the above-mentioned acts (see *ICC-Statute 1998, Article 7*).

**‘Genocide’:** 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 to members of the group, 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 (*see Genocide Convention 1948; ICC-Statute 1998, Article 6*).

**,War crimes':** Severe violations of humanitarian law committed during an international or internal armed conflict and directed against people not actively participating in combat, such as civilians, prisoners of war, the wounded or the sick. They include murder, mutilation, cruel treatment and torture, hostage-taking, outrages on personal dignity, in particular, humiliating and degrading treatment, and the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples (*see IV. Geneva Convention 1949, Articles 3, 146 and 147; Additional Protocol I and II to the Geneva Conventions 1977; ICC-Statute 1998, Article 8*).

**,Gross violations of human rights':** Severe violations of human rights such as murder, torture, disappearances or prolonged arbitrary detention committed by state agencies (or non-state entities such as liberation movements). In comparison with 'crimes against humanity', this term is also often used for isolated acts that were not necessarily part of a widespread or systematic attack.

In the immediate aftermath of mass atrocities, practitioners should be aware that a state may be temporarily incapable of fulfilling its international obligations. In exceptional situations a state should abstain from criminal prosecutions. Such a policy is justified if the national courts are unable to uphold basic procedural standards, or if the prosecution and punishment of gross human rights violations seems likely to endanger the survival of a newly elected government or would result in the incarceration of large numbers of suspects and perpetrators in untenable prison conditions. An attempt to condemn past human rights violations should not lead to new human rights violations (Méndez 1997). Third parties and practitioners should insist, however, that the temporary inability of a state to fulfil its international obligations does not mean that it is entitled to act contrary to its obligations. Furthermore the inability of the state to punish perpetrators does not mean that the state is freed from the obligation to rebuild its criminal justice system or investigate past human rights violations. Third parties should, therefore, support local efforts to ensure that past atrocities are investigated and that the capacity to penalise human rights violations is regained. This can be done either in co-operation with governmental institutions, if there is enough political will to do so, or by supporting local human rights organisations in efforts to record past injustices or by enabling victims to bring charges against offenders.

### 3.2 Local, Contextual and Combined Approaches

Although ethical standards should be upheld, they should not be misunderstood as rigid recommendations; rather, they must take into account local needs and existing power relations:

1. The extent and type of past injustices often vary profoundly. A country might be confronted with mass atrocities, like genocide, or instead with more subtle injustices, such as those experienced in former communist countries. Large sections of the citizenry may have been subjected to persecution, imprisonment, torture or murder, or only a specific minority may have been victimised, have participated in acts of violence or gone through both experiences.
2. There are strong differences between countries emerging from a large-scale civil war, where

much of the infrastructure has been destroyed, and countries in which an authoritarian regime has collapsed, but in which public institutions remain largely intact.

3. The balance of power between former adversaries will differ, depending on whether the armed conflict ended by negotiation, stalemate, defeat of one party or a process of democratisation largely controlled by the old elite of the former regime.
4. The degree of stability achieved in the country, the resources available, and the political will or power to support or implement specific instruments may also vary widely.

Only an approach that is appropriate to the specific country and context, that takes the existing options for action into account and is sensitive to local traditions and conflict resolution practices can hope to succeed.

Third parties can advise former adversaries, but usually have only limited influence on the policies pursued by local actors. In some situations, the international community may be strong enough to impose certain activities in the field of transitional justice, e.g., an international criminal tribunal. These institutions may well fail to be efficient tools of conflict transformation, however, if they are not supported by local actors and not supplemented by similar efforts to build up national institutions dealing effectively with the past. All instruments in the field of transitional justice exhibit their specific strengths and weaknesses. Therefore, a strategy should combine different approaches and ensure the participation of local actors from all levels.

### 3.3 Proper Sequencing

Important, too, is proper timing of instruments: institutions of transitional justice can easily fail or even abort an unconsolidated peace; activities can be implemented too early or too late to prevent the re-emergence of violent conflict.

In the immediate aftermath of armed conflict emphasis should first be placed on guaranteeing a minimum of physical security and preventing expulsion from housing or other shelter. Activities in the field of justice should first strive to investigate, prosecute and punish *current* injustices and human rights violations that could easily stir public emotions and set back the delicate peace process. Government, public administration and civil society should clearly indicate that violent means to solve conflict will not be tolerated. If local authorities are able to convince people that a long-term strategy to address past injustices will be implemented, they will then not expect overnight remedies. In cases in which most citizens have experienced arbitrary violence, even small improvements in the security situation will strengthen confidence in the peace process and legal system. Support in the field of justice should, therefore, first follow a minimalist approach and take into account the basic needs of people who have been locked in protracted conflict. Activities should then be increased and broadened step by step and, finally, be guided by a maximalist approach, directed towards the establishment of the rule of law, ensuring comprehensive protection of social and political rights (Pankhurst 1999).

Calls for national reconciliation have often been necessary to prevent further bloodshed in war-torn societies. But practitioners must be careful not to join the chorus of reconciliation too early; that is, as long as past injustices remain pending. Reconciliation is a legitimate long-term vision, but building capable institutions to deal with past injustices and peaceful co-existence – not reconciliation – should be the first aim. Third parties should avoid forcing their visions of mutual respect and friendship on former adversaries, as long as ongoing violence, structural injustices, hatred and disrespect do not allow people to reconcile.

Third parties should be aware that only a limited degree of understanding can be reached between former adversaries in the immediate aftermath of armed conflict. Usually, those who participated in armed conflict or torture will find it very difficult to acknowledge that their actions may have been useless, unjustified or even immoral. For some, they may have felt they had good reason for their actions because of the death of comrades, surviving life-threatening experiences or being interrogated for being a presumed terrorist. To admit to having engaged in these activities for a bad cause or for no purpose at all, to have been victimised by accident or in vain, or to have been personally responsible for actions commonly regarded as immoral or inhumane, any of these amounts to nothing less than a personal declaration of bankruptcy. Admitting guilt or acknowledging the futility of our experiences and actions is a fundamental threat to our self-esteem and personal integrity. Such self-realisation is contrary to many people's naturally delusional conviction that they are good and moral citizens.

As a rule, future generations are better equipped to reach a common understanding of what has happened. They do not have to confront themselves with negative and frightening thoughts about their own integrity. But even those born later cannot easily strip off their social identity. Usually second and third generations remain preoccupied with continuing feelings of victimisation or guilt, especially when past injustices have not been adequately addressed by their parents' generations and continue to shape social reality.

### 3.4 Outsider Restraint

Reconciliation cannot be imported into conflict-ridden societies. Development agencies and foreign NGOs can usually do no more than support institutional frameworks that may facilitate mutual understanding across former divisions. In the end, only local actors themselves can reconcile with one another.

Therefore, the ownership of initiatives for reconciliation or institutions dealing with past injustices should be in the hands of local activists. International or foreign institutions may have more resources at their disposal and their work may become crucial when local institutions have collapsed, but they risk becoming merely fleeting interventions. The impact of a truth commission dominated by international experts will diminish when staff and commissioners have left the country after the final report has been written. In contrast, local staff will continue to identify with their work and remain a pressure group within the country.

On the other hand, the participation of international experts in legal institutions dealing with past atrocities may well raise the national and international standing of an institution and protect its local members from repression. Furthermore, international experts can bring to newly established institutions knowledge gained in similar efforts and experiences in other countries. Also, the conflict parties will often explicitly request their participation, since they might not be able to agree on suitable candidates from their own ranks. If courts and commissions of inquiry are set up in such a way that they cannot be denounced as foreign interference in internal affairs, they are more likely to be accepted locally. Ideally, they should be regarded as genuine local or national efforts to bring about peace, justice and reconciliation.

Foreigners often lack the necessary language skills or have only limited knowledge of local traditions that could be useful in facilitating the reintegration of victims and perpetrators.

Certain traditional ceremonies or rituals may indeed be compromised by excessive intervention from outsiders. This does not mean that outsiders and foreign experts should not play an important role in supporting or building up local initiatives and institutions, but they should work in the background, giving advice, training local staff, or functioning as neutral chairpersons to ensure fair proceedings.

### 3.5 Possibilities for Third Parties

Development agencies and human rights and conflict resolution NGOs can also support local attempts to deal with past injustices by lobbying decision-makers and by providing legal and organisational advice. They can, for instance, organise workshops and conferences with local experts from the former conflict parties, the legal sector, public administration, human rights and victims' organisations and other local non-governmental organisations, with the aim of drafting suitable legislation. Exchange programmes involving local and foreign experts can increase the incentives to find solutions appropriate to the given situation. Instruments and institutions that are developed locally with the participation of all conflict parties and actors from the governmental to the grass-roots levels are then more likely to be widely accepted.

Local and international human-rights organisations can have an important role in monitoring the rebuilding of the justice system. They can report unsolved atrocities, document cases of impunity, monitor truth commissions, judicial trials and prison conditions, call for the charge or release of detainees and support the work of local legal aid organisations and human rights and victims' organisations.

In situations in which local authorities prove unwilling to investigate, pay reparations or prosecute past atrocities, support should be concentrated on local NGOs. Official structures should only be supported when they meet basic criteria of procedural justice and evidence the necessary independence and power to carry out their work. As it is often difficult to assess how institutions that are only recently (re-) established are likely to work in the future, supporting the justice system after civil strife always involves a certain risk. Therefore, donors should concentrate on giving short-term financial support and remain flexible enough to increase or reallocate grants. Close networking between representatives of different funding agencies in the country can ensure that resources are spent efficiently and can increase the pressure on local institutions to adhere to internationally recognised standards. Official truth commissions should always receive a certain amount of funding from the authorities in the country, since the government is more likely to accept their work and recommendations when the state has contributed to its financial support. Third parties should be aware that local NGOs might also be aligned to one of the parties of the conflict. In these situations, they can support similar initiatives on both sides of the conflict, provide links and encourage co-operation between them.

Conflict resolution NGOs have shown that they can train members of communal courts or land commissions to mediate conflicts and provide opportunities for victim-offender mediation. But institutions of transitional justice can only work efficiently if they are understood and supported by civil society. Hence, special efforts should be made to inform local journalists about the work and procedures of tribunals, truth commissions or other similar local institutions. Third parties can support media reporting and assist in making information available in all local languages.

Non-governmental organisations are often essential for collecting statements or informing people about their rights. They can provide computer and database experts for data collection and analysis. Some organisations have also provided legal counsel for victims and perpetrators to ensure fair proceedings. Others have assisted criminal tribunals and truth commissions with the services of

forensic experts to identify bodies in mass graves. Foreign governmental agencies have sent detectives, inspectors, criminologists and state attorneys to support the investigation of past human-rights violations. Foreign experts should be selected by local institutions and work closely with local colleagues to ensure that the independence of local institutions is always maintained and the necessary knowledge efficiently transferred.

## 4. Open Questions and Perspectives

The problem of justice after armed conflict and during the transition to democracy has received considerable attention in recent years. Nevertheless, many questions remain open. While some problems can be solved with the benefit of increased experience and knowledge, it may well be impossible to overcome certain irresolvable dilemmas facing post-conflict societies.

### 4.1 Resolvable Problems

To ensure that truth commission processes are high quality, existing international guidelines should be further refined. Recent developments in international criminal law have prompted the question of whether transitional societies may still lawfully grant amnesty in order to ensure peaceful settlements. As long as impunity remains widespread, this question may seem to be posed prematurely. Nevertheless, serious efforts should be made to develop international criteria for amnesty procedures that are compatible with the obligation to investigate and compensate gross human rights violations under international law. The UN principles against impunity developed by a sub-commission of the Human Rights Commission should be supplemented in this regard and receive official status as a declaration of the UN General Assembly.

So far the academic debate has mostly focused on the strengths and weaknesses of criminal prosecutions and truth commissions. Instead of presenting these as alternatives, it needs to be discussed further just how the different approaches can be combined and linked effectively. There is also no shortage of publications on the legalistic aspects of the emerging regime of international criminal law. However, the practical problems facing international and national criminal tribunals, truth commissions and land commissions, have unfortunately received far less attention. Additionally, practitioners need to gain more experience in integrating traditional courts and alternative dispute resolution approaches within the formal justice system, and with efficient methods of supervision of such institutions by state structures in order to ensure adherence to human rights standards.

The current enthusiasm for and interest in the international criminal tribunals may easily divert public interest and funding from rebuilding independent *local* justice systems in war-torn societies. The prominence that campaigns against impunity have achieved in human-rights circles may mean that current human-rights violations receive less attention. Although combating impunity and documenting past human-rights violations remains an important tool to prevent future abuses, this must not decrease the availability of funding for other activities in the domain of prevention.

### 4.2 Challenging Dilemmas

War-torn societies and countries that have experienced large-scale atrocities usually find themselves unable to deal adequately with all of the injustices that have been committed. Often the physical and psychological damage caused by armed conflict or state repression cannot be repaired

at all. Justice will therefore always be justice in only a limited sense, as it will be impossible to do justice comprehensively. Often, the political power structures that emerge after the end of open hostilities inhibit proper consideration of certain atrocities. As long as people who themselves have been responsible for past atrocities hold senior positions in, or are supported by, large sections of society, they will try to prevent any investigations into crimes for which they could be held accountable. Under these circumstances, it is very difficult to build up independent local judicial institutions, as necessary as these are for conflict transformation. Usually, third parties cannot fundamentally change structural constraints that are typical in many conflict-ridden societies, including the lack of financial resources and trained personnel, as well as a legal culture that was never based on an independent judiciary.

Practitioners should also be aware that legal institutions in and of themselves have only a limited ability to assist conflict-torn societies. Institutions like the South African TRC have often been described as positive examples of restorative justice, superior to retributive justice. But there is a danger of overemphasising what these institutions can in fact be reasonably expected to achieve. Some assumptions made about truth commissions are not realised as simply as it is often presented. Speaking out about past atrocities, for example, will not automatically lead to trauma recovery, healing or reconciliation within communities and entire nations.

It is also a myth that efficient institutions of transitional justice will enable societies to close the book on the past as soon as their findings or judgements are made public. More accurately, trials or truth commissions usually serve as a starting point for long-term reconciliation processes and should encourage – not stifle – public debate about past injustices. Legal institutions have an important function after the end of an armed conflict, as they have the potential to transform violent conflict into arbitrated settlements. Third parties can support the establishment of these institutions, or assist non-governmental organisations working to document or redress past injustices. Local initiatives can also re-establish social relationships across former conflict lines. External actors should nevertheless be aware that only former adversaries themselves can reconcile with one another and that the long-term aim of reconciliation may be reached neither quickly nor easily.

## 5. Reference and Further Reading

- Akhavan, Payam 1998. „Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal,“ *Human Rights Quarterly*, 20, 737-816.
- Alvarez, José E. 1999. „Crimes of States/Crimes of Hate: Lessons from Rwanda,“ *Yale Journal of International Law*, 24, 2, 365-483.
- Boed, Roman 1998. „An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice,“ *Columbia Journal of Transnational Law*, 37, 2, 357-402.
- Boraine, Alex and Janet Levy (eds.) 1995. *The Healing of a Nation?*, Cape Town: Justice in Transition.
- Carver, Richard 1993. „Zimbabwe: Drawing a Line through the Past,“ *Journal of African Law*, 37, 1, 69-81.
- Cassese, Antonio 1999. „The Statute of the International Criminal Court: Some Preliminary Reflections,“ *European Journal of International Law*, 10, 144-171.
- Dassin, Joan (ed.) 1986. *Torture in Brazil: A Report by the Archdiocese of Sao Paulo*, New York: Vintage Books.
- Hayner, Priscilla B. 1994. „15 Truth Commissions – 1974 to 1994: A Comparative Study,“ *Human Rights Quarterly*, 16, 4, 597-655.
- Hayner, Priscilla B. 1996. „International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal,“ *Law and Contemporary Problems*, 59, 4, 173-80.

- Joinet, Louis 1997. „Set of principles for the protection and promotion of human rights through action to combat impunity,“ *in* UN Commission on Human Rights, op. cit.
- Kritz, Neil J. (ed.) 1995. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 Volumes, Washington, DC: United States Institute for Peace Press.
- Méndez, Juan E. 1997. „Accountability for Past Abuses,“ *Human Rights Quarterly*, 19, 255-82.
- Minow, Martha 1998. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston: Beacon Press.
- Morris, Virginia and Michael P. Scharf 1995. *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Irvington on Hudson, NY: Transnational Publishers.
- Morris, Virginia and Michael P. Scharf 1997. *The International Criminal Tribunal for Rwanda*, Irvington on Hudson, NY: Transnational Publishers.
- Orentlicher, Diane F. 1991. „Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,“ *Yale Law Journal*, 100, 8, 2537-2615.
- Osiel, Mark 1997. *Mass Atrocity, Collective Memory, and the Law*, New Brunswick, N.J.: Transaction Publishers.
- Österreichisches Studienzentrum für Friedens und Konfliktforschung u.a. 1999. *Krisenprävention: Theorie und Praxis ziviler Konfliktbearbeitung*, Chur: Rüegger.
- Pankhurst, Donna 1999. „Issues of Justice and Reconciliation in Complex Political Emergencies. Conceptualising Reconciliation, Justice and Peace,“ *Third World Quarterly*, 20, 1, 239-256.
- Randelzhofer, Albrecht and Christian Tomuschat (eds.) 1999. *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*, The Hague: Martinus Nijhoff.
- REMHI 1998. *Guatemala: Nie wieder – Nunca Mas*, Aachen: Misereor/Recuperación de la Memoria Histórica.
- Roht-Arriaza, Naomi (ed.) 1995. *Impunity and Human Rights in International Law and Practice*, New York: Oxford University Press.
- Salazar Volkmann, Christian 1999. „Erinnern oder vergessen? Auswirkungen der Menschenrechtsberichte in Guatemala,“ *Der Überblick*, 35, 3, 56-61.
- Scharf, Michael P. 1997. „The Case for a Permanent International Truth Commission,“ *Duke Journal of Comparative and International Law*, 7, 2, 375-410.
- UN Commission on Human Rights, 1997a. *Question of the impunity of perpetrators of human-rights violations (civil and political): Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119*, New York, NY: UN Commission on Human Rights, E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.
- UN Commission on Human Rights 1997b. *Views and comments received from States on the note and revised draft basic principles and guidelines on the right to reparation for victims of [gross] violations of human rights and international humanitarian law*, New York, NY: UN Commission on Human Rights; E/CN.4/1998/34; 22 December 1997.
- Weilenmann, Markus 1999. „Konfliktregelungsverfahren am Kreuzpunkt zwischen Mediation und Recht: Plädoyer für einen gesellschaftlich integrativen Ansatz der Konfliktbearbeitung,“ *in* Österreichisches Studienzentrum für Friedens und Konfliktforschung u.a., op. cit.

#### Internet sources:

- Bibliographic information/Discussion Groups, <http://www.reconciliation.org.za>
- International Criminal Tribunal for the Former Yugoslavia, <http://www.un.org/icty>
- International Criminal Tribunal for Rwanda, <http://www.ictt.org>
- International Criminal Court (ICC), <http://www.un.org/law/icc>
- International NGO Coalition on the ICC, <http://www.igc.org/icc>
- South African Truth and Reconciliation Commission, <http://www.truth.org.za>

United Nations Human Rights Home Page, <http://www.unhchr.ch>  
United States Institute for Peace/Internet Library, <http://www.usip.org/library/truth.html>  
Victim Organisations/Support for Victims  
International Rehabilitation Council for Torture Victims, <http://www.irct.org>  
Redress – Seeking Reparation for Torture Victims, <http://www.redress.org>  
Project Disappeared/FEDEFAM, <http://www.desaparecidos.org>  
Derechos Human Rights/Equipo Nizkor Impunity, <http://www.derechos.org>  
Avocats Sans Frontières (Legal Representation), <http://www.asf.be>  
Hirondelle Foundation (Media Work/Rwanda Tribunal), <http://www.hirondelle.org>  
International Commission of Jurists, <http://www.icj.org>  
HURIDOCS – Computer and Database support <http://homepage.iprolink.ch/~huridocs>  
Physicians for Human Rights (forensic anthropology), <http://www.phrusa.org>  
Argentine Forensic Team, <http://www.eaaf.org.ar>