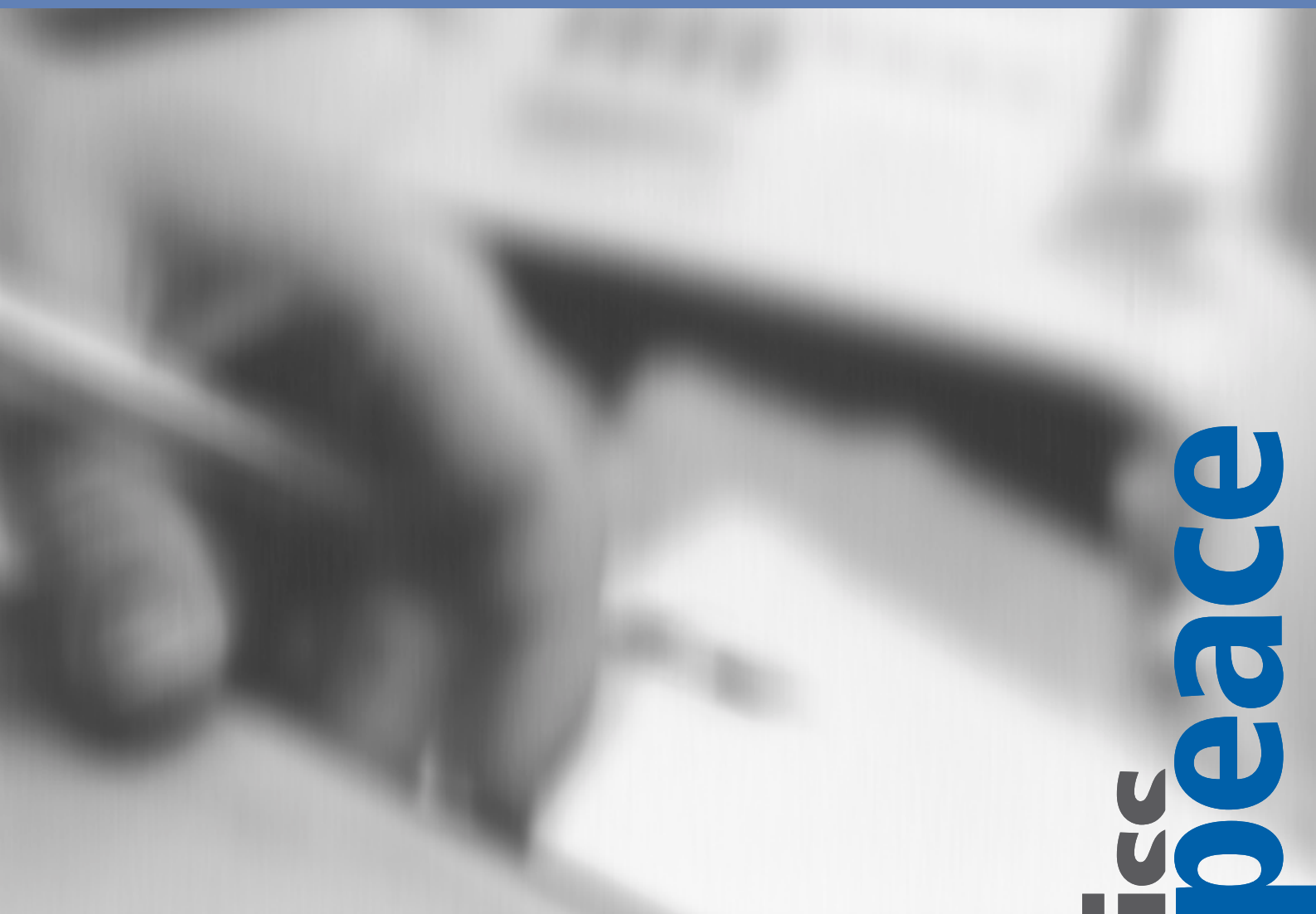


# Working Paper

Schweizerische Friedensstiftung  
Fondation suisse pour la paix  
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**2 | 2004** KOFF - Series

## Dealing with the Past

Critical Issues, Lessons Learned, and  
Challenges for Future Swiss Policy

Mô Bleeker and Jonathan Sisson, Editors

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## **Dealing with the Past**

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# swisspeace

**swisspeace** is an action-oriented peace research institute with headquarters in Bern, Switzerland. It aims to prevent the outbreak of violent conflicts and to enable sustainable conflict transformation.

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## KOFF – Series

### Dealing with the Past

#### Critical Issues, Lessons Learned, and Challenges for Future Swiss Policy

Mô Bleeker Massard and Jonathan Sisson, Editors

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## Abstract/Zusammenfassung/Résumé

The present report on „dealing with the past“ is the result of lengthy consultation process undertaken by the Center for Peacebuilding (KOFF) at the request of the Political Affairs Division IV of the Swiss Federal Department of Foreign Affairs. The report addresses a number of principal and pragmatic issues in connection with dealing with the past. Particular attention is devoted to various models of transformative justice and to the role of both state and non-state actors in transitional societies. The interdisciplinary approach of the consultation process is reflected by articles on specific issues such as “truth” and historical memory, the process of democratization in the Balkans, the application of international humanitarian law, challenges in connection with negotiations, and Switzerland’s own legacy in dealing with its past. In the introduction several concrete policy recommendations are formulated.

Der vorliegende Bericht zur Vergangenheitsbearbeitung ist das Resultat eines Konsultationsprozesses, den das Kompetenzzentrum Friedensförderung (KOFF) im Auftrag der Politischen Abteilung IV des Eidgenössischen Departements für Auswärtigen Angelegenheiten unternommen hat. Der Bericht beleuchtet wichtige Grundsatzfragen und eine Reihe von praktischen Problemen, die sich bei der Aufarbeitung der Vergangenheit stellen. Diskutiert werden insbesondere verschiedene Modelle der transformativen Justiz und die Rolle von staatlichen und nichtstaatlichen Akteuren in einer Übergangsgesellschaft. Ausserdem widerspiegelt der Bericht den interdisziplinären Ansatz des Konsultationsprozesses anhand einiger spezifischen Themen wie „Wahrheit“ und historisches Gedächtnis, Demokratisierungsprozesse in den Balkanländern, Anwendung von internationalem humanitärem Recht, Herausforderungen bei Verhandlungen und Fragen an die Schweiz im Umgang mit der eigenen Vergangenheit. In der Einleitung werden zusätzlich konkrete Politikempfehlungen formuliert.

Ce rapport sur le traitement du passé est le résultat d’un processus de réflexion réalisé par le Centre pour la Promotion de la Paix (KOFF) à la demande de la Division politique IV du Département fédéral des affaires étrangères. Le rapport aborde de manière théorique et concrète les principaux éléments liés au traitement du passé : les différents modèles de la justice transitionnelle et le rôle de l’état et de la société civile. Il reflète ensuite l’approche interdisciplinaire de cette démarche collective avec des contributions sur des thèmes spécifiques tels que: “vérité” et l’élaboration de la mémoire historique, les processus de démocratisation dans les Balkans, l’application du droit humanitaire international, la Suisse et son propre traitement du passé. Des recommandations concrètes par la politique étrangère Suisse dans ce domaine sont formulées dans l’introduction.



# 1 Preface

The following report is the result of a study which the Center for Peacebuilding (KOFF) undertook at the behest of the Political Division IV (PD IV; Peace and Human Security) of the Swiss Federal Department of Foreign Affairs. The purpose of the study was to examine the main challenges and obstacles regarding “dealing with the past” with a view to identifying and outlining policy options for the PD IV in this field.

In the course of the study, KOFF developed a multi-disciplinary approach which involved a series of consultations among specialists from different fields, including academics, Swiss government experts, and representatives of national and international non-governmental organizations (NGOs). The papers presented at these consultations form the basis of this report. The participants were asked to examine issues related to the topic from different perspectives and to develop specific policy proposals for the PD IV. Among these is the general view that „dealing with the past” should be regarded as a theoretical framework when addressing issues involving transitional societies. A need for the development of instruments, particularly technical support and training, is specifically mentioned. Thematically, an emphasis is placed on the struggle against impunity and the creation of spaces for dialogue between political adversaries. In this way, „dealing with the past” is seen as an instrument in the promotion of new social norms in the areas of justice, good governance, and human rights.

Several of the recommendations which emerged from the consultations have since been adopted and put into practice by the Swiss Federal Department of Foreign Affairs in connection with its peace promotion policy. In September 2004, the PD IV opened a new desk for “dealing with the past” with Mô Bleeker Massard, a former program officer at KOFF and the facilitator of consultation process behind the KOFF report, as the person responsible for this program. KOFF has also made “dealing with the past” and reconciliation one of the focal points of its program.

In conclusion, KOFF expresses its gratitude to the authors for their valuable contributions to the consultation process which produced this report. KOFF would also like to acknowledge the participation of the following persons at various stages of the process: Colin Archer, Jean-Nicolas Bitter, Ricardo Bocco, Rahel Bösch, Michael Cottier, Richard Friedli, Marc Georges, Thomas Greminger, Johanna Grombach Wagner, Thomas Guerber, Claudine Haenni, Stephan Husy, Agnetta Johannssen, Elke-Nicole Kappus, Guillermo Kerber, Jürg Lindenmann, Peter Maurer, Roland Salvisberger, Nicole Töpperwien, Urs Thalmann, Janine Voigt, Catherine Widrig, and Natascha Zupan.

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## 2 Introduction and Recommendations

### Mô Bleeker Massard

The weight of the past – repression, violence, genocide – has left its mark on all processes of transition from colonial regimes to independent nations, from repressive dictatorships to democratic governments. A range of judicial, penal, and psycho-social approaches have been developed in the last sixty years to deal with the past – from the Nuremberg tribunals to the International Criminal Court, to truth and reconciliation commissions. Has this made conflicts any more *humane*? Do memories of the past and their official recognition enable us to act differently in the present? Unfortunately, this is far from being the case. Many lessons have yet to be learned in developing and applying approaches about dealing with the past. Although the issue of dealing with the past is a broad and relatively new discipline, which has arisen especially in connection with truth commissions, it can be affirmed already at this stage that there is a direct and positive interaction between a society's endeavors to address its past and its capacity to develop a lasting peace.

As this new century gets under way, conflicts have not diminished in number, but have changed radically in nature. No less than 93% of all violent conflicts throughout the world are taking place within individual states and not between states. The civilian population is the main victim of such internal strife and is even targeted as a matter of strategy. In the wake of the de-colonization processes between the 1950s and 1960s and following the break-up of the Soviet Union in 1989, new nation states have emerged, often marked by weak, deficient institutions and central authorities that have found it difficult to assert their legitimacy. There is an interrelationship between the emergence of these new<sup>1</sup> and vulnerable states in quest of legitimacy and the change in the nature of conflicts, if only because many of the conflicts are taking place in those territories. The governments of these nation states rule over territories, populated by a heterogeneous mixture of cultural, ethnic and religious groups that identify to varying degrees with these new powers and credit the new leaders and governments with very little legitimacy. As such, they face similar problems: weak institutions, limited legitimacy, power struggles determining the political agenda, and a highly fragmented civil society.

Of the conflicts in progress in the year 2000, 33 were taking place inside national borders and only two between two or more states. Neighboring countries become embroiled in some conflicts, as is the case of the fighting in the Democratic Republic of the Congo, which in one way or another involves the six states of Angola, Namibia, Zimbabwe, Rwanda, Burundi, and Uganda. Over all, about one-third of the member states of the United Nations have been directly caught up in a conflict during the past decade. Only one-fifth of the conflicts taking place between 1989 and 2000 have led to stable and lasting peace agreements. In most of these cases, the hostilities have indeed ceased, but lasting peace is still proving elusive.

The parties to the conflicts are also changing. Government forces find themselves up against different regular and irregular groups, including paramilitary units, rebel groups, clan leaders or mafia groups, and even private militias. It is extremely difficult to monitor and gain access to these groups and hence to identify partners with whom to negotiate.

<sup>1</sup> The countries in question are "new," but also old, especially those emerging after the break-up of the Soviet Union.

The civilian populations are the chief victims of these new conflicts and in some cases also the perpetrators. Indeed civilian men and women, sometimes even children, are forcibly recruited and compelled to take part in the fighting. Increasingly, public places such as churches, schools, hospitals, markets, even refugee camps are becoming the new battlefields.

Lastly, this new type of warfare is generating large numbers of refugees and internally displaced persons, for the most part women, children, and the elderly. These man-made humanitarian disasters leave behind profound marks on individuals and communities, both conceptually and materially. In many of these strife-torn countries, state structures have virtually stopped functioning and there is no further guarantee of law and order in its most elementary sense. New powers are emerging in these gray areas – new "protection entities" often linked to the underworld, organized crime, and local mafia groups. It is not just these parallel powers that are being enriched by the spoils of war, but the direct protagonists in the conflict as well. This can make it more costly to end a conflict than to continue it. Most of the current conflicts have been going on for a long time and although fragile peace agreements may lead to a ceasefire, the situation on the ground is, in fact, "neither war nor peace." This is especially true of conflicts that have been taking place in newly emerging states. Moreover, the new "asymmetrical" conflicts, as illustrated by the "war on terror," are raising and will continue to raise fundamental questions about the rules of war, compliance with international conventions, as well as international humanitarian law. As things stand, we can only hope that accomplishments in this regard will continue to gain ground instead of being undermined.

## **2.1 Dealing with the Past, Constructing Memory, and Conflict Transformation: A Holistic Approach**

No approach to dealing with the past would be complete without taking the context of the process into account, which means tackling the holistic dimension of conflict transformation. The end of any conflict represents a complete turn-around in perspective, especially when approached from the standpoint of promoting lasting peace. Ideally, the structural and underlying causes of the conflicts must be eliminated, solid and efficient institutions must emerge and serve the entire population, recognized and legitimate formal structures must be built up to allow the opinions and interests of the various actors in society to find expression without the use of violence. The culture of conflict, the "meta-conflict"<sup>2</sup> must give way to a culture of negotiation, the culture of distrust toward institutions must yield to one of confidence. This process of conflict transformation, the transition to lasting peace and dynamism is an extremely complex one. It encompasses all aspects, levels, and dimensions of a society. But what are its implications for dealing with the past?

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<sup>2</sup> The meta-conflict has its own dynamics and can become deeply embedded in a group's culture, perpetrating militarism, the "glory" of killing the "other," and the legitimacy of violence as a means for dealing with conflict. Violence becomes the norm and is functional. See: Johan Galtung 1990: Cultural Violence. In: *Journal of Peace Research* 27/3: 291-305.

It will first be recalled that the possible approach to dealing with the past in a post-conflict society is closely bound up with its potential contribution to the necessary and fragile reconstruction of an entire society. This approach entails striking a delicate balance: Should the emphasis be on human rights and the crimes committed in the past? Or should it be on strengthening the state or both? Should priority be given to reconciliation within society as a whole and to efforts to determine the facts, even if that might mean granting amnesty to some perpetrators who acknowledge their part in crimes? Or should efforts to elucidate the past simply be abandoned and a line drawn under it?

Although there are numerous on-going discussions on the modalities of justice, most experts agree on the principle that the "true facts" must be determined, officially acknowledged, and widely publicized. Independently of subsequent negotiations concerning responsibilities and sanctions, the acknowledgement of truth is the centerpiece of successful conflict transformation and of a future lasting peace.

Secondly, in dealing with the past, the choices are often dictated by complex power balances between the belligerents themselves, between the belligerents and "civil alliances for peace," between all these involved parties and external actors, depending on the strategic importance given to the conflict or to the region concerned. Yet, it is to the extent that efforts to deal with the past are recognized as legitimate by the great majority of the society concerned that they will be able to go hand-in-hand with the promotion of a lasting peace. In other words, any strategy for dealing with the past should have the support and approval of civil society bodies and leaders. As stakeholders in the process, they should be empowered to negotiate with the appropriate government bodies concerning the modalities and stages for implementing the requisite mechanisms.

Thirdly, dealing with the past must help transform the culture of conflict, both materially and conceptually. On the one hand, through its modalities, it aims to avert any repetition of violent events, especially the human rights violations that occurred during the conflict, to repair the damage caused (to the extent possible), and to set up the institutional mechanisms for good governance, particularly in the legal field, based on the observance of human rights and democratic rules. On the other hand, it must also help transform the normative and functional culture of violence into a democratic culture of peace and civil conflict management.

The fourth remark is that in the context of the transition from war to peace, dealing with the past plays a crucial role in depolarizing the society. Dealing with the past should contribute to a feeling of national belonging or unity and foster structures and relations based on trust. This brings us directly to the subject of reconciliation processes. In that context, we approach reconciliation by stripping away its religious and moral components and transferring it to the socio-political arena. We construe reconciliation to be a process of conflict transformation leading to a sweeping social, political and economic change. From a systemic point of view, reconciliation challenges the entire social system and not just some social groups or aspects of the system.<sup>3</sup> In the aftermath of sustained violence, the

<sup>3</sup> In this regard, see John Paul Lederach 1997: Building Peace. Sustainable Reconciliation in Divided Societies. Washington: United States Institute of Peace Press, 55-60.

most important tasks for a process of reconciliation are "to enhance social and political tolerance, to facilitate the institutionalisation (in the broadest sense possible) of democratic processes, to allow for transparency; to inculcate the notion of accountability amongst community members or citizens and their political leadership."<sup>4</sup>

Dealing with the past is thus a direct element of the transition between conflict and peace, and its components will evolve differently depending on nature of the conflict and its settlement. We are thinking of transitions from dictatorial regimes to democracy, the situations left behind by fascism or Stalinism, the period following the fall of communism and of post-genocide situations. Every situation has its own solutions and its own way of dealing with the past: transitional justice, restorative justice, truth and reconciliation commissions, fact-finding commissions, purges, international tribunals, all of these being measures taken in the name of "dealing with the past." As Neil Kritz states in the introduction to his three volume compendium on transitional justice, "New terms are created for the country or region in question – *denazification* in Germany after Hitler, *defascistization* in Italy, *dejuntification*, *decommunization* – but they all express the same attempt of a liberated society to purge the remnants of its vilified recent past." Yet he cautions: "If handled incorrectly, however, such action may deepen rather than heal the divisions within the nation."<sup>5</sup>

Indeed, dealing with the past is not *per se* a good thing! The issue of constructing memory is a case in point. Celebrating memory, recalling the past, is not merely an established idea, but is also very much in vogue. Nevertheless, this great unanimity conceals a multitude of complex and treacherous issues. As Tzvetan Todorov writes, "In the modern world, the cult of memory rarely serves good causes."<sup>6</sup> The search for truth in the past is elusive:<sup>7</sup> "As for goals that we seek to reach by remembering the past, the answer is not so simple: The judgments that we make derive from a choice of values rather than from a search for truth. We must compare the gains that follow from any use of the past."<sup>7</sup> Mystifying the past could lead to abuses and competition among victims could descend into a fatal spiral.<sup>8</sup> On each occasion, we are duty-bound to look at the question of the legitimacy and usage of this "cult of memory." Does this give us a better grasp of present threats and help us avert fresh violence? Does it reinforce solidarity among victims? Does it morally help former individual and collective victims not to commit crimes again? Does it enable torturers to admit to their crimes and make the corresponding amends? Does it instill in society a willingness to reject any threat similar to that of the past? Does it engender a shared feeling of shame over the barbarism that everyone "allowed to take hold"? Of what or of whom does memory become an agent – of reconstruction or rehabilitation? The answers to these questions are not always straightforward. That simple fact allows us to assert that,

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<sup>4</sup> Ian Liebenberg and Abebe Zegeye 1998: Pathway to Democracy? The Case of the South African Truth and Reconciliation Process. In: *Social Identities* 4,3: 544.

<sup>5</sup> Neil J. Kritz 1995: The Dilemmas of Transitional Justice. In: *Transitional Justice*. Vol. I. Washington: United States Institute for Peace Press. xxi.

<sup>6</sup> Tzvetan Todorov 1996: The Abuse of Memory. In: *Common Knowledge* 5: 9.

<sup>7</sup> *Ibid.* 21

<sup>8</sup> J.-M. Chaumont 1999: *La Concurrence des Victimes. Génocide, Identité, Reconnaissance*. Paris: Editions La Découverte.

like dealing with the past, constructing memory should help us understand the extent to which warfare dehumanizes individuals and society and instills a deep-seated and strong desire “never again” to witness it, not only on behalf of past victims, but also in the name of future ones.

Thus, if, by dealing with the past and constructing memory, we wish to help shape a “reconciled society,” we must take these two approaches into account when developing strategies for conflict transformation and for promoting lasting peace.

Our fifth observation is thus that dealing with the past can help enhance a society's capacity to transform its conflicts to the extent that its actions are oriented toward boosting confidence both materially and conceptually and that the various government and civil society actors are supported so that they can reach a consensus on practices for dealing with the past. And in this regard, the modalities of strategies for dealing with the past have a direct bearing on the (re-)building of a democratic and peaceful society.

## 2.2 Dealing with the Past: A Tool in Conflict Transformation

Dealing with the past is not only an approach in connection with a process of political transition, it is also a tool in support of conflict transformation.

As such, it has important human security dimensions and can be employed:

- During the conflict with respect to fact-finding work by compiling and disseminating information on present and past events. Lessons learned can be implemented to prevent future escalations of violence by informing and training state and non-state military actors with respect to human rights, international humanitarian law, and international conventions.
- In the later negotiation and post-conflict phases to promote the proper functioning of the institutions charged with determining the facts and judging those responsible for violations, to buttress the institutions of justice, the presence and democratic functioning of the state, its accountability, transparency, and the equality of citizens before the law. In this way, it can boost the capacity for transparency and monitoring by both government and civil partners.

The cultural dimension of dealing with the past can contribute to drawing up shared collective histories and to fostering forums for information and memory where several truths co-exist along with visions of a reconciled society. In the realm of education, this would mean supporting the creation of integrative memories that respect diversity.

As a tool of conflict transformation, the process of dealing with the past can create negotiating forums to address the nation's foremost concerns (access to resources, power-sharing, etc.). Again, it should foster the capacities of non-governmental and governmental players to negotiate and formulate proposals.

On an overall level, as both a tool and a strategic approach, dealing with the past underpins the coherent incorporation of human rights and peace promotion.

## 2.3 Recommendations

Dealing with the past in the framework of conflict transformation encompasses a range of activities to promote peace and strengthen human security. As such, it is a central issue, which should be an integral part of peace promotion programs.

Activities should have a clearly forward-looking orientation, working to bring about a reconciled and democratic society that is capable of managing its conflicts peacefully. Naturally, these activities are determined by the societal framework in which they take place. In this regard, good practices can be underpinned by synergies among the various initiatives undertaken in different regions of the world, making it possible to institutionalize the lessons learned and the strategies used and to bring out the cultural and political diversity reflected in those initiatives.

The Political Division IV (PD IV; Peace and Human Security) of the Swiss Federal Department of Foreign Affairs deploys its peace promotion programs during the stages of violent confrontation, of negotiation, and in the immediate post-conflict phase. Some components can enhance the work of dealing with the past in the framework of current peace promotion activities:

- At all levels, improving the knowledge about and the observance of human rights, international humanitarian law, and the fight against impunity;
- Building up the skills and action capabilities of non-state actors that can contribute to civil peace promotion;
- Enhancing the media and educational vehicles for peace promotion.

In dealing with the past in the framework of conflict transformation, depending on the context involved, it would be important to situate certain activities in a continuum spanning the conflict and post-conflict phases. This would ensure that follow-up is done as part of development assistance over the medium and long term (Swiss technical cooperation).

Activities carried out during the conflict phase make it possible to forge contacts and strengthen relations with different parties to the conflict and to strike up relations of trust that will be crucial to the further evolution of the process. On this basis, decisive and judicious contributions can be made at subsequent stages. In the strict sense of dealing with the past, support programs and modalities should focus on the post-conflict stage.

In this regard, however, it is important to keep in mind that the approach to dealing with the past is dictated largely by the correlation of forces at the end of the conflict, between the belligerents, on the one hand, and civil society's capacity to act, on the other. This is the reason why activities should be initiated already during the conflict phase which can

contribute to diminishing the consequences of the violence, to forge ties with the parties involved, and, for want of a better term, to prepare the terrain, so that when it comes to dealing with the past, societies can do so with the highest degree of discernment.

We know from experience that the effectiveness of initiatives for dealing with the past will depend largely on political will – which itself will be strengthened by a civil society that is active and capable of acting as a partner for proposals and negotiations –, on technical capacities especially in the legal, judicial, and criminal fields, and on the quality of access to the system of justice. These components are the three crucial mainstays of dealing with the past in a manner well integrated into a vision of peace promotion.

### Phases in Transition

The three phases described below are part of a continuum in the framework of conflict transformation. Each phase provides its own opportunity to implement strategies for dealing with the past. The post-conflict stage, into which dealing with the past falls more directly, could derive sustenance from these efforts and have a greater impact.

*The first phase* takes place during the conflict and before negotiations and has several general objectives:

- The protection of the civilian population and the prevention of future violence, including violations of international conventions and international humanitarian law;
- Capacity-building among non-state actors in civil society<sup>9</sup> in order to “politicize” the issues of the conflict (as compared to demilitarizing them);
- Constructing plural histories and deconstructing the “enemy/other.”

**Keywords:** International humanitarian law and human rights, protection of civilians, capacity building of non-state (even state) actors. Supporting initiatives to foster a different image of the “enemy.”

**Activities:** Train and inform the parties to the conflict with respect to human rights and international humanitarian law and ensure that facts and violations perpetrated during the conflict are documented (fact-finding).

**Main events:** Continuing relations with state and non-state actors, dissemination and educational work in the fields of international humanitarian law and international conventions. Training of local non-state bodies in data collection, gathering evidence and organizing reports for the use of national and international bodies, the UN Commission on Human Rights, for example. Specific support of the media working in conflict transformation is intended to aid the process of creating plural histories and of deconstructing the “enemy/other.”

<sup>9</sup> The reference is to representatives from civil society institutions, such as religious and trade union institutions, economic actors, political parties, civil rights, human rights, women's, and minority associations and groups, and so on. Non-state actors in the conflict are military personnel involved in military actions against the central power as well as paramilitary structures or private militias.

An important activity which should already be undertaken during the conflict phase is the *preparation of negotiations*. The negotiations themselves characterize the second phase and often take place between armed groups and between actors generally relegated to a very peripheral position. Similarly, the military components of negotiations often occupy such a central place that they tend to overshadow other more political elements concerned with re-organizing society as a whole. With a view to broadening the scope of negotiations, it would be necessary to train entities recognized by civil society to enable them to table proposals in preparation for and during negotiations. This would, in turn, do much to "politicize" negotiations, to depolarize them, and to buttress local ownership and pave the way for subsequent processes.

Keywords: Preparation of negotiations during the conflict stage.

Activities: Training non-state actors to become partners for dialogue and negotiation.

Main events: Training leaders of civil institutions/groups with respect to negotiating mechanisms, formulating negotiation proposals, and creating events to open the way for local ownership of negotiations. Meetings with other civil actors as part of other on-going or completed processes. Access to lessons learned.

*The second phase*, schematically that of negotiation, has the following goals:

- The observance of human rights, international conventions, and international humanitarian law as the basis of dialogue;
- Preparation of the groundwork for future constitutional reforms, for decentralization, and for putting in place suitable legal structures for the transition and for the future; boost the skills of non-state players in formulating proposals;
- Strengthening media capabilities as arenas of dialogue and democratic debate.

Keywords: International humanitarian law and human rights. Putting judicial and constitutional institutions and mechanisms into place. Building the negotiating capacity of non-state players. Supporting independent media as an expansion of the realm of public and political discussion.

Activities: Strengthening and supporting the involvement of civil society actors; further institutionalizing the observance of human rights, international conventions, and international humanitarian law; laying the groundwork for future constitutional reforms, decentralization, and power-sharing mechanisms; supporting (the creation or the strengthening of) independent media as an expansion of the realm of public and political debate.

Main events: Politically anchoring the observance of human rights, international humanitarian law, and other conventions, as pertains to the stages and content of negotiations. Developing (for the benefit of those involved in negotiations) political and constitutional proposals designed to bolster structures and enhance the dynamics of trust. Public conduct of these discussions and of democratic dialogue.

*The third phase* is more directly related to dealing with the past and usually forms the post-conflict phase. The objectives of this phase are:

- Fostering the best option for dealing with past abuses (tribunals, truth commissions);
- Reinforcing prior efforts in the spheres of justice and the constitution;
- Strengthening actors and public forums for dialogue and negotiation between civil society and government;
- Supporting the creation of a factual history of past events.

Keywords: Institutional capacity-building (good governance), specific support for civil society leaders, supporting public forums for dialogue, supporting initiatives to publish facts of history, supporting the production of communication and educational material designed to encourage knowledge of and respect for several cultural and religious "truths."

Method: Build these initiatives into a vision of conflict transformation, so as to enhance coordinated and collective ownership of the understanding of history and of the mechanisms that led to the conflict, including as well the coordinated and collective ownership of its future consequences.

Activities:

- Support on-going efforts to develop the best option for dealing with the past (history of facts and ways of handling those facts: tribunals, truth commissions, etc.);
- Technical and institutional support for the improved functioning of justice and police bodies, public prosecutor's office, courts, ombudsman-type institutions;
- Support and institutional development of non-governmental organizations active in the fields of justice, human rights, and the monitoring of justice, so as to improve their capacity to formulate proposals and for monitoring work;
- Assist the development of documentation centers (on the past) and decentralized activities pertaining to the ownership of history and the organization of victims;
- Creation of networks for international exchanges between institutions active in this field;
- Initiatives to educate the public at large about the operation of the justice system, about civil and legal rights, etc;
- Promotion of alternative methods of administering justice with a view to complementarities with the national system;
- Support for the decentralization of justice and of security entities;
- Support for the reform of the doctrine of the armed forces, the police, and security forces;

- Reinforcing prior efforts in the spheres of justice, decentralization and the constitution, and civil forums for dialogue and negotiation.

### 3 Dealing with the Legacy of Past Abuses

## An Overview of the Options and their Relationship to the Promotion of Peace

Neil J. Kritz<sup>10</sup>

#### 3.1 Introduction

Rather than being dismissed as an obstacle to conflict resolution, issues of justice and accountability are routinely anticipated and included as an element in peace negotiations and are viewed as unavoidable, if the resulting accord is to be viable over the long term. Recent peace agreements (such as those for El Salvador, Guatemala, Bosnia and Herzegovina, and Sierra Leone, to name but a few) commonly incorporate provisions to deal with the legacy of past abuses in various ways. Conceptually, it is helpful to examine what kinds of factors render a confrontation with the past more, or less, crucial to the promotion of peace.

Proximity in time and space to the perpetrators increases the importance of dealing with past abuses. The changed nature of most contemporary wars has impacted the issue of geographic distance and has consequently strengthened linkage between dealing with past abuses and the securing of a durable peace. By the turn of the century, no less than 93% of major violent conflicts around the world were not fought between states but within them.<sup>11</sup> In contrast to classic inter-state conflicts, parties to these wars do not have the luxury of being separated by geographic boundaries at the conclusion of the hostilities. Rather than retreating to opposite sides of a border, parties to these intra-state conflicts have to live together and typically come into contact with one another on a daily basis. Where the conflict was characterized by massive atrocities, by inhuman abuses against the rights and dignity of one's neighbors, then some form of justice is necessary. In a scenario in which victims and perpetrators unavoidably interact, whether in the political arena or in the street, that painful past is more dynamically and vividly present, and must be confronted in a deliberate and thoughtful manner if the goal is a society truly at peace.

Spain presents an example of temporal distance; by the time of the post-Franco transition, a good deal of time had already passed since the worst abuses of the dictatorship. This was a significant factor in allowing Spain to simultaneously avoid both a rigorous confrontation of the past and a return to violence. While the issue still resonates nearly four decades after the transition, given the current pressure on the Spanish government to help heal wounds by providing resources to locate and excavate the murdered and still missing victims of Franco's repression – and while this should be done, because it is right – the alternative of ignoring the issue does not pose the risk of renewed civil war.

<sup>10</sup> The opinions expressed are those of the author and do not necessarily represent the views of the United States Institute of Peace or the United States Government.

<sup>11</sup> Taylor B. Seybolt 2000: Major Armed Conflicts. In: SIPRI Yearbook 2000. Oxford: University Press 15. A review of comparable surveys for the years 1992-99 finds that wars of the classical inter-state variety only comprised, on average, slightly more than 3% of the major armed conflicts in any one year.

A seemingly strong counter-factual case is that of the former Yugoslavia. In the name of brotherhood and unity, the Tito regime prohibited any discussion of the brutalities committed by Serbs, Croats and Bosniaks against one another during the World War II period. The result was not brotherhood: accounts expanded into mythologies transmitted from one generation to the next in each ethnic community and further exaggerated along the way. For example, by the 1990's, Croat nationalists claimed that 20,000 people had died at the notorious Jasenovac concentration camp in Croatia during the war, mostly of disease; Serb nationalists insisted that up to a million people, overwhelmingly Serbs, were slaughtered by the Croat *Ustashe* at Jasenovac. After the death of Tito, cynical nationalists were able to exploit this unresolved history of atrocities to instill fear in each ethnic group and to manipulate them into new rounds of violence.

Two factors help to explain the differences in these cases. First, while there was no prosecution of abusers in Spain, the country did acknowledge and deal with the Franco legacy in other limited ways. Second, an honest and complete confrontation of the legacy of past abuses is arguably most important to the promotion of peace for conflicts between ethnic or religious groups. Following conflicts of a political nature, democratization and economic development can be transformative, and members of a national group previously at war with itself can attribute the abuses to "the old regime" and potentially move on. In contrast to the extinguished former regime, ethnic and religious groups remain living side by side with their distinct identities, making it much easier for extremists to tar ethnic or religious adversaries with the alleged crimes of their predecessors even generations later.

Another aspect of the changed nature of contemporary warfare makes it more imperative to address wartime abuses in order to achieve a stable peace. The increase in the incidence of intra-state conflicts has been accompanied by a dramatic expansion in the active targeting of civilians, particularly by non-state rebel forces, as a tactic in fighting such wars. These wide-scale violations of the rules of international humanitarian law – seemingly intended to sow fear and coerce cooperation by the target community, force population displacements, gain control of territory, and/or leverage weaker military capacity against the overpowering state military forces and armaments – leave deep scars and resentments that need to be addressed in the construction of a society less vulnerable to future violent strife.

The counter-argument continues to have its advocates and needs to be considered. A decision to avoid dealing with past abuses may be determined to be the necessary price for obtaining a peace agreement or the departure of a repressive regime. Beyond the imperatives of *realpolitik*, moral arguments can be – and have been – made that if an unsavory deal can facilitate a quicker end to the killing and facilitate the process of societal reconciliation, then it behooves the negotiators to accept it and move on.

Experience has proven such a calculation often to be flawed and fleeting, however, as a blanket amnesty may prove to constitute not only a moral sacrifice, but also a tactical blunder. An amnesty often does not mean leaving the problems of past abuses in the past. Instead, an amnesty can actually preclude the demarcation of past and future by carrying the culture of impunity, and the continuation of violence, into the present.

For each of these reasons, there is a positive relationship between a society grappling with the legacy of past abuses and the potential for that society attaining a stable peace. The

primary question is not whether to pursue a program of dealing with the past, but rather what mechanism(s) to employ in this exercise.

### 3.2 Attention to Local Context and Impact

For the advancement of a culture of justice and accountability as well as for the effective promotion of peace and reconciliation, the best option will always be a local one through the deployment of mechanisms that are located *in situ* and administered by local actors. External mechanisms are too easily dismissed by local leaders, when politically expedient, as the work of “outsiders who don’t really understand what happened here.” Whether the approach indicated is a criminal tribunal, truth commission, or program of non-criminal sanctions, it is more likely to have a deep and lasting impact where there is a sense of local ownership of the process, where local victims and perpetrators alike are directly engaged in this process.

#### The Importance of Even-Handedness

A new regime, particularly one dominated by a victimized ethnic, religious or political group, needs to be rigorous in ensuring a strict and even-handed accounting for abuses committed by forces affiliated with it as well as those perpetrated by its adversaries. There is nearly always a resistance to do so. The group’s political constituency – i.e., the victims – argue that such “even-handedness” is an affront to them and a further denigration of their suffering. There is a fear that justice and an accurate characterization of good and evil in the conflict will be supplanted by the creation of an artificial equivalence between the suffering of the victims and that of their tormentors. There is a concern that any implication that abuses may also have been committed by those associated with the main victim group will weaken the new regime’s claim to the moral high ground.

If the confrontation of past abuses is to contribute to peace and stability, however, then it must be objective and even-handed, even if it puts a dent in the pristine image of the new government. The fact that one party to a conflict was responsible for the majority of abuses does not exonerate the gross violations committed by its adversary. A full accounting of the atrocities of the vanquished regime provides little comfort to the victims of abuses perpetrated by the liberation forces – even if these forces eliminated a greater evil; it instead instills resentment and cynicism toward the entire exercise of confronting the past. When the African National Congress, for instance, attempted to obtain amnesty from South Africa’s Truth and Reconciliation Commission for the ANC leadership while avoiding the requirement that they confess and acknowledge their own responsibility for past abuses, it risked compromising the Commission’s potential contribution to peace and stability, and the Commission opposed the attempt.

### 3.3 An Overview of the Options

When contemplating post-conflict justice today, one is confronted by a growing number of options, including prosecutions before a variety of fora, truth commissions, purge programs, and reparations regimes. As various options evolve in the realm of post-conflict

justice and compete for human and material resources and popular attention, it is appropriate for policy makers to question their potential benefits. The needs of post-conflict societies – for food aid, reconstruction, resettlement of the displaced, demobilization and reintegration, economic and educational renewal, among others – are routinely enormous and urgent. Squandering resources and attention on an unnecessary multiplicity of justice initiatives is not a reasonable option.

### **Prosecution**

The reasons for criminal accountability have been elaborated by activists and academics alike. Trials communicate that a culture of impunity which permitted abuses is being replaced by a culture of accountability, giving a sense of security to victims and a warning to those who might contemplate future abuses. They provide some redress for the suffering of victims and help to curtail the inclination towards vigilante justice. They provide an important opportunity to establish the credibility of a previously compromised or non-functioning judicial system. Particularly in the context of recent intra-societal conflicts, criminal trials make the important statement that specific individuals have committed the crimes in question and are therefore to be held accountable, not entire ethnic or religious groups – thereby repudiating notions of collective blame and guilt that can otherwise be used to foment the next round of violence.

### **International Tribunals**

International tribunals have several strengths over domestic trials for such major offenses as genocide, war crimes or crimes against humanity. An international tribunal will be more able to assemble the necessary human resources (including technical ability in forensics and other areas and expertise in evolving areas of international law). It is less subject to credible allegations of bias or victor's justice than a local trial process. Its impact will generally be far broader than a domestic process: first, by communicating to potential perpetrators of these crimes, not only in the country in question but worldwide, that the international community will not tolerate such atrocities and that the same fate would await them; second, by contributing to the further development and interpretation of international criminal law. Finally, the practical reality may be that an international tribunal can do for a society emerging from mass abuses that which the society cannot do for itself, either because senior perpetrators are beyond the reach of local authorities or because the domestic system is incapable of undertaking the task.

The International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR, respectively) have made valuable contributions along these lines. They have established important new legal precedents; the determination that rape under certain circumstances constitutes a war crime rather than just an age-old consequence of battle will hopefully impact the conduct of at least some future war. The exclusion of indicted leaders like Radovan Karadzic from peace negotiations and from local politics, the first conviction in history of a former head of government for genocide (former Prime Minister Jean Kambanda of Rwanda, sentenced to life in prison), and the forced delivery and trial of former strongman Slobodan Milosevic are but a few of the tribunals' major accomplishments. Each of these achievements has been a positive contribution to the attempt to build a durable peace in these two regions.

### Local Trials

The best scenario for prosecution of war crimes and related abuses is to proceed before a domestic court that is viewed by all as independent, unbiased and professionally competent. This is implicitly endorsed by the Rome statute of the International Criminal Court (ICC), which recognizes primary jurisdiction in the local judiciary and only grants authority to the ICC when the domestic system is incapable of, or unwilling to, proceed. Domestic trials for these past crimes can enhance the legitimacy and credibility of a fragile new government, demonstrating its determination to hold individuals accountable for their crimes. They can provide an important focus for rebuilding the domestic judiciary and criminal justice system, establishing the courts as a credible forum for the redress of grievances in a nonviolent manner. In addition, domestic courts will naturally be more sensitive to the nuances of local culture and legal tradition, and their rulings can resonate more clearly with a local population that views these courts as its own. In order to build a durable peace, a fundamental objective must be the development of a robust and permanent local system of justice – one that will mete out justice fairly and protect against the future repetition of such abuses. It is logical to build this objective into any program of dealing with the past.

War criminals are often directly connected to the emergence of organized crime syndicates as well as terrorist networks, each of which takes advantage of the vacuum in law enforcement capacity to entrench itself during and after the conflict. These pose a grave threat to the establishment of security and stability. Investigating, prosecuting or judging those accused of any of these three categories of crime require specialized training and personnel, carry heightened risks of intimidation and physical harm, and demand unusual courage on the part of judges and other justice system personnel. In many legal systems, trials of these crimes may entail specialized procedures and the use of classified intelligence. In addition, if local justice systems are consumed by prosecution of past abuses, they cannot give due attention to the large number of property disputes that typically arise in post-conflict situations to the adjudication of contracts, or to other elements that are important to peace-building. Accordingly, it is often advisable to establish a specially designated chamber to which is assigned all cases of war crimes, organized crime and terrorism. In this way, specialized personnel and resources can be directed to one panel (and specialized expertise developed) without burdening every court in the country with these complex and controversial cases.

### Hybrid Courts: Improvement on the Model?

An interesting innovation in the prosecution of past wide-scale abuses that has gained currency in the last few years is the hybrid court. This mixed international-local body may offer many of the advantages of both ad hoc international tribunals and local prosecutions, while minimizing or avoiding several of the problematic characteristics of each. Recent experiments with this approach suggests that it is worthy of closer analysis and may well become a common item on the menu of options to be considered in future instances of post-conflict justice.

The East Timorese judicial system was virtually non-existent by the time of the establishment of the UN Transitional Authority (UNTAET). Court buildings had been burned and looted, furniture and equipment destroyed or stolen, as were law books and case files. Judicial system personnel were virtually all gone. It was plain that the justice system completely lacked the capacity to deal with major crimes committed during the violence

which had so recently occurred. In response, UNTAET created a hybrid international-local body, situated within the local justice system. A "Serious Crimes Unit," headed by an international prosecutor with a mixed international and local staff, was established to investigate and prosecute the crimes of genocide, war crimes, crimes against humanity, torture, sexual offenses and murder. Cases are heard by a Special Panel for Serious Crimes at the Dili District Court, comprised of two international judges and one East Timorese judge.

The operation began functioning in relatively short order. Despite language barriers, insufficient resources and personnel problems, it has been relatively effective. The hybrid criminal justice system in East Timor indicted 101 individuals in thirty-five serious crimes cases in less than two years. Twenty-two people have been convicted, including ten for crimes against humanity, with sentences ranging from four to thirty-three years. As a function of the mixed international and East Timorese personnel, all proceedings are translated into both Bahasa Indonesian and English. This has been accomplished for a fraction of the cost of the Yugoslavia or Rwanda tribunals, in much less time, with the advantage of local participation and local access and visibility.

In Sierra Leone, a hybrid "Special Court" was created by a formal agreement between the UN and government of Sierra Leone. The Special Court's mandate is "to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 June 1996, *including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process* in Sierra Leone."<sup>12</sup> Over the course of three years, the Special Court is expected to investigate and prosecute perhaps 15-20 cases. The court has an international prosecutor and Sierra Leonean deputy prosecutor, the trial chamber will consist of two international judges and one local judge, and the appeals chamber will have three internationals and two locals.

In Kosovo, local courts were far too politicized and ethnically one-sided – Serb judges having been forced out – to credibly proceed in cases of war crimes or other sensitive crimes. The UN mission in Kosovo initially adopted a hybrid approach in which a majority of locals sat with an international judge. It soon became apparent, however, that this was insufficient to stem the ethnic bias of the majority. In December 2000, an alternative hybrid approach was adopted, under which any criminal case may be assigned to a special panel consisting of one local and two international judges, with one of the internationals designated as presiding judge for the case.<sup>13</sup> As in East Timor, Kosovo's hybrid courts have filled an important void in the management of post-conflict justice. Given that neither the ICTY nor the local courts are viable options to handle these cases of wartime offenses, current ethnic crimes, organized crime and terrorism, and given that progress in Kosovo will be blocked without dealing with these crimes, the hybrid panels have reduced the influence

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<sup>12</sup> Emphasis added.

<sup>13</sup> UNMIK Regulation No. 2000/64 on Assignment of International Judges/Prosecutors and/or Change in Venue (15 December 2000). <<http://www.unmikonline.org/regulations/2000/reg64-00.htm>>.

of ethnic bias<sup>14</sup> in these sensitive cases while serving the positive pedagogic and social function of visible and accessible trials with local participation. Once again, significantly more cases have been dealt with by the hybrid court than by the international tribunal, at a significantly lower cost, with greater local access and ownership.

The use of mixed international-local courts to administer post-conflict justice carries some risks. The quality of international judges and prosecutors assigned to these hybrid bodies, to be fair, has been uneven to date. In addition, a patchwork of hybrid tribunals will be less effective in developing a coherent and unified international jurisprudence on questions of both international law and procedure than has been achieved by the twin ad hoc international bodies. However, hybrid courts have several positive characteristics that commend them for expanded use. They operate on location, making the justice process visible and accessible to its primary audience. Since they include local judges, prosecutors and related personnel and have often been established within the domestic judicial system, hybrid courts allow for a much greater and more real sense of local ownership. By bringing human and material resources into the local justice system and by having internationals work side by side with the local partners, sharing skills and mentoring over the course of a few years, hybrid courts can make a substantial contribution to the long-term capacity of the local courts – a by-product wholly absent from the purely international model of criminal justice. The time required for these hybrid courts to be staffed and fully operational has been a fraction of that needed for the ad hoc international tribunals. The hybrids' track record in securing indictments and completing trials also compares very favorably to the ICTY and ICTR. Lastly, as noted, the price tag of hybrid courts is very inexpensive relative to the costs of the international models.

Once the permanent International Criminal Court (ICC) is functioning, ad hoc international criminal tribunals like those established for the former Yugoslavia or Rwanda should no longer be necessary or appropriate. This should be distinguished from the continuing potential value of hybrid tribunals. In the hybrid scenario, the local system would be incapable of conducting prosecutions for war crimes or crimes against humanity on its own – triggering ICC jurisdiction under the terms of the Rome statute – but the country in question would also recognize the need to establish individual criminal accountability for the gross abuses which have occurred. In such a case, hybrid courts such as those described above offer an alternative option to the ICC's exercise of jurisdiction, under which the nation is empowered to render justice *in situ*, in partnership with the international community.

### **The Limits of Prosecution**

Crimes against humanity, genocide, or systematic repression are not carried out by a handful of people; where such atrocities occur, hundreds if not thousands of perpetrators and their accomplices are often implicated in patterns of abuses involving tens of thousands of victims. None of the court options outlined above is capable of touching more than the tip of this iceberg; they have the capacity to prosecute only a tiny percentage of potential defendants. (Ironically, more expansive human rights standards mean that fewer

<sup>14</sup> International Crisis Group 2002: A Kosovo Roadmap II. Internal Benchmarks (1 March). 11.

cases can typically be handled than was the case in the post-World War II trials in several European countries, as due process standards and respect for the rights of the defendant increase the time required for these high-profile trials.) The ICC, with its global mandate, will probably need to focus its resources on a much smaller number of defendants per country than ad hoc international tribunals are currently doing. While a vital component of an attempt to deal with past abuses and construct a durable peace, prosecution will generally be inadequate by itself.

### 3.4 Truth Commissions

In the past twenty years, truth commissions have become increasingly popular instruments in the attempt to reckon with past abuses in various nations. These official bodies serve several functions, many of which cannot be pursued through criminal trials. Truth commissions provide a forum in which all parties can participate and tell their story and that of their lost relatives and colleagues, ensuring that these accounts are incorporated into the national history. This provides an important outlet for the thousands of victims and perpetrators who will not have an opportunity to testify at any trial. A truth commission also focuses not on a single case, but on the broad history and patterns of abuses and the underlying societal trends that made them possible. In carrying out this task, a truth commission may examine the roles and actions of specific sectors that, while not rising to the level of criminality, nonetheless contributed to the atmosphere of abuse. Virtually every truth commission has also been given the mandate, based on its examination of these patterns, to produce recommendations for societal reforms that will redress past abuses and prevent their recurrence. All of these aspects of truth commissions can advance the peace-building process.

Truth commissions, as they have evolved, are appropriate in two different situations. When these bodies were established in various Latin American transitions — in countries such as Argentina, Chile, and El Salvador — they were needed because the systems of abuse in these countries had been designed to hide the facts. Torture and related abuses were committed largely in secret; crimes like “disappearances” were intended to erase any trace of the victim or the crime. As a consequence, there was a compelling need to uncover and acknowledge the truth. In Bosnia, on the other hand, truth is not hidden; rather, such a commission is needed because of the existence of multiple “truths,” each with a distinct ethnic coloration. Nationalists of each the three ethnic communities involved in the Balkan wars propagate a history that portrays their group as the sole victim of mass abuses and the others as evil perpetrators. At a meeting in 1997, the leader of one of Bosnia’s three ethnically dominated war crimes commissions recognized that he and his counterparts were “in the process of creating three conflicting versions of the truth, and if we keep going along this path, fifty years from now our grandchildren will fight again over which one is correct.” Similarly, a number of observers have suggested that the construction of a stable peace between Palestinians and Israelis will ultimately require a truth commission-type process, as the parties to that conflict cling to mutually exclusive versions of their history over the past fifty-plus years.

### The Role of Civil Society

One of the lessons that have emerged regarding truth commissions concerns their relationship to civil society. To achieve its goal, a truth commission must do more than merely research and document facts. To note three very different models and contexts as examples, Chile, South Africa and Guatemala each conducted successful truth commission processes. In each of these cases, the participation of civil society was crucial to that success.

A truth commission, even if it doesn't hold public hearings, needs to engage the public in a painful national dialogue, an exploration of society's ills and defects that permitted the atrocities in question, and what to do about them. In various countries, those sectors of civil society that have contributed to the truth commission process have included religious groups, representatives of the media, human rights and victims' organizations, the business, medical and legal communities, historians, sociologists, psychologists, and political organizations. Without the active participation of civil society and without the resultant sense of public ownership of and investment in the process, a truth commission could produce a technically accurate history of the conflict and abuses, but the report might be relegated to an academic shelf without making any meaningful contribution to the reclamation of society's sense of values, tolerance and respect for human rights.

This can only occur in partnership with a sufficiently robust civil society. As a consequence, a nation in which the institutions and organizations of civil society have been wholly decimated by civil war or by a long period of harsh repression will not, in general, be an appropriate candidate for a truth commission. Where the grassroots no longer exists in any meaningful way, the situation will suggest more of a "top-down" mechanism for reckoning with past abuses. In post-1994 Rwanda, with the institutions of civil society decimated, the criminal justice model seemed the only option – organized and run by the state, and not reliant on participation of the public. Five years later, with civil society somewhat recovered and functioning on both the national and local level, Rwanda could contemplate shifting from the model of criminal trials to the more participatory approach known as *gacaca* (discussed below).

### From Truth to "Truth and Reconciliation"

As truth commissions become more sophisticated, their goals and mandates become somewhat broader as well. Beyond simply an accounting of victims and perpetrators, recent commissions focus more explicitly and expansively on reconciliation. Guatemala's truth commission organized a national conference to elicit input from representatives of civil society from around the country regarding the kinds of societal reforms that were in order, in accordance with its charge to "encourage national harmony and peace." Its final report extended to such matters as the social and political participation of indigenous peoples and their employment and professional training in state agencies; the need for fiscal reform; and the use of local traditional forms of conflict resolution. Similarly, South Africa's Truth and Reconciliation Commission report included extensive recommendations aimed at the faith communities, the business sector, the legal community, the health sector, and the media.

In the case of Sierra Leone, where large numbers of children were both victims and perpetrators of the abuses, the Truth and Reconciliation Commission is expected to play a key role in examining this horrible problem and in providing a mechanism for a traumatized

society to begin the repair and reintegration of its next generation. In Bosnia, where various groups have advocated the establishment of a truth and reconciliation commission, all parties have agreed to an intriguing innovation: as part of its mandate to record and analyze past abuses, their TRC will also document the stories of those on all sides who resisted the abuses, often risking their lives to protect neighbors across ethnic lines. As noted earlier, criminal trials repudiate collective blame by individualizing guilt. Similarly, recognition by truth commissions of these true heroes, who are present in every conflict and who manage to preserve humanity in the face of inhumanity, would undermine collective blame by demonstrating the good within each group. This innovation will hopefully be included in the mandate of future truth commissions.

One of the reasons for this increased focus on reconciliation and reform has to do, arguably, with the different contexts in which truth commissions are being established. In a transition from a repressive regime, which killed, tortured and disappeared people solely on the basis of suspected political leanings, the prevention of further abuses requires the establishment of accountability, democratization of government, and reform of the security forces and the criminal justice system – surely no small order. This roughly characterized the nature of the transitions in Argentina, Chile and El Salvador. When the atrocities also have a racial, religious or ethnic component to them – as they have in South Africa, Guatemala, and Bosnia – then more is needed to rebuild society in a manner that will avoid new rounds of violence. Left un-addressed, grievances can be incorporated into group traditions and lore that are transmitted from one generation to the next, planting the seeds for future conflict.

### **National versus International Truth Commissions**

This need for a sense of local ownership has obvious implications for the question of a domestic versus international truth commission. The parties to El Salvador's 1992 peace agreement determined that although a truth commission was needed to provide a forum for victims and to establish an objective record of abuses and responsibility, Salvadoran society was too polarized to undertake the task for itself. As a consequence, the Commission on the Truth for El Salvador was established as an international operation: All the members and the staff were non-Salvadoran. This "outsider" quality, however, was cause for some rejection of the exercise, even though the Commission's report was regarded as generally accurate.

There have been no purely international truth commissions since El Salvador's, and that is likely to remain the case. To the extent that the mandates of these commissions are expanding to not only establish the facts but also to serve as a catalyst for reconciliation, a sense of local ownership and engagement in the process becomes increasingly important to the success of the exercise. Where polarization or the limited capacity of domestic society requires an international presence, a hybrid has been developed; a national truth commission with one or more foreign members, a majority of local members and a mixed staff, similar to the development of mixed courts discussed earlier. This model proved effective in Guatemala and is currently in use in the Truth and Reconciliation Commission now operating in Sierra Leone.

### 3.5 The Next Phase: Increased Focus on Non-Criminal Sanctions

In confronting the legacy of past abuses, various forms of non-criminal sanctions are commonly employed, and address far more cases than the criminal justice process. Curiously, it is routinely ignored in the consideration of post-conflict justice policy. Given that any criminal process – or even a combination of the various options for criminal justice – will usually be incapable of prosecuting more than a small percentage of those implicated in wide-scale wartime abuses, and given that simply ignoring these cases and leaving hundreds or thousands of these individuals in place could pose a significant injustice and threat to reform, the use of some kind of administrative sanction would appear to be a nearly inevitable element of post-conflict justice.

Most commonly, this approach generally entails the exclusion of individuals from a variety of elected or appointed offices based on their prior activities, associations or positions. Depending on the country, this screening may apply to positions in the military or security forces, in government agencies, in banking, education, or a variety of other fields. Sanctions may also include a loss of benefits or selected civil rights. As a general rule, the more onerous administrative sanctions employed by several countries in the post-World War II transitions have not been repeated. With the exception of Ethiopia, where the right of suffrage was denied to all members of the former ruling party, sanction programs have usually been limited to restrictions on employment. In some cases, these restrictions have been limited to a cooling-off period of five or ten years, in theory giving time for democratization and consolidation of the peace process to take hold before re-opening a level playing field for all.

These administrative purge programs have been instituted in a variety of post-war contexts. In El Salvador, an “Ad Hoc Commission” of three Salvadorans reviewed individual records and, in a confidential report to the national president and the UN Secretary-General, recommended the removal of one hundred senior military officers based on their past involvement in human rights abuses. In the months that followed, the individuals identified were quietly removed from active duty. The vetting ranged to the very top of the military command, and even resulted in the forced retirement of the Minister of Defense. In Bosnia, the International Police Task Force was charged with screening all candidates for the reconstituted local police forces, rejecting anyone who had engaged in persecution of ethnic minorities. Most of these individuals will never be prosecuted for their prior action, but leaving them in place would mean that, rather creating a sense of security for all citizens, the police force would actually be source of insecurity and mistrust on the part of their former victims.

Screening or purge programs carry several advantages. They can be used to process large numbers of cases quickly, not being burdened by the procedural rigors of the criminal process. They cost far less than trials in both financial and human resources. They are a measured response, allowing those less culpable to avoid trials or prison. Precisely because they are lower profile than trials, however, generally hidden from public scrutiny, and not subject to the same due process guarantees, non-criminal sanctions are much more apt to be used for purely political reasons, to pursue vendettas or to empty bureaucracies in order to install one’s own loyalists. In a process of post-war transition, with factions on guard to resist any diminution of their relative power, it is problematic to deprive large numbers of people of their position in the security forces, social status, source of livelihood or rights of political participation without affording them adequate procedural rights.

Some have suggested that screening programs are not retrospective or punitive, sanctioning individuals for their past misdeeds or affiliations. Instead, they argue, the vetting that takes place is merely prospective, ensuring the qualifications of candidates and applicants for important positions in society. This analysis would permit much lower due process requirements on the effort. Actual practice in many countries has belied this non-punitive depiction. Some have argued alternatively that, when it comes to purges, members of the police or military are not entitled to the same procedural protections as are those in government or in the private sector. An extensive body of international standards, comparable to those by which criminal proceedings are measured, has not yet evolved in respect to non-criminal sanctions.<sup>15</sup>

Given the potential reach of these programs – specifically, to thousands of those implicated in wartime abuses who will not be the focus of other post-conflict accountability mechanisms – administrative sanctions are a missing link which need to be better integrated into a comprehensive approach to dealing with past abuses.

### 3.6 Accountability at Village Level: Models for Post-Conflict Justice

As noted previously, the types of abuses under consideration generally involve the participation of large numbers of people. Criminal trials can only handle a very small percentage of potential defendants. It is not the role of truth commissions to deal with, or even identify, all the alleged individual perpetrators. At the moment, two nations have launched related experiments aimed at addressing that gap through innovative and more informal processes that engage the population at the local community level, and that attempt to facilitate reconciliation and re-integration of individual perpetrators.

In the Rwandan case, post-conflict justice has evolved into a three-tiered approach, with a small number of the senior-most architects tried before the International Criminal Tribunal in Arusha, Tanzania, the remaining planners and leaders of the massacres tried before national courts, and the much larger number of those implicated going before less formal community panels. Following the 1994 genocide, which swallowed up to one million people in one hundred days, Rwanda's new government embraced a criminal prosecution approach to transform a perceived national culture of impunity into one of accountability. The prison population soon swelled far beyond capacity to some 125,000 people. Although the Rwandan courts have processed some 5,000 genocide cases – a Herculean feat especially given the decimation of the judicial system during the genocide – prosecution of the remaining caseload would take many decades at best. As a consequence, the overwhelming majority of the caseload is being transferred to a new village-level system called *gacaca*, loosely based on an indigenous model of traditional justice.

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<sup>15</sup> See, in particular, Articles 48-50 of the "Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity". In: Louis Joinet 1996: Final Report pursuant to UN Sub-Commission Resolution 1995/35. The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Violations of Human Rights (Civil and Political Rights. E/CN.4/Sub.2/1996/18 (29 June).

In bringing justice to the people where they live, the *gacaca* program is founded on the principle that the offenses "were publicly committed before the very eyes of the population, which thus must recount the facts, disclose the truth and participate in (...) trying the alleged perpetrators."<sup>16</sup> Over 100,000 lay *gacaca* judges, popularly chosen in their communities for their integrity, will staff some 11,000 *gacaca* panels throughout the country. To offset the intimacy of village-level justice, the law provides that no *gacaca* judge may participate in a proceeding against a defendant to whom the judge is related or with whom the judge has had "serious enmity" or "deep friendship relations."<sup>17</sup> At the first stage of the *gacaca* process, the entire adult population of every one of Rwanda's nearly 9,000 "cells" (the smallest administrative unit) is to participate in clarifying the facts and establishing a comprehensive record of the genocide as it transpired in their village. In an attempt to impose on those convicted in *gacaca* proceedings "penalties [that] favor their reintegration into Rwandese society,"<sup>18</sup> many will serve half their sentence in community service.

East Timor has introduced a different model of informal justice with its "Commission for Reception, Truth and Reconciliation." Like previous truth commissions elsewhere, the East Timorese body has a mandate to investigate, and establish the truth regarding, past human rights violations; identify practices and policies that contributed to these violations and recommend reforms to prevent the repetition of such violations and respond to the needs of victims. Its major innovation is a nation-wide "Community Reconciliation Process." Under this scheme, serious criminal offenses, such as murder or rape, remain subject to prosecution. For other, lesser offenses which were committed in connection with the political violence in East Timor, "such as theft, minor assault, arson ..., the killing of livestock or destruction of crops,"<sup>19</sup> the individual may submit a confession to the Commission, which then refers the case to a local Community Reconciliation Process panel comprised of community representatives in the village or town where the acts occurred.

At a public hearing, the panel will hear from the applicant, the victims of the acts in question, and other members of the community, and will then inform the individual perpetrator of "the act of reconciliation which it considers most appropriate" for the individual case. This may include the ordering of community service, reparation, public apology, and/or any other "act of contrition," along with a prescribed time limit for performance.<sup>20</sup> All this will be confirmed in a "Community Reconciliation Agreement" signed by the panel and the applicant and then registered in the district court, which has the discretion to (a) reject an agreement if it finds the ordered act of reconciliation disproportionate to the acts disclosed or violates human rights principles or (b) impose penalties for non-fulfillment of the terms of the agreement. If, on the other hand, the

<sup>16</sup> Organic Law No. 40/2000 of 26/01/2001 Setting Up "Gacaca Jurisdictions" and Organizing Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994. In: Official Gazette of the Republic of Rwanda 2001. 40 (6) 15 March. Preamble.

<sup>17</sup> Ibid. Article 16. Relationship to the defendant's alleged victims is not grounds for refusal.

<sup>18</sup> Ibid. Preamble.

<sup>19</sup> Ibid. Schedule 1.

<sup>20</sup> Ibid. Section 27.7.

Community Reconciliation Process is completed, the individual perpetrator is immune from prosecution for the acts disclosed.

If *gacaca* in Rwanda and the Community Reconciliation Process in East Timor are reasonably successful, they will likely stimulate other variants. The potential value of such informal processes – to handle the majority of perpetrators, compensate for the very limited capacity of the post-conflict formal criminal justice system, and bring post-conflict justice down to the community level – strongly argues in favor of their development.

It also raises the question as to whether community justice programs can be designed so as to satisfy international human rights standards. *Gacaca*, for example, will not satisfy all the criteria set by international standards regarding criminal defense rights. Subjecting *gacaca* to those standards, however – trial before a competent regular tribunal, right to counsel, a variety of due process guarantees – would render the program as impossible to implement as the formal trial mode that the country has attempted for the last six years. While acknowledging these shortcomings, Rwandans argue that the *gacaca* program will engage local villages in the process of justice, return and reintegrate perpetrators into their home communities, and empty the prisons of untried cases within a relatively short time. Local customary approaches hold great potential as an important component of dealing with the past while advancing the peace. On the other hand, simply turning a blind eye to the dissonance between traditional mechanisms and international standards would leave a disturbing lacuna in the construction of a comprehensive framework for post-conflict justice. Finding the acceptable balance between these informal mechanisms and international standards should be a subject of substantial inquiry in the next few years.

### 3.7 Which Instrument is Most Effective?

It is essential to recognize, however, that all mechanisms for post-conflict justice have two target audiences. One of these is the international community. In the best-case scenario, each instance of post-conflict justice will (1) contribute to the elaboration of international jurisprudence with respect to the articulation of crimes and the rules for accountability; (2) serve to deter those who might contemplate committing such crimes elsewhere; and (3) highlight the patterns that led to the abuses in question, hopefully suggesting warning signs and lessons the international community might heed as any new potential atrocities are in the making. These are each important to the promotion of peace, particularly beyond the zone of conflict where the abuses in question occurred.

The primary audience, however, is the people – victims, perpetrators, and bystanders alike – of the society which endured the conflict and suffered the atrocities in question. It is essential that the needs of those people not be given short shrift for the sake of a feel-good international exercise in justice. From a legal perspective, the obligations of post-conflict justice, including such elements as criminal accountability, a right to the truth, or reparations, pertain primarily to that nation. From a pragmatic, political perspective, insofar as dealing with the past is a necessary ingredient to successful peace-building and long-term stability in the country, and to the eventual reduction and departure of international military and/or civilian peacekeeping missions, post-conflict justice needs to be maximally effective vis-à-vis the local population. Finally, from a moral perspective, the international

community, after allowing the atrocities in question to proceed (usually despite early warning signs and opportunities to intervene) owes it to the victims to assist them with an approach to post-conflict justice that will have the deepest impact on their society. This priority focus has, unfortunately, not always been apparent in the approach of various players and institutions in the international community.

A profound example of the need for balance in the search for justice and reconciliation is the debate over establishment of a truth and reconciliation commission in Bosnia and Herzegovina, where the perpetuation of three ethnically driven and mutually exclusive versions of history imperil the prospect of long-term peace. Although a diverse range of Bosnian NGOs coalesced early on around the idea of a national truth and reconciliation commission, it was initially blocked by senior officials at the International Criminal Tribunal for the former Yugoslavia, who effectively mobilized the international community to stop the domestic effort in its tracks. ICTY officials suggested that the Bosnian TRC could only be established after the conclusion of all trials in The Hague – now projected for 2008, a full thirteen years after the end of the war in Bosnia and Herzegovina. Waiting that long to begin a national process of accounting and reconciliation, while conflicting views of abuse and victimization become more deeply ingrained within the various ethnic communities in the country, is surely not the best recipe for long-term peace. Although it took nearly five years, attitudes on this issue have evolved, with the current leadership of the ICTY endorsing the TRC proposal as an important, complementary mechanism to help Bosnia to deal with its recent past in a healthy way.

Sound policy for post-conflict justice will require moving beyond the simplistic belief that prosecutions before international tribunals like the ICC constitute an effective and principled response to genocide, war crimes and crimes against humanity while truth commissions are “soft,” second-best compromises. It is essential to recognize that mass atrocities – especially those perpetrated in the context of ethnic or religious conflict – generally expose and/or produce complex problems and rifts in society which are resistant to simple, one-step solutions; they typically require sophisticated, multi-faceted and well-integrated responses.

Sierra Leone has recently emerged as a potential exemplar of a more integrated approach to the issues. Although the Special Court will play a vital role in establishing criminal accountability for the horrific atrocities perpetrated during the conflict, Sierra Leone’s severe societal ills related to these atrocities cannot be addressed through the Special Court alone. It has been projected that the new tribunal will prosecute no more than twenty people over a four-year period. The cases of thousands of victims and perpetrators will be beyond the scope and capacity of the Special Court. In addition, the special and painful problem of child perpetrators in Sierra Leone – who are often also victims, having been kidnapped from their villages and then drugged and put into service by the Revolutionary United Front (RUF) to hack off the limbs of their fellow citizens – is an immense one affecting both the present and next generation; the Special Court is not the vehicle by which Sierra Leonean society can grapple with and address such problems.

As a result, a consensus eventually evolved that both the Special Court and the Truth and Reconciliation Commission are needed in Sierra Leone. The UN Secretary-General and the Security Council each noted the need “to ensure that the Special Court for Sierra Leone and the Truth and Reconciliation Commission will operate in a complementary and mutually supportive manner.”<sup>21</sup> More recently, the newly designated international prosecutor for the Special Court has strongly concurred in this point of view. This attitude towards the design of an integrated system of mechanisms to deal with past atrocities – one that recognizes the roles, limitations, and mutually reinforcing qualities of each institution – is encouraging. The contrast between the posture initially adopted by the ICTY towards the proposed Bosnian TRC and the approach that emerged in the case of Sierra Leone may suggest an evolution in the search for justice and reconciliation towards a policy that is more holistic, realistic and hopefully more effective in the long run.

### **3.8 Implications for the International Criminal Court (ICC)**

The International Criminal Court (ICC) is an idea and an institution whose time has come. Human society and international law have been on a grand if clumsy trudge towards a credible system of justice in which the perpetrators of massive abuses are either deterred before they act or at least have reason to fear being brought to account after they do. The ICC will be a crucial part of that system – but must be perceived as only a part.

In the era of the ICC, national reconciliation will still require societies to confront the reality of vast numbers of people implicated in wartime abuses, in ways that fall into the very wide space between international criminal justice on the one hand and inaction on the other. For the ICC to fulfill its role in the evolving architecture of post-conflict justice and reconciliation, for it to best serve the ultimate goal – namely, the construction of stable societies in which such atrocities are less likely to occur – then it will also need to be conscious of, and sufficiently sensitive to, the other mechanisms discussed above which will similarly be part of that architecture. In the exercise of prosecutorial discretion, given that he or she will have more than enough country cases from which to select, the ICC prosecutor should also consider the existence or contemplation of such mechanisms as truth commissions, hybrid tribunals, traditional justice, or non-criminal sanctions, and the impact of ICC actions on these processes. The prosecutor should also consider the ways in which such complementary approaches may aid the ICC’s own investigation or trial.

### **3.9 A Comprehensive Approach to Justice Assistance**

Finally, any consideration of dealing with past abuses must necessarily include attention to the reconstruction of the local criminal justice system. Although the relationship between the two appears obvious on its face, there has often been a failure to make a connection between the design of retrospective and prospective components of post-conflict justice.

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<sup>21</sup> UN Document S/2001/40. 3. Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council.

The international community is too often bifurcated on these issues, with some agencies and organizations focused only on dealing with past abuses while others working solely on the prospective rule of law. Another prominent manifestation of this disjuncture is the significant disparity in resource allocations. The international tribunals for Rwanda and the former Yugoslavia currently employ more than 2,000 staff; they have been allocated in excess of \$1 billion dollars to date and may cost some \$2 billion by their conclusion. Were such sums spent on reform and capacity-building efforts in the justice systems of Rwanda and the former Yugoslavia, these would likely be dramatically different places today. Instead, funds allotted for prospective justice are a fraction of that made available for its popular retrospective counterpart by the international community.

Even if only to pursue credible war crimes trials, each of the components of the criminal justice system needs attention. This includes such items as the recruitment, training and funding of court clerks and other non-judicial court personnel, in addition to judges, prosecutors, and investigators. The system of appointment and removal of judges, as well as all other personnel of the criminal justice system, may require careful re-examination. Technical and financial assistance is generally required. Attention must also focus on the defense bar, or else an imbalance in capacity and aid can undermine the credibility of any war crimes prosecutions. Overhaul and professionalization of the police force is crucial, as is a properly functioning correctional system.

The urgency of rebuilding the local criminal justice system in all its aspects is driven by another dynamic. Frequently, the end of a conflict, particularly a civil war, is followed by escalating crime rates. The authority and effectiveness of police forces may be shaky as a result of overhauls to the system and changes in personnel; often, police along with other security forces are being downsized or overhauled; exposure of their role in wartime abuses may tarnish their image and further undermine their authority. The status of laws and legal authority may be unclear. Turf battles over control of the levers of power are ongoing. Poverty and unemployment is widespread, as is displacement of people and property. The social fabric is torn asunder. This is the perfect environment for a spike in common crime. In addition, organized criminal enterprises, often including or controlled by former combatants, exploit the situation to carve out their piece of the national economy. This significant rise in crime, and growing public pressure to crack down on the same, is often the backdrop for efforts in post-conflict justice.

Although past atrocities and new crime waves are of a different nature, the response to them strains many of the same meager human and material resources in the criminal justice system. The society emerging from war often does not have the luxury to put either focus aside. The sense of impunity which results from ignoring the past will make it much harder to reform the institutions of the criminal justice system in any meaningful way, to restore public confidence in them or to deploy them against newly emerging patterns of crime (insofar as it often involves some of the same people). Diverting too much energy and resources from the fight against the new rise in crime, on the other hand, is not a reasonable or politically tenable option. In both the policy and operational context, the international community needs to pursue a more integrated approach to these issues.



## 4 External Actors and Transitional Justice

Naomi Roht-Arriaza

### 4.1 Introduction

This chapter focuses on the external role in supporting transitional justice efforts. It does not attempt an exhaustive catalogue of what states, intergovernmental organizations (IGOs), and non-governmental organizations (NGOs) have done to date in this field, but it does illustrate some of the types of possible action employed to date. It begins with some lessons learned from experiences to date, which can help to formulate a coherent approach. It then maps some of the areas where external actors have played a role, points out some gaps and opportunities given Switzerland's strengths, and some of the difficulties and complications involved. Finally, it discusses timing, combining and sequencing issues.

### 4.2 Lessons Learned

There has now been a good decade of experiences in transitional justice. These experiences can be distilled into a number of lessons learned, among them the following:

#### Holistic Approach

In the early 1990s, debates over the merits of "truth versus justice" were common. Ten years later, experience has shown that the question is not which takes priority, but how to combine and sequence a "package" of measures that allow the maximum possible of justice, truth-telling, reparations to victims and structural reforms. Indeed, experience shows that focusing on a single mechanism in isolation may simply increase the frustration of victims. For example, those who testify before a truth commission without any subsequent acknowledgement of wrongdoing by the perpetrators, prosecutions, or reparations have reported that the experience was, on balance, not helpful. Thus, recent post-conflict arrangements in Sierra Leone include a mixed tribunal (international and national) to try those accused of serious violations of international humanitarian law, as well as a mixed truth commission to hear testimony from victims, paint an overall picture of the conflict, and deal with child perpetrators. The East Timorese Commission on Reception, Truth and Reconciliation is documenting the conflict there as well as facilitating "community reconciliation procedures" in cases of lesser offenses. Under the community reconciliation scheme, minor offenders may perform an act of reconciliation, such as community service, reparations, or apology to the victims in exchange for reintegration into the community without further sanctions. Serious violations of humanitarian and human rights law are not included; they will be dealt with by a court. Support for efforts in the transitional justice area should be part of an overall strategy with multiple entry points, and with well-articulated connections among the different mechanisms used. The specifics will vary from country to country.

#### Local Impact

The single most important criterion for transitional justice work is the effect on the victims and survivors and on the communities in which they live. People generally experience conflict on the local level. In civil war or situations of widespread repression, communities are torn apart and often the unjust power structures connected to war or repression persist in the post-conflict era. Recent efforts in transitional justice have recognized the need to

bring justice to the local level and not simply to have international, or even national, trials and truth commissions. Thus, both the Sierra Leone and East Timor tribunals and truth commissions referenced traditional leaders and customary law and will attempt to reach, and to reintegrate, people at the local village and municipal level. Rwanda's *gacaca* tribunals, despite their faults, are also efforts to decentralize justice and make it relevant to reintegration of both victims and perpetrators into local communities.

What follows is that the bulk of outside assistance should be focused on efforts that will have a clear local impact. Investigations of violence in a given region, decentralized national trials or investigations, cleansing of local-level police or local officials tied to previous repression, support for local investigators and for victims and witnesses are some examples of this kind of assistance.

This does not mean that international and transnational efforts should be ignored, but rather combined with local-level efforts. It also means, however, that assistance to such efforts should depend on a clear articulation of how they will combine with, facilitate, or serve as a catalyst for local efforts. For example, increased media coverage of international criminal tribunal proceedings within the territory where the violations occurred would serve to increase their local impact; support for a transnational case based on universal jurisdiction might, under certain circumstances, catalyze domestic criminal investigations. Assistance to groups pushing for domestic implementing legislation for the International Criminal Court (ICC) might both support the ICC and open up possibilities for domestic prosecutions within the context of complementarity. Other efforts might help open up local dialogues or a space for discussion of the recent past.

### **Political Will**

Transitional justice initiatives will fare better if there is a real change in regime and a commitment at all levels of the new government to break with the past. In the past, efforts that have focused in a piecemeal fashion on issues like judicial or police reform without the requisite political will in place have been ineffective. For example, much of the work by the United States Agency for International Development (USAID) on judicial reform in Central America in the 1980s fell into this category. Similarly, the Guatemalan Commission for Historical Clarification ("truth commission") had widespread international and domestic support, but no governmental will existed to implement its recommendations, which weakened its effectiveness. Political will on the part of actors in a conflict is also a prerequisite for adequate security to allow for dealing with the past.

This does not mean that planning for transitional justice initiatives must wait until conditions are ideal. On the contrary, planning, discussion with all relevant actors, and lining up resources for transitional justice initiatives should precede the actual "transitional moment" in order to reduce start-up times.

### **Need for a Longer-Term Commitment, including Follow-up and Exit Strategy**

A related concern is the ability to make a relatively long-term commitment to periodic monitoring and follow-up within countries where assistance is provided. There has been a tendency to see "transitional" moments as short, perhaps the period leading up to the first normal elections. Experience has taught that many transitional justice issues take considerably longer. The international community's attention span has been short, leaving many initiatives half-fulfilled because of a lack of outside pressure and monitoring and of

established follow-up mechanisms. This has been especially true with such issues as the recommendations of truth commissions or the implementation of reparations programs. Especially where political will is weak, outside monitoring and continuing support over the long term is essential.

Conversely, some initiatives require thought about how the lessons learned and skills provided can be transmitted to local actors, so that they can take over tasks now performed by outside specialists. In the areas of criminal investigation, forensics, judicial administration and reform, or others, where foreign personnel are provided, thought should be given to how they will train locals to take over their functions. International courts and commissions should also consider what happens when they close up shop: how does the experience gained, the information collected, the results achieved, get transmitted to those who will carry on?

### **Transparency and Equity Issues**

External support for transitional justice initiatives must be sensitive to the overall level of development, adequate governance and considerations of equity. For example, funding programs with huge salary disparities between foreign and national staff, or providing expensive computer equipment to governments that cannot use it or where corruption is rife, or providing large amounts of money to institutions without the administrative capacity to effectively absorb them (all errors committed in the past) should be avoided because they will reduce effectiveness. Similarly, in some situations, the main beneficiary of transitional justice initiatives will be the government or an international agency; in others, NGOs will be seen as more trustworthy. In one country, the best channel may be through religious organizations (for example, the Catholic Church's Vicaria de la Solidaridad in Chile in the early 1970s), while in another the churches may be perceived as complicit with the repression and a poor choice (for example, churches in Rwanda during the 1994 genocide).

### **Timeliness and Opportunity**

To some extent, events move too fast in this area to plan too far ahead. A target of opportunity (say, a person charged with crimes against humanity who decides to travel abroad) or a change in circumstances (say, the implementation of a peace accord) may create new short-term needs. Some funds should be kept in reserve for this kind of opportunistic action.

## **4.3 Mapping the Field**

The number of actors and initiatives in the transitional justice field has expanded exponentially in the last decade. Any list would be incomplete and soon out of date. Instead, this paper will highlight some of the major initiatives and organizations.

### **Support for the ad-hoc International Criminal Tribunals**

The International Criminal Tribunals for Former Yugoslavia and Rwanda (ICTY and ICTR, respectively), set up by the U.N. under its Chapter VII authority, have attracted funding from the U.N., individual governments (especially the U.S., Canada, and a number of European states) and regional IGOs. In addition to money, states have seconded personnel to act as prosecutors and investigators. NGOs have contributed forensic experts.

### **Support for the International Criminal Court (ICC)**

In addition to the funding mechanism established in the Rome Treaty, the Dutch government especially has destined funds for some of the start-up costs of the International Criminal Court. The Canadian government has also provided major support. The U.S. government, on the other hand, has dedicated substantial diplomatic efforts to weakening the Court and exempting U.S. nationals from its reach.

### **Support for “Mixed” Tribunals**

New international ad-hoc tribunals are unlikely, both because of their cost and because of the coming into being of the ICC. Nonetheless, for situations that attract international attention and are not within the purview of the ICC, the trend is towards mixed national-international tribunals based on a mixture of national and international law. Examples include the tribunals of Sierra Leone and the proposed Cambodia tribunal, both of which have received support from external actors.

### **Support for Specific Truth Commissions**

A number of major truth commissions have received substantial funding both from the UN, IGOs like the EU, NGOs, and individual states. Funds have been provided for database creation and management, for investigators, for NGOs to offer counseling and support to victims, for publication and dissemination of findings, for meetings and conferences of commission staff and members in different countries, and for general support. International actors have also been key in helping shape proposals for new truth commissions, for example in the former Yugoslavia.

International support was also key to international fact-finding inquiries, some of which served as precursors to international prosecutions such as the Commission of Experts on violations of humanitarian law in the former Yugoslavia and the short-lived U.N. Commission of Inquiry for the Congo.

### **Support for Domestic or Transnational Prosecutions**

A few domestic prosecutions have received international support. Ethiopia’s Special Prosecutors Office, for example, received international funds for database management, training, and legal advice to prosecutors, forensic anthropologists, and experts to follow the subsequent trials.

Transnational prosecutions have received support from international NGOs but little from governments. For example, Human Rights Watch and the International Federation of Human Rights, as well as Amnesty International and the International Commission of Jurists have supported groups of complainants.

### **Overall Advice to Countries on Transitional Justice Strategies**

The Office of the High Commissioner for Human Rights has provided help to new governments discussing transitional justice strategies, especially in conjunction with U.N. peace-keeping/peace-building operations. The U.N.’s Department of Political Affairs has been key to transitional justice arrangements in the context of peace accords, but has not in implementation. The United Nations Development Program (UNDP) has funded several transitional justice efforts.

A number of specialized non-profit organizations focus on the area of transitional justice. The International Center for Transitional Justice, a U.S.-based group funded largely by foundations, has provided experts, documentation, and support for transitional justice, including truth commissions and the interrelationship between truth commissions and prosecutions, reparations, and other mechanisms. They have worked in Nigeria, Ghana, Sierra Leone, South Africa, Peru, Mexico, Panama, Afghanistan, Burma, East Timor, Indonesia, the Former Yugoslavia and Northern Ireland. The United States Institute of Peace, based in Washington, D.C., has a number of programs on transitional justice, including organizing seminars and conferences, providing experts, and developing policy guidelines and model codes and procedures. A recent project, for example, focuses on peacekeeping and the administration of justice, including development of specialized bodies and procedures for the handling of war crimes and related abuse. The Institute has also been deeply involved in the creation of a truth commission for Bosnia-Herzegovina. The University of Notre Dame's Center for Civil and Human Rights has a large transitional justice program, including fellowships, a documentation center and research, as does the Max Planck Institute in Germany.

#### **Judicial Reform / Police Reform**

A number of states, especially the United States (through the Agency for International Development), as well as more recently the World Bank and the regional development banks, have focused on reforming the judiciary and police. Reform projects have included training for judges, administrators, and prosecutors, database management, court modernization, revision of codes, and changes in judicial training and selection procedures. Only a small part of this work has actually focused on prosecutions or civil suits against human rights violators; these have generally been seen as a sub-set of the larger question of making the judicial system operative in the context of economic liberalization. There are exceptions: international aid supported efforts by the Rwandan government to design and create special chambers of the courts to deal with genocide cases. Other states have supported the creation and training of new police forces after vetting members to weed out human rights abusers.

#### **Demobilizing and Reintegrating Refugees and Ex-Fighters**

International aid has been used to pay for demobilization camps, weapons confiscation and destruction, and vocational retraining programs for ex-fighters where there has been an internationally-brokered cease fire to a civil war. The UK, for instance, has focused on demobilization of child soldiers in Congo and West Africa. There have also been efforts (for example, the Dutch in the former Yugoslavia) to support refugee return and reintegration.

#### **Monitoring of Peace Processes and of Trials**

The U.N. High Commissioner for Human Rights (UNHCHR) through field offices and special missions has provided monitors of ongoing violations during the transitional period who also sometimes assist with investigation of past violations. UNHCHR staff has also provided technical assistance in creating domestic investigative capacity.

## 4.4 Modalities of Assistance: Examples from other States

States contribute to transitional justice initiatives through a number of modalities. Many United Nations activities, including human rights field offices and missions, are financed through special state contributions. The United Nations Development Program (UNDP) and the High Commissioner for Human Rights are the two main U.N. agencies concerned with transitional justice and both of them have provided support to national truth commissions. The European Union also has humanitarian assistance and development offices that engage in some transitional justice work. In 1994, the United States created a special office within the Agency for International Development, known as the Office for Transition Initiatives (OTI). OTI defines its mission as "seizing critical windows of opportunity, OTI works on the ground to provide fast, flexible, short-term assistance targeted at key transition needs. Its ability to assist local partners in addressing the root causes of conflict is key to bridging the gap between emergency relief and long-term sustainable development." Its areas of work include building citizen security (including community stabilizing, civilian-military relationships, police reform, reintegrating ex-combatants, and mine awareness education) and promoting reconciliation (including conflict management, domestic judicial/human rights processes and international judicial/human rights processes). In addition, other offices within USAID have contributed to transitional justice initiatives, notably to the Guatemalan, Peruvian, Salvadoran and South African Truth Commissions.

The Canadian International Development Agency created a peace-building fund for projects in the transitional justice area. The Norwegian government funds transitional justice initiatives through the foreign ministry, the Human Rights Fund, and the Norwegian Resource Bank for Democracy and Human Rights (NORDEM) for personnel needs. The Swedes and other donor countries work through their development assistance agency. The Norwegians, Swedes, Danes, Canadians and Irish have established official rosters of experts who can be seconded to other countries for such purposes as election monitoring, helping with criminal investigations and other "transitional" needs. The Austrian, Belgian, Dutch, German, Japanese, Danish, Italian, Swiss, Canadian and U.S. governments as well as the U.N., European Union and private foundations funded the most well-known truth commissions. Transitional justice initiatives generally are funded and managed under the rubric of human rights or democracy/governance within the cooperation agencies.

## 4.5 Possible Roles for Switzerland

Transitional justice, broadly defined, will continue to be an area of international concern, especially given the existence of the ICC. It is difficult to predict what forms transitional justice will take: every experience to date has been unique, while consciously building on the strengths and weaknesses of prior efforts. What is clear is that help is sorely needed to strengthen and learn from existing mechanisms and to allow for creative responses to new challenges. Switzerland has a number of assets it should make use of in defining an appropriate role: its history of neutrality and lack of a colonial past, its role as the headquarters of the International Committee of the Red Cross (ICRC) and depositary of the Geneva Conventions, its proximity to U.N. offices in Geneva, and its expertise in financial

matters. It can use those assets to help define its comparative advantage. It can act by joining existing multilateral initiatives, especially those of the EU. It can also, and perhaps more importantly, consider what needs are not now being filled, and focus on filling those gaps that make use of Swiss comparative advantage.

### **International Humanitarian Law**

Swiss knowledge of, and experience with the development of humanitarian law could be useful in supporting local prosecutions. The biggest gap today in the transitional justice field is support of local initiatives for investigation and prosecution of those responsible for genocide, crimes against humanity (including torture), and war crimes. This is so for several reasons: the ICC will only work, if states are prepared to carry out *bona fide* domestic investigations and prosecutions. Moreover, a large number of cases will not be brought before the ICC, either because they are outside the court's temporal jurisdiction, because the relevant states have not agreed to the court's jurisdiction, or because the court simply does not have the resources to take on all potential situations within its mandate. At the same time, the ad-hoc Tribunals will begin to wind down their work, and it is unclear how many other "mixed" tribunals are likely to attract widespread support. Most investigations and prosecutions will have to be local.

Support for domestic prosecutions can take a number of forms. First, many countries that have ratified the ICC Statute have still not completed the process of incorporating domestic implementing legislation into their penal codes. Until this is done, domestic prosecutions will be more difficult. Second, local prosecutors and investigating magistrates are often under-trained, under-resourced, not supported by elements in government, and subject to threats and intimidation. Where prosecutors are sincerely interested in pursuing human rights-related prosecutions, they need support, from training to investigative resources to protection. Local human rights groups need help learning how to collect and preserve evidence and testimonies. Both often need assistance with forensic investigations and other kinds of specialized investigation.

Associations of local human rights and criminal lawyers prepared to take on cases dealing with past abuse may need to be nurtured, supported, and protected. It would be especially important to support groups with a victims-centered orientation willing to bring cases in countries that have a *partie civile* or related procedure. Moreover, this is not just an immediate post-transition need, but one that continues for a number of years. Courts or politicians have often thrown up domestic obstacles to prosecutions (even if these are not lawful under international human rights or humanitarian law). Amnesties, prescription, secrecy laws, and the like need to be discouraged or conditioned at the outset where they violate international law, as well as challenged in the courts if they are enacted. That requires ongoing support for legal advocacy groups.

### **Financial Investigation and Support**

Second, one area of investigations where Switzerland may have a clear comparative advantage is following the money trail. Most dictators and high-ranking military officials are also involved in some form of corruption, skimming the national treasury or stealing the assets of their victims. Technical support with these kinds of investigations could be invaluable, for both criminal prosecution and civil reparations.

To date, both national and international prosecutions and civil suits have done a poor job finding stolen or crime-related assets that could be used to pay reparations to victims, which has limited the effectiveness of reparations programs. Although there are clear legal standards requiring redress and reparations for harms, few countries have actually paid reparations to victims and survivors. Argentina and Chile have gone the farthest in this regard, in part because they were relatively rich countries with a relatively limited number of potential claimants. The South African Truth Commission recommended reparations, but only small interim reparations have actually been authorized and paid. In other very poor states, the sheer number of victims and survivors makes monetary reparations difficult for a new government. Support for innovative programs leveraging existing resources and foreign aid to provide services and material aid (even for needs as modest as reburials and tombstones for those killed) is essential. Equally important is support for culturally sensitive medical, psychological, and occupational therapy for survivors and for victim's families dealing with the long-term effects of trauma. These areas have been vastly under-funded.

### **Criminal Prosecution**

A third area would build on Swiss expertise in combating transnational crime. Often, national prosecutors and courts will be unable or unwilling to prosecute abuses that took place on their territory, in situations where civil suits are unavailable and the ICC does not have jurisdiction. In those cases, the only option for those seeking justice is to attempt transnational prosecutions in the national courts of a third country, under a theory of either passive personality (state of the victims' nationality) or universal jurisdiction. The investigation of Chilean ex-dictator Pinochet shows that these investigations, under certain circumstances, can serve as a catalyst for domestic prosecutions and are not unduly disruptive of domestic political processes. At the least, these cases are useful for establishing that there are no safe havens for those who commit abuses. At the most, they can lead to requests for extradition to the home state which, although unlikely to be granted, trigger international obligations to 'extradite or prosecute,' again catalyzing domestic investigations.

Transnational prosecutions have been severely under-funded, in part due to their necessarily opportunistic nature. Nonetheless, support for lawyers willing to take on these cases, for the creation of *dossiers* on potential defendants, including potential witnesses and evidence that can be easily provided to investigating magistrates or prosecutors, support for investigators as to the whereabouts of ex-torturers and ex-officials in an abusive regime, and support for victims groups to facilitate witness travel, and the like are all required to make international justice for past crimes a reality.

### **Protection of Witnesses**

Any kind of support for prosecutions should encompass the protection of witnesses and their family members who may be harmed if they testify before either national or international tribunals. The ad-hoc Tribunals' protection of witnesses was clearly inadequate, especially at the start; the ICC promises to do better, but witness protection is an extremely expensive proposition, especially considering that the witness needs to be protected before and after as well as during their participation in a trial, and that some witnesses who do not end up testifying will need protection as well. National prosecutions, with less international interest and scrutiny, have even greater needs in this area. Moreover, some witnesses will need protection *in situ*, while others will need to be moved to a different area or even outside the country. Public and private prosecutors, court

personnel, expert witnesses, and others connected to highly explosive judicial proceedings will also need at least temporary protection in many cases.

### **Monitoring of Mechanisms**

Other gaps that Swiss authorities might consider involve areas that touch on both prosecutions and non-penal sanctions. A number of recent innovations in transitional justice involve the use or adaptation of customary or indigenous conflict resolution and cleansing mechanisms at the local level. It is not clear, however, how these mechanisms will work, what impact they will have, and how they will intersect with international human rights norms on due process and on redress and with national or international efforts. Support for monitoring and investigation of such mechanisms would be useful. Here Switzerland's experience with decentralized government and coordination of local efforts might prove useful.

### **Support for Database**

So too would support for database creation and management and for exploration of creative options regarding vetting of police and military forces and the use of non-penal sanctions like dismissal, loss of pension rights, and the like for those responsible for past abuse. These mechanisms have been underused in the past, in part due to lack of resources and support for government and NGOs interested in pursuing these options.

### **Preservation of Documents**

Record copying and preservation are other areas that have been neglected and that are important to an integrated strategy for dealing with the past. The needs include copying and microficheing old paper documentation (going back to WWII and earlier) that can serve both historical purposes and for families trying to document the fate of loved ones. In other cases, copying and microficheing or digitalizing is required because of the lack of basic security in many countries where prosecutions or truth commissions deal with the past. The offices of lawyers and human rights groups have often been raided with the clear intention of destroying evidence: having several copies of sensitive documentation in several locations can ensure that such evidence is available as needed. Here again, Swiss expertise gained in the course of Holocaust-related cases could be put to good use.

### **Development of Educational Material**

Another area that has received little attention and that shades over from "transitional justice" to development assistance is the use of educational materials and media to promote a tolerant society based on rule of law. School textbooks, for example, will need updating to encompass recent history, an often contentious and conflict-filled arena. New media will need support both to broadcast the proceedings and results of trials or truth commissions, and to showcase local efforts at reconstruction and recovery. Again, Swiss experience in revisiting the legacy of the Holocaust might prove useful.

## **4.6 Conclusions: Timing, Sequencing, and Combining Strategies**

A holistic approach to dealing with the past implies a combination of national and international strategies and a combination of penal and non-penal sanctions, truth-telling, reparations, and efforts at establishing (or reestablishing) coexistence and tolerance among

communities in conflict. It is not possible to prescribe in advance how these factors will fit together, since every situation will differ. The extent and type of abuses, the number of victims and of perpetrators, the manner in which the old regime is ousted or leaves power, the degree of economic development of the country, the degree to which the new regime embraces the rule of law, the strength of the non-governmental sector and of victims/survivors and lawyers groups, and a host of other factors will have to be weighed and a package of measures designed. The role of external actors should be to ensure that this process is transparent and includes all those concerned, especially the victims and survivors and civil society in general, and to help discover and fill the gaps.

### **Timing and Sequencing**

With that caveat, it is possible to contemplate some general considerations. Planning for dealing with the past should start as soon as possible, even while conflict continues. It is especially key both to consult on major policy choices, and (to the extent security arrangements allow) to attempt to safeguard evidence for future trials as soon as possible. Consultation should be as wide as possible, including non-governmental groups inside and outside the country and other donor countries which have dealt with the same issues and/or geographic area. Evidence gathering, including witness statements, is important to do early on, even if it is not clear whether prosecutions will be domestic or international and when they will begin. It may take quite a while to rebuild a national judicial system or to make it operative in the face of procedural limitations. Witnesses may also be more willing to come forward in public after some time has passed, but identifying even those witnesses early on is important for protection purposes. Regarding reparations as well, a full-fledged reparations program may have to await a stable economy, but interim services and reintegration programs might be possible more quickly. On the other hand, it makes little sense to fund judicial or police reform programs without a decisive change in regime and some assurances that the new government has the real political will to carry out profound changes. A truth commission will also have greater impact if there is a government in place interested in carrying out its recommendations. This was the main weakness of the Salvadoran and Guatemalan truth commissions.

Finally, while "transitions" are envisaged as relatively short periods where great changes can be made, experience has shown that it often takes much longer, often a generation or more, for the issues of "transitional justice" to subside. Thus, to the extent Switzerland has a long-term development assistance policy, it would be important to have a level of policy coordination that ensures that longer-term development programs work in concert with, and not against, the goals of transitional justice. Thus, for example, local actors (mayors, for example) who played a role in prior repression should not be in charge of development projects, and such projects should be structured to encourage multiethnic cooperation. Similarly, short-term humanitarian assistance policies should be revised in light of the principles of transitional justice, especially the need to avoid impunity for those who commit international crimes.

### **Switzerland as an Actor**

Sometimes (but not always) in the wake of conflicts aid for reconstruction is coordinated through donor conferences or other mechanisms. The Swiss could either participate in such conferences or wait to analyze the results in order to see where major gaps remain. Obvious allies include the European Union and the Nordic countries. In some situations, however, Switzerland may be able to play a role that other European countries cannot. For

example, in Francophone Africa, French and/or Belgian government assistance may be looked at as suspect given past colonial relationships, whereas Swiss assistance would have no such limitations while allowing for fluid communication. In these situations, it may be better to go it alone. In Latin America, similarly, it may be better to work with Canadians or Europeans who do not elicit the same suspicions as does U.S. aid in much of the region. Along these lines, Switzerland could seek out partners in the global South who have rich experiences to share (South Africa, for example) to help design and staff transitional justice efforts elsewhere. This would promote South-South cooperation, allow for the spread of knowledge and position Switzerland as a progressive force.

Switzerland can play a positive role by focusing on its own history and strengths and seeking to fill gaps and unmet needs in the area of transitional justice. The approach should focus on local efforts and on not duplicating other work. The most important alliances will be local human rights, public interest law, and victims/survivors groups in each country where dealing with the past is a key issue. Beyond that, some of the specialized institutions described above possess a wealth of expertise and experience in developing strategies for dealing with the past, and should be consulted about appropriate policies. These groups, and international human rights organizations, will be helpful in finding appropriate local partners. And of course, in situations where a number of donor countries are involved, donor coordination will ensure that resources are used to best advantage.



## 5 Responding to a Painful Past

### The Role of Civil Society and the International Community

Priscilla Hayner

#### 5.1 The Critical Role of Civil Society

The strength of civil society in any given country – how many and how well organized the nongovernmental advocacy, community-based, research, and other such organizations are – will partly determine the success of any transitional justice initiative. Because of their information, contacts, and expertise in human rights issues, the contribution of nongovernmental organizations (NGOs) can be critical.<sup>22</sup>

Indeed, civil society has played an important role in every country that has experienced a successful transitional justice endeavor. National NGOs have helped to initiate, advocate for, and shape some of the strongest and most interesting transitional justice initiatives that have been implemented around the world. In Ghana, Sierra Leone, East Timor, and Peru, for example, national or local organizations played central roles in giving shape to the justice mechanisms put in place to confront past crimes.

In Sierra Leone, the truth commission legislation – which was designed after the Lomé peace accord agreed in principle to establishing a truth commission – developed out of a broad process of consultation and thus has considerable support and enthusiasm from a wide audience. A broad coalition of civil society groups put forward proposals for a “truth, justice, and reconciliation commission” even before the Lomé talks had begun. After Lomé, the Office of the UN High Commissioner for Human Rights (OHCHR) helped to facilitate a multi-stage process to gather views of victims, religious organizations, international representatives, experts on women’s and children’s rights, political parties (including the party representing the former rebels), government officials, members of Parliament, paramount chiefs, human rights organizations, and others. This not only increased the sense of ownership in the process and vastly improved the ultimate mandate given to the commission, but also served as a process of public education about the role and potential contribution of the truth commission. This process was independent from any official initiatives, and in the absence of the commission being established in the two-year period after the TRC Act was passed, civil society effectively filled what otherwise would have been a void of activity around the TRC. Some foundation support was obtained to support these activities, including several projects that were funded by the OHCHR through earmarked donor funds.<sup>23</sup> Most projects, however, were done inexpensively and largely with volunteer NGO labor.

<sup>22</sup> For a more detailed exploration of the role of civil society in the work of truth commissions, specifically, see *Truth Commissions and NGOs: The Essential Relationship – The ‘Frati Guidelines’ for NGOs Engaging With Truth Commissions*, April 2004, available at <<http://www.ictj.org>>.

<sup>23</sup> These OHCHR-funded projects included a study of the existing traditional practices that could be used by the Sierra Leone TRC in its community-based work, such as to advance the reintegration of ex-combatants; a mapping project to help determine where and when the most intensive violence had taken place; and a public information campaign to inform the general public about the work of the coming truth commission. In addition, the Ford Foundation provided funds for the Truth and Reconciliation Working Group to undertake broad educational activities.

In Ghana, a national human rights organization, the Center for Democratic Development, worked with the government to hold a well-attended national conference on the proposed national reconciliation commission shortly after the government put it forward. This conference, which included a number of international participants who described the experiences from other countries, allowed the first broad and public discussion of the bill and was successful in opening the debate and highlighting the difficult issues around the truth commission proposal for Ghana.

NGOs elsewhere have not always been so successful in shaping truth commissions to the form they preferred. In Guatemala, during the 1994 session that finalized the terms for this commission, human rights, indigenous, and victims' groups pressed the parties to the peace negotiations and the UN mediator to change the terms of the proposed truth commission mandate. However, the final accord creating the commission included a number of limitations that these civil society groups had opposed. With time, the commission gained the trust and support of civil society and was able to overcome these initial limitations in its mandate.

In a number of countries, civil society coalitions have been formed to follow these transitional justice developments, advocate for improved policies, undertake research that would support the work of the commissions or other bodies, and advance public education efforts around the country.

Somewhat similar to the preparatory work around truth commissions, there has also been important work from civil society in advancing efforts to prosecute accused perpetrators. Overlapping with the development of the truth commission, the Special Court for Sierra Leone also gained support from civil society organizations, and a coalition of organizations worked to inform the public about the expected work of the Court beginning more than a year prior to its establishment. The Special Court Working Group's work helped to dispel some of the myths and misunderstandings about the powers and likely reach of the Court. In Peru and Guatemala, national human rights organizations have taken the lead in advancing cases for prosecution. The Center for Human Rights Legal Action (Centro para Acción Legal en Derechos Humanos) in Guatemala has collected vast amounts of information and evidence to support the development of cases against former state leaders. It has also assisted in providing training in international law to national prosecutors in Guatemala, in particular through bringing members of the public prosecution service to the Hague for intensive seminars with prosecutors from the International Criminal Tribunal for the former Yugoslavia.

In addition to truth inquiries and prosecutions, NGOs have often worked to advance the subject of reparations. South African and Peruvian organizations have followed this issue closely, especially as the needs and demands have become clear during the course of the national truth commission's work. Indeed, truth commissions and government officials have often made very clear their desire for assistance in thinking through this particularly difficult topic.<sup>24</sup>

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<sup>24</sup> Given the little information and lessons learned that have been collected on the subject of reparations, the International Center for Transitional Justice is now undertaking a broad study of successful (and not so

Finally, the most effective institutional reform programs often result from extensive input from civil society, sometimes including explorative research and programmatic design. In some cases, non-governmental entities are well placed to help implement such programs. This may include reform in the areas of the military, police, outdated or discriminatory laws, judicial systems or structures, or other institutions that relate to maintaining the rule of law and fortifying democratic governance.

In all of these areas, a process of public consultation will result in a greater sense of ownership of the product or policy, and thus greater involvement in its implementation and investment in its success. Past experience shows that consultation also results in a far superior outcome than what is obtained through back-room negotiations or decisions made under the pressures of time. This continues to be true long after the initial period of policy development. In Guatemala, for example, the process of designing recommendations for the truth commission's final report brought together more than 400 civil society representatives and political leaders for a full-day brainstorming workshop with the commission.

NGO lobbying is likely to continue during the course of a commission's (or other institution's) work, when organizations may press it to expand its reach or change its operating policies, urge the domestic government or foreign governments to release files and to cooperate fully with investigations, and encourage governmental or private donors to provide support. Because a truth commission typically shuts down with the submission of its report, pressure for the implementation of its recommendations must also fall to those outside of the commission, including national and international NGOs, foreign governments, and the United Nations, among others. In addition, some governments have printed very few copies of commissions' reports or may not have found it in their interest to distribute the reports widely. The production of more accessible versions of the report, or wider distribution of the full report, is thus sometimes left to private actors.

## 5.2 International Involvement

The role of the international community in a transitional country that is seeking to establish justice for past crimes is also critically important. There are, of course, numerous examples where international input has affected or influenced the nature, timing, and style of transition and played a part in setting out the justice agenda. This may be through international NGOs, bilateral governmental initiatives, or intergovernmental institutions such as UN agencies.

However, while recognizing the important role of international actors, it must be stressed that national actors should always lead in shaping the transitional justice agenda and preferred policy approaches. The critical questions of whether, when, and exactly how to tackle massive crimes of the past should, in most cases, be addressed first and foremost by

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successful) reparations programs around the world. The results from this study, based on more than a dozen commissioned country-based papers and a half-dozen thematic papers, will be available in 2005.

nationals. The very nature of many of the possible mechanisms or policy initiatives requires a full sense of national ownership for their successful implementation, and thus the decision and manner of investigating the truth, providing redress for those who suffered, or prosecuting widely must emerge from *within* the country, rather than from the outside. Furthermore, it is now very clear that each transitional situation will differ from those before it, and the needs, circumstances, political culture, and potential opportunities will also vary. Each new country that approaches the challenges of justice in transition is likely to design a unique set of policies or institutional responses that respond appropriately to the national context and, hopefully, that venture as far and as boldly as possible under any given constraints. There is no one right model, nor should it be suggested that any country import the exact mechanisms used elsewhere.

This is particularly true in relation to indigenous mechanisms or approaches that may be incorporated into new accountability initiatives. Current developments in East Timor and, soon expected, in Sierra Leone, are intended to combine the best practice from international experience with domestically rooted cleansing or reconciliation ceremonies to facilitate the reintegration of low-level perpetrators into their communities. This may be done through a process of apology and acknowledgement, or through a symbolic or literal repayment or community service. It is imperative that locals craft the shape of these initiatives.

International involvement must therefore begin with a presumption that the answers will come from within the country, and thus encourage widespread engagement with the issues at hand while avoiding prescription on any specific policy response.

This is not, however, to downplay the important role that the international community can, and generally should, play in societies in transition. Most important, international expertise can be provided in the form of basic information on past experiences and lessons learned, which can suggest possible paths forward and help the country avoid mistakes made elsewhere. There are numerous examples of this, provided through consultants, workshops, training, and other forms of capacity-building.

Second, the international community can assist a country in transition by providing assistance on technical, legal, or other specific matters. For example, international human rights conventions may inform the drafting of legislation that pertains to past crimes. Newly established truth-seeking bodies may need experts in information management and database technology or in forensic sciences, for example, and often this specialized expertise cannot be found domestically.

There are bounds, of course, within which the international community should stand firm. Clear international obligations and standards should be respected, and outsiders may well strongly counsel the national actors as to their obligations. Mechanisms that promote or allow impunity, discrimination, or unfair procedure should, of course, be opposed, and the grounds for this opposition made clear.

However, within the clear bounds established by standards of human rights and democratic principles, there is considerable leeway for national variation. The duties in the realm of accountability ascribed to states under international law — some established more clearly than others — leave considerable room for differences in design, timing, and reach. This

must especially be true once existing national limitations are recognized, which may include limited financial and human resources to support the proposed policies, or weak or corrupt national institutions that would not realistically be able to carry out certain policies, at least in the short term.

Finally, where there have been lessons learned of a practical nature, there is a clear role for internationals to advise that a chosen path may be ill-advised, and advocate for appropriate changes to a policy or plan. This may be in the arena of psychological support to victims, involvement of the public and media in a truth-seeking exercise, the creation of expectations that are unrealistic in the circumstances, or other operational matters.

It is assured that the next few years will witness unexpected, and likely fascinating, developments in the sphere of accountability for countries emerging from conflict. It should also be expected that the initiatives and institutions put in place tomorrow will be strengthened by the experiences of yesterday and today because of the efforts of both NGOs and the interested international community.

### 5.3 The Policy Role of Foreign Governments: Recommendations

The following recommendations suggest possible ways that a foreign government might direct its policies in an effort to support a country's good efforts to grapple with past human rights crimes. There are, of course, many varying points of support and encouragement by which a foreign government may assist local actors in this difficult arena and this is not intended to be an exhaustive list. These recommendations emerge from the observations of the International Center for Transitional Justice in working with local actors in many different national contexts, as well as years of direct consulting with local entities.

*Approach the subject with no policy assumptions*, recognizing that each country must make nationally based decisions and may come to very different decisions on its accountability strategies than seen elsewhere. Allow local actors to define priorities, and the nature, timing, and speed of any initiatives. Assume each national situation to be unique and that needs will differ.

*Provide support during the critical phase of policy exploration and development*, and consider particularly the importance of public education and consultation in thinking through policy options. Avoid assumptions that transitional justice options are necessarily well-understood, even by experienced policymakers on the national level, prior to an education and training process. The general public will have even less understanding of the issues and nature of truth and justice options.

*Recognize the urgency of responding quickly* on these issues, as there is generally a narrow window when the momentum of transition is strong, political interest in responding to past abuses is most genuine, and policy options most flexible. When critical decisions must be made relatively quickly at the negotiating table or by new political leaders, there is little time for lengthy reflection or development of funding proposals – while typically there is a key need for input on lessons learned from experiences elsewhere that must be brought in quickly.

*Reach out to a wide range of actors* that may play, or should be asked to play, a role in decisions on how to respond to past abuses. This may include government officials, members of the opposition, human rights organizations, victim groups (sometimes not very formally organized), church or religious organizations or leaders, traditional leaders such as paramount chiefs, women's organizations, and others. All of these sectors should be brought into a process of consultation and education.

Most important, *ensure that victim and survivor perspectives are included in policy discussions*. No final decision on justice policies should be reached without consultation with victim communities — which may, of course, reveal differences of opinion between themselves.

*Support development of new and creative policy responses*, such as those suggested above. This may require a combination of legal advice on international norms, standards, and obligations, combined with a process of creative brainstorming based on the real needs and real possibilities that are confronted in that particular place at that time.

*Keep expectations realistic*, and encourage partner organizations to also be realistic and level-headed in their claims. Recognize that some goals cannot be achieved quickly. For example, the expectations that "reconciliation" can be achieved in the short term, or that all wrongdoers will be prosecuted, or that large financial reparations might be provided to all victims, are generally unrealistic and will result only in frustration and disappointment.

While nationals must take the lead, *facilitate international technical assistance or a sharing of lessons learned from elsewhere*. General lessons learned from experiences around the world should be made available in print or through in-person meetings. Translation of key materials into local languages can be extremely useful. Recognize as well the importance of international organizations in providing expertise or assistance in very specific or technical areas as accountability initiatives take shape, such as in forensic anthropology, information management and database design, international law, or the declassification of documents held by foreign governments.

*Encourage direct sharing of experiences* and expertise between countries that have encountered similar transitional justice challenges. Focused meetings or conferences that incorporate such international experience can be especially valuable at critical junctures.

*Support training and strategic policy thinking in advance of a transition*, where possible. Even in contexts where a transition is not imminent, it can be expected that questions on transitional justice will be confronted eventually. Advance training can enable a country to be better prepared when a transition does take place. In many cases, initial discussion proposals can be drawn up and thought through even before a transition is secured, or before peace talks begin.

*Support coalitions of organizations that work together* on transitional justice issues, where possible. This allows incorporation of multiple skills and networks, which will be necessary for successful civil engagement with these issues. This works especially well where pre-existing coalitions exist, as has been true in Peru and Sierra Leone.

*Recognize the critical role of a public information campaign*, especially as policies are developed and new institutions are put in place. For the public to fully understand the nature and role of any new bodies and to keep expectations reasonable, outreach by radio and through civil society networks, religious groups, or other means can be very important.



## 6 Dealing with the Past, Dealing with History

Christian Giordano

### 6.1 Past, History, and Truth

History as a humanistic discipline is held to be pre-eminently the *science du passé*. As such, its task is reconstructing the reality and truth of past events and processes. The German historicism of Leopold von Ranke and Friedrich Meinecke, the current of thought that for almost two centuries had so much influence in Germany and inspired followers all over Europe and the United States, introduced a critical method that could go beyond the field of speculation and reach the naked truth of facts. Most of the distinguished representatives of this school therefore sought to describe facts as they actually occurred in the past. However, from the very beginning, the problem lay in accurately and clearly defining what the terms reality and historical truths should indicate. Already during the nineteenth century, the ensuing disagreements generated heated debates and fierce diatribes, which however did not solve the controversy and thus did not provide an adequate answer to the crucial question tackled by historians.

*History and Truth*, first published in French in 1955, is a significant work by Paul Ricoeur in which he attempts to define the question from a philosophical point of view.<sup>25</sup> The author aptly stresses that even in this age whoever embarks on the arduous adventure of being concerned with the past, especially a historian, is expected to be fairly objective. I believe this expectation has endured nearly unchanged even in the period following the '90s of the past century, i.e. after the so-called postmodernist turning-point. However, evoking objectivity means reasoning in terms of reality and truth, along with the uniqueness of both. Paul Ricoeur reminds us that objectivity, with reference to the past, cannot have the same characteristics we expect, rightly or not, from pure/exact sciences such as physics, chemistry, or biology. The dissimilarity is due to the kind of knowledge, since whoever sets about reconstructing the past must be content with a knowledge by traces. In fact, to count on reconstructing both remote and very recent events and processes as they actually occurred, as if they were laboratory experiments, and furthermore to presume to (re)live them directly in the present, would be a self-deception. All those who apply themselves to reconstructing any past (whether personal or collective, be it that of a persecuted or annihilated community or a tyrannical regime) should never be compared to a photographer who, after all, experiences the event he is observing personally and in the present. Consequently, the integral past is at the most an ideal or, better yet, a never reached or an unreachable end.

Knowledge by traces implies the idea of incomplete objectivity, i.e. the awareness that the past is like a yellowed thus barely decipherable manuscript from which one tries to draw out some meaning. The reconstruction of what has irrevocably occurred is not a plain reproduction, but rather a re-composition that cannot set aside the subjectivity of the person who interprets the manuscript and must heed the many possible truths it includes. In conclusion, to avoid the narrow context of a chronicle, i.e. the plain chronological listing of events, we must reconstruct the past by interpreting it: in other words, by trying to grasp the meaning of what happened.

<sup>25</sup> Paul Ricoeur 1983: *History and Truth*. Evanston: Northwestern University Press.

Stressing the unshakable quality of subjectivity, the concept of incomplete objectivity in relation to the reconstruction of the past, obviously undermines the old positivist dogma of a single and univocal truth. The following example illustrates the significance of subjectivity and the unmistakable plural quality of historical truth: Frederick Barbarossa, emperor and powerful promoter of the third crusade whose purpose was to expel the so-called infidels from Jerusalem. In Germany, this outstanding personage of medieval history is still considered a great and positive ruling figure of the Holy Roman Empire (which in German is emblematically called *Heiliges Römisches Reich deutscher Nation*). In fact, ever since the 16<sup>th</sup> century Barbarossa had become the symbol of German national unification hopes. It is far from surprising that Adolf Hitler named his attack against the Soviet Union, launched on June 22, 1941, *Operation Barbarossa*. A similarity between the Emperor Barbarossa and the *Führer* was thus skillfully propagandized and insinuated into the national consciousness. According to this point of view, both pursued a legitimate crusade with a civilizing mission. The minor difference between Barbarossa and the German dictator, again according to this Nazi slant, was that the former fought the Muslim infidels, while the latter fought the Bolshevik ones.

Inversely, Frederick Barbarossa in Italy is almost invariably portrayed as a tyrant and enemy of the nation's unity. In fact, this emperor of the Hohenstaufen dynasty is persistently accused of having tried to overpower the autonomy efforts of the Lombard communes. The struggle between the municipal authorities, on the one hand, and the empire, on the other, led to Barbarossa's invasion of northern Italy and to the coalition of the Lombard communes, sanctioned by the Pontida oath of allegiance on April 7, 1167. Armed conflict became inevitable and at the battle of Legnano on May 29, 1167, the far more powerful imperial army was utterly defeated. Beginning with the *Risorgimento* times, i.e. during the Italian independence struggles during the 19<sup>th</sup> century, the Pontida oath of allegiance and the battle of Legnano became two fundamental symbols of the Italians' will to become one nation. Literary works and even an opera by Giuseppe Verdi (entitled *La battaglia di Legnano*), certainly the most undisputed founding father of the Italian nation, were devoted to these remote medieval facts. Obviously, Barbarossa was cast as the villain and stigmatized as the ancestor of all the treacherous rulers of German origin – above all the Habsburg dynasty – that dominated Italy over the centuries. Thus, the emperor Frederick also became the metaphor of the Austrian domination in the peninsula following the Congress of Vienna (1815). In short, at the time, speaking about Barbarossa implied the Austro-Hungarian occupation in Italy.

However, to prove how multifaceted the truths concerning the past can be, we need to add a footnote. About 130 years after the Italian national State was formed (1860), the Lega Lombarda, which has notoriously federalist, if not separatist views, and therefore challenges the legitimacy of the present unitary State that followed the *Risorgimento*, was founded. All the symbolic apparatus of the Lega Lombarda (assimilated with the Lega Nord at present) again derives from the above-mentioned facts. Pontida has become the classic site for the movement's assemblies and its charismatic leader's favorite tribune for his most important general policy statements. The *Carroccio*, i.e. the oxen-pulled cart on which the Lombard communes hoisted their insignia during the battle of Legnano, has become the movement's current emblem. In this case, Barbarossa remains a tyrant and a sinister figure with the sole difference that nowadays he is the symbol of the corrupt unitary centralism, or, in Umberto Bossi's own words, of *Roma ladrona* (Rome, the thief).

## 6.2 The Past in the Present

Historical anthropology as *science du présent* highlights that the past not only belongs to the past but also acts heavily upon the present, since specific social actors can actualize it. In other words, the past can be more or less intentionally mobilized, or, better yet, activated in the present. Such a mobilization or activation can occur for specific reasons. For example, it could take place to accent a certain identity or a given feeling of belonging; to convey a metaphoric or symbolic message of hostility or friendship to other actors; to steady positions of power or relations of social inequality; to rebel against reputedly unacceptable political and/or socio-economic conditions, etc.

What has been defined as the actualization of the past is worth being illustrated by a factual example. At the end of the 17<sup>th</sup> century, Poland lost its independence that had lasted seven hundred years. The country was occupied and divided into three parts assigned to Prussia, Russia, and Austria respectively. The painful dismemberment process incited a resolute resistance that culminated in the ill-fated uprising led by Thaddeus Kosciuszko (1794 –1795). The revolt was repressed with a lot of bloodshed mainly because of the brutal intervention of the Russian troops under the command of General Suvorov. A lesser-known fact is that Kosciuszko on April 4, 1794 unexpectedly defeated the Russians at the battle of Raclavice with the momentous assistance of spirited but ill-equipped peasant forces. The Poles consider this rather marginal wartime fact as the most glorious event of the entire uprising. Almost two hundred years later, at the height of protests organized by the rural wing of *Solidarnosc* – that is, some months before General Jaruzelski came in power in December 1981 and just when the threat of a Soviet invasion was impending – a large rally was organized at Raclavice in which participants, dressed as late eighteenth-century Polish peasants, held corresponding banners bearing the 1794 motto “feed and fight.” With this actualization of the past, the rural wing of *Solidarnosc* clearly meant to convey the following message: Just like the peasants who fought along with Kosciuszko, Polish farmers, i.e. the most authentic part of society and the least contaminated by socialism, are ready to feed and protect Poland, should there be an intervention from the usual invaders, namely the Russians.

Of course, this case is quite remarkable and, given the charismatic aspect of the rally, may be considered an exceptional event. However, we must immediately add that the actualization of the past can creep into countless aspects of our everyday life, especially in a period which, despite globalization, seems to be turning increasingly into an epoch of memory. Historical exhibitions, heritage conservation policies, commemorations with their specific rituals and cults, monuments, the names of city streets, the representations of personages and events on banknotes, etc. are *lieux de mémoire* (as the French historian Pierre Nora called them) and should all be regarded as cases of actualization of the past, of which we are usually not even aware. Moreover, just as often we don’t realize that these cases of mobilization of the past, apparently banal and commonplace, suggest and at times impose a specific kind of truth that is submitted to us as the only truth.

If we accept the assumption of the actualization of the past in the present, we need to ask ourselves the following questions.

- Who are the managers that oversee the past?
- How do specific social actors use past events, i.e. what means do they have?

- How is the past re-elaborated, reinterpreted, manipulated or utterly re-invented?
- How are facts selected, i.e. which events are magnified and which are diminished or omitted?
- What reasons underlie these choices?

These questions, which in our opinion are essential, will be analyzed more in detail when they come up in the next sections.

### 6.3 Antagonistic Truths or the Politics of Symbols

The previous reference to the different representations of Emperor Frederick Barbarossa in Germany and Italy was intended to provide a case in point. The two historical "truths" have never been closely connected and therefore, though contradicting each other, have never become truly antagonistic. There are other cases, however, in which two or more divergent, if not opposite, truths appear simultaneously and become the target of heated ideological discussions among intellectuals and of political contentions among the ruling classes of a country or of two or more States. In most cases, intellectual and political elites manage the past and produce both the histories and the memories of a society, and consequently also the antagonistic truths. The latter are a specific social construction of reality that results from an accurate re-elaboration, reinterpretation, manipulation, or even reinvention of the past in the present. The "invention of tradition" is the term which the historians Eric Hobsbawm and Terence Ranger have coined to describe such constructions. Such an invention is never utterly arbitrary or spontaneous and should be interpreted as a clever modulation of the facts. Two antagonistic facts might even be based on the same events of the past.

To avoid being overly abstract, we will analyze an actual example. In this case, we have chosen the age-old controversy, burdened by interethnic conflicts and tensions, which divides Hungarians and Romanians on the Transylvania question. In fact, the entire political contention is based on two opposite views of the past. The Romanian position stems from the undeniable premise that Transylvania was part of ancient Roman Dacia and its inhabitants were Romanized autochthonous populations that should be regarded as the ancestors of present-day Romanians. Moreover, this truth's corollary is that a demographic continuity since Roman times can be ascertained in this region, according to some sources. Therefore, grounds for this claim are in the premise that Transylvania has remained continually populated for at least 2000 years. Such a fact has turned it into one of the nation's cradles, if not the cradle of the nation *tout court*. The Hungarian version is based on another thesis: i.e. that of a forsaken and uninhabited Transylvania. The Magyar nomad tribes of Ugro-Finnic origin reached the Pannonia plain and the Carpathian basin (present Transylvania) towards the end of the ninth century. They settled in this region specifically because it had been abandoned during the Roman Empire's decline and territorial diminution. Thus, Transylvania is a cradle of the nation for Hungarians as well.

The question at the core of the diatribe and resulting conflicts is the following: *to whom does Transylvania belong?* Obviously enough, there are two antithetic answers! Recent

history has made the situation even more complicated and dramatic because Transylvania, which for centuries was part of the Austrian Empire, was assigned to Hungary after the 1867 settlement that created that odd two-headed institutional contrivance known as the Austro-Hungarian monarchy. After WWI, the Treaty of Trianon (June 4, 1920), which decreed Hungary's disconcerting defeat (as part of the Central Empires) and rewarded Romanian intervention at the side of the winners, granted Transylvania to Romania. Other than the WWII boundary revision conceived by Hitler, the ephemeral overlord of Central and East Europe at the time that gave Transylvania back to Hungary, the situation has endured to this day. If for Hungarians the loss of Transylvania is a far from overcome, grievous, collective trauma, the attribution of this region to the Romanian national State instead incites a strong feeling of national pride that is often openly performed through a specific policy of symbols, which, in turn, causes strong resentments among Hungarians, particularly in the Transylvanian minority.

Antagonistic truths concerning the past are used especially in territorial contentions in which boundaries are ill defined or have a variable geometry because they have almost constantly been shifted in the course of history. Therefore, antagonistic truths and the principle of territoriality are frequently linked. We should always remember that an appeal to a historical right, the so-called right of the first-come, generally legitimates a territorial claim. However, this implies dealing with the past to give credence to one's requests in the present. The clash between two antagonistic truths regarding who reached a specific territory first is extremely dangerous for social cohabitation (especially among ethnic groups). In this case, the collective with a more plausible claim to being there for a longer time can easily obtain prerogatives, or even specific types of sovereignty, to the prejudice of the other. Given such political implications of the antagonistic truths, it is far from surprising that in Kosovo –before, during, and after the war- antagonistic truths have often been used to corroborate territorial claims by both the Serbian and the Albanian camp. Similar discourses based on the confrontation between two historical truths have repeatedly flared up the Israeli-Palestinian conflict. We need only recall the bitter dispute regarding the territory of Jerusalem, and above all of the so-called Holy Sites, which are believed to be so because of deeds that occurred in a now distant past.

Antagonistic truths often bolster the community spirit or the ethnic or cultural identity of a group facing an actual or presumed threat from outside. At the same time, the ensuing contention tends to strengthen the ruling class' hegemonic status and therefore confers legitimacy to the elites. Usually the latter are interested in kindling the antagonism of the truths and thus in amplifying tensions and conflicts through a shrewd emphasis, or a crafty re-evaluation, or again by deliberately omitting certain facts of the past. In such cases, there is frequently a conflicting policy of symbols ending in a symbolic battle over the *lieux de mémoire*, for example, in Cluj/Napoca, the capital of Transylvania, where the name itself gives rise to tensions between Hungarians and Romanians. In fact, Napoca is the city's Roman name and the demonstrative use of this ancient name on road signs and maps is an attempt to legitimate the Romanian truth of demographic continuity between Roman times and now. Moreover, in Cluj, where a relevant Hungarian minority lives, the nationalist mayor of Romanian origin has been trying for years (unsuccessfully until now mainly due to financial problems) to erect a copy of the Trajan Column in one of the city's main squares, i.e. the one with the Hungarian Roman Catholic cathedral and the monument in honor of Matthias I Corvinus, king of Hungary. This historical square is the paramount *lieu de mémoire* of Cluj's Magyar community and the mayor's intention is to heavily stress the

undeniable Romanian quality of Cluj in a place sacred to the rival nation. In turn, the rival nation is extremely reluctant to credit the mayor's historical truth, while strongly asserting its own truth instead.

Though all of this may appear irrational and ludicrous, the politics and potential war of symbols linked to antagonistic truths should be taken very seriously, because they are the most disruptive igniters in case of inter-ethnic and international tensions. We need only mention the disorders that broke out in Cambodia because a Thai actress rashly remarked that the temples of Angkor Wat had been erected by her nation ages ago. Granted that various factors underlie these uprisings; they were fired, however, by the above-mentioned comment.

We should recall that the past confers excellence and thus legitimacy to a social group and/or political community (a nation, for example). Whoever owns a past can count on a considerable symbolic capital employable in the present. This capital based on the past is a crucial tool in what may be called the struggles for recognition: for example, when a minority tries to assert its identity in contraposition to a majority's one or, inversely, when a majority refuses to accept a minority group's identity claims. On this subject, there are plenty of examples in which the clash of antagonistic truths implies a symbolic struggle for recognition. In Riga, for example, there has been a symbolic struggle of this sort lately concerning the statue of Mihail Bogdanovic Barclay de Tolly, which has resulted once again in worsening (after a period of relative calm) inter-ethnic relations between members of the Russian minority and those of the Latvian-entitled nation. Russians insist that the statue must stay where it is near the Orthodox cathedral, a strategic place in the city center, while the municipal administration would rather move it elsewhere. The gist of the controversy is that, for the Russians, Barclay de Tolly is an important national hero and was a great strategist in the war against Napoleon (consider his statue near the Kazanski Sabor of St. Petersburg). For Latvians, however, he is a governor who, at one time, ruled over Riga and Latvia in the name of the oppressor: the Russian czar. For Russians, Barclay de Tolly is the symbol of their legitimate presence in Latvia and their right to recognition as a minority. For Latvians, the same personage is a symbol of the foreign domination and therefore the disavowal of their own nation.

## 6.4 Concluding Remarks

These observations have sought to demonstrate that the purpose of dealing with the past cannot simply consist in the reconstruction of a single, univocal truth regarding past events and processes, particularly those with strong criminal connotations such as the Holocaust, massacres in Rwanda or in Sierra Leone, or ethnic cleansing in Bosnia or Kosovo. If so, the judicial tools we already have, i.e. a judicial inquiry and a subsequent appeal to the criminal code, would be sufficient and the reasoning and contribution of historical anthropology would become utterly pointless.

We have striven to highlight the symbolic aspect of historical "truth" which, because of its contentious nature, can easily degenerate into bloody conflict. Apart from the symbolic sphere, geopolitical reasons and economic interests are, of course, significant factors. Yet, an analysis focusing purely on materialistic determinants would not suffice. After due

consideration, Max Weber and Georges Balandier came to the conclusion that physical violence or purely rationalistic reasoning alone cannot be used to achieve one's own material needs. It is the symbolic sphere that generates the necessary legitimacy to which Weber refers to in his sociology of power and domination.

The case of antagonistic truths with respect to even a distant past is a good illustration of the powerful role which the symbolic sphere may assume as a potential source of conflict. Its disruptive potential is something which must be taken into serious consideration when discussing conflict prevention, peace-building, or reconciliation. In fact, there are several examples in which the simultaneous political mobilization of antagonistic truths has become the ideological apple of discord and, consequently, the historical antecedent of tragic events that have traumatized entire populations. Strategies for prevention, peace-building, and reconciliation, though vague and double-edged terms, should not be limited to the most violent stage of a conflict, but must be seen in a wider context. From a pragmatic point of view, dealing with the past means intervening in the difficult task of regarding the contraposition of truths in relative terms. At this point, we need to add that there are producers (namely, political and intellectual elites) and consumers (namely, the citizenry) of antagonistic truths and that the transmission belt (or the resonance box) of these opposing views are the educational system and mass media. The former must be regarded as fundamental to the identity construction of a social group or political community. Consider the major role of schools in the development of nation states. The teaching of history in these institutions is crucial to the way in which antagonistic truths are passed on, promoted, and perpetuated. Mass media, in turn, are powerful boosters and influential guarantors of such truths.

Beyond the significant juridical-institutional implications, any intervention with the intention of creating a more dialectic, and less antagonistic, historical culture should be aimed at these two areas. We must be fully aware though that a historical culture should never become an artificial compound of harmonious representations and automatically consensual practices, because we would then be dealing with a hypocritical endeavor based upon political correctness. When we can look at the past as a process of both contestations and confluences – as a Malaysian historian aptly stated – , we will move closer to a culture that is no longer focused on incompatible antinomies emerging from the past and based on the antithesis between *us*, the included, and the *others*, the excluded. Dealing with the past in the practical sphere linked to prevention, peace-building, and reconciliation processes should lead to a new view of a country, a region, or a society's history by stressing whatever unites, without underestimating or refusing to admit the differences, because this endeavor cannot occur without the negotiation process of identities, affiliations, and belonging.



## 7 Dealing with the Past in Countries in Transition

### The Past as a Challenge to History and Law

Lidija Basta Fleiner

This article develops six theses which focus on the critical structural paradoxes faced by transitional societies, particularly in South-Eastern Europe, when trying to deal with the past.

#### 7.1 The Perspective of a Secure Future

Thesis 1: Given that dealing with the past implies the re-construction of the past within a present-future-complex, a look backwards as a result of collective critical self-reflection is viable only if coupled with a look forwards, i.e. if there is a commonly shared feeling that the future is guaranteed.

It is well known that many of the South-Eastern Europe countries in transition, notably those from the Western Balkans, have not yet reached a point of no return with respect to viable market economies and sustainable constitutional democracies. A historically unique case of simultaneous reforms in terms of nation-state building, market economy, and democratization has resulted in a mutual blockage or obstruction of reform processes. The immediate consequence is that policy makers, often enough, have been surprised by and unprepared for the effects of the strategic decisions they had taken. Against such a background, politics are unable to communicate to society a feeling of security and a perspective for the future. This problem exists also at the initial drafting stages of a new constitution in transitional states which are caught between two equally important and often equally lacking preconditions for democratic consolidation: the need to establish both democratic and effective government at the same time.

In addition, before democracy becomes possible, a state must exist! In cases in which the state issue remains open or is "solved" in a way that obviously does not provide a constitutional basis for viable state decision-making (e.g. Bosnia and Herzegovina, Serbia and Montenegro, pending status of Kosovo), key state and constitutional decisions are trivialized as issues of survival against the background of dirty day-to-day trade-offs among major political actors. Moreover, in terms of corruption, the argument could be made of an outright *coup d'état* in situations, in which the actors, who are in addition often directly connected with organized crime, prejudice the constitutional rules and laws to their own advantage. Not much imagination is needed in order to understand that such conditions are not conducive to an environment within society which would sustain a commonly shared feeling that the future is guaranteed.

#### 7.2 Collective Moral Indignation

Thesis 2: Collective moral indignation – as a pre-condition and way to deal with the past – is viable only within a society which has become sufficiently strong and coherent by having established common identity. In consequence, a transitional society with a still on-going

nation-building process remains structurally unprepared to disassociate itself from the past by facing it, since a common denominator for "itself" has yet to be defined.

A collective spirit of moral indignation is a pre-condition for dealing with the past, especially in cases of ethnic wars and war crimes. Reconciliation should be seen by the majority within a given society as a process of self-liberation and as a demonstration of strength when it involves a commonly held sense of shame for crimes committed "to honour sacred ethno-national interests." Regrettably, however, it is more than obvious that the Balkans are not yet prepared for such a moral catharsis. This again should not be taken as a proof that people there are born-nationalists and –fascists! Let us remember how many decades the German nation needed to face the holocaust or how long it took to the French to openly talk about the crimes committed in Algeria.

The latter two cases, in fact, show that only a strong, self-confident nation can face the dark sides of its history. In most of the newly founded (some even re-founded!) multi-ethnic states within the Balkans, nation-building properly taken has not yet started. The principle of having strictly separated and ethnically defined heroes and criminals respectively remains, in most cases, the only "basis for a common identity." Unlike in Poland or Hungary, for example, the process of drafting a constitution in the countries concerned, as explained above, could not until now articulate a constitutional consensus as an avenue to a democratic consensus. No "constitutional patriotism" in the sense of Habermas is feasible as initial grounds for a common identity. In such circumstances, it remains an illusion to expect that "there should not be the feeling of victory on the side of the victims as against the perpetrators."

### 7.3 The Reconstruction of History

Thesis 3: Given that dealing with the past in fact means to revisit and reconstruct history, in a transitional multi-ethnic society, the reconciliation process faces a paradox expressed in the need to retrospectively identify the manipulation of history, whereas parallel ethnic histories can be transcended only by projection into the future.

To start with, the communist phase in the history of all transitional countries in Central and Eastern Europe was a paradigm of the manipulation of history, the purpose of which was to introduce political mechanisms of exclusion on an ideological base as a major constitutive principle of these societies (one party system embraced by a quasi-state structure). However, multi-ethnic transitional societies face an additional problem which seems to be an un-surmountable structural paradox in terms of pre-conditions to deal with the past. The dissolution process of Yugoslavia convincingly demonstrates that each ethnic group, in the meantime, has undertaken its "own" and "authentic" re-writing of recent history and that each ethno-nation claims to have been excluded, as such, from major decisions and thus a victim of the communist regime!

As a result, for example, the Truth and Reconciliation Commission founded by the Yugoslavian President V. Kostunica in 2001 was pre-destined to fail: Those who thought that the Commission should concentrate on the truth about crimes committed – left; those who claimed that the truth means first of all to identify the historical context and historical

reasons for the crimes – remained and have not yet published the results of their investigation. In the meantime, it has been decided that the new state of Serbia and Montenegro will not further finance the Commission work. Another example to illustrate the same paradox: When it became clear that FR Yugoslavia would lose its case against Bosnia and Herzegovina in the International Court of Justice regarding the jurisdiction of the latter for the state reparations for the crimes committed, there were those who claimed that the Yugoslav expert team was not well composed, since it had only lawyers and no historian. (Yugoslavia has, meanwhile, withdrawn its complaint against BiH, hoping to reach a bilateral political solution.)

This “retrospective history” would have undoubtedly remained one of the hardest nuts to crack even if ethnic wars and ethically “cleansed” war crimes had not taken place in the meantime! It dominated constitutional debate on the eve of dissolution and it was the main reason for the successful use of the constitution as an instrument in dissolving the common state.

In particular, as the case of Serbia shows, the lack of a “constitutional culture” and of a generally positive attitude towards the constitution as a fundamental legal basis plays very much into the hands of those political actors who see a long and delayed constitutional reform as a chance to neutralize a lack of democratic legitimacy and to postpone elections. In such a situation, it becomes even less probable that the coming constitutional revision, imposed by the Constitutional Charter of Serbia and Montenegro, will produce a coherent design for constitutional democracy as a first step toward civic nation-building. Put differently, there is no hope for transcending parallel ethnic histories in near future.

## 7.4 Legal Responsibility

Thesis 4: Legal responsibility as an instrument of dealing with the past persists as a challenge to law in all those cases where the paradoxes underlying the rule of law demonstrate a structural tension between legality and legitimacy.

“We hoped for Justice and we got the rule of law instead!” This statement by a dissident from the former GDR is a good illustration of a major paradox of the rule of law in transitional societies, that of a structural tension between legitimacy and legality. Whereas in traditional Western constitutional democracies the principle of the rule of law inherently postulated legality as a ground for legitimacy, in the Eastern European context of transition there is no such intrinsic identity between legality and legitimacy. On the contrary, there may well be an intrinsic tension between the two. The latter is certainly the case with respect to the introduction of a market economy and the curtailment of welfare rights, but even more so in connection with the retroactive criminalization of the acts of the old regime (retrospective justice and the problem of retroactivity effect).

The major underlying dilemma refers to the difference between the rule of law as an aim of transition, on the one hand, and as a method of transition, on the other. Due to the unique case of simultaneous, mutually blocking structural reforms, already mentioned, transitional societies are supposed to produce both the pre-conditions and the effects of the rule of law at the same time. In terms of a democratic constitution, this means that the constitution itself is expected to produce its own pre-conditions!

In other words: Is the rule of law as a method or form of transition at all feasible, and if so, under what conditions? How can democratic governments deal with the injustices of their predecessors without sacrificing the rule of law?

This is not simply a political problem for incumbent politicians to solve, but rather a problem of a historical and structural nature. Namely, unlike Western liberal democracies, ex-communist states, particularly in the region of South-Eastern Europe, developed a traditional relationship between a weak society and a strong quasi-state, i.e. the communist authoritarian regime. In order to enforce the rule of law in societies struggling with insufficient functional differentiation, weak legal traditions, and modest economic growth, it is again the state which has to encourage a liberal spirit and, consequently, to act as deliberately self-restricting. However, let us not forget what has already been said: The state in transition, in particular in South-Eastern Europe, is a weak state, caught up in the most trivial day-to-day trade-offs and calculations of *realpolitik*.

Given the above-described historical and social context for the rule of law, any policy of legal responsibility which attempts to come to terms with the past through the establishment of justice will inevitably have to face major difficulties and obstacles, such as:

- Dealing with the past in terms of legal responsibility aims at a clear differentiation between legitimate and illegitimate in order to prevent its repetition. However, this critical aim of dealing with the past falls short of commonly accepted terms of legitimacy in a great number of transitional societies of South-Eastern Europe, particularly in former Yugoslavian republics;
- The legal responsibility of perpetrators is immanently related to the establishment of the truth. And yet, the establishment of the truth cannot be reduced to legal proceedings: Legal truth is always linked to individual cases!

In terms of the rule of law, a clear point of distinction in dealing with the past between retribution and retaliation is demonstrated when a democratic constitutional state treats its enemies and the enemies of open society fairly and justly. However, the transfer of Slobodan Milosevic to The Hague, for example, although *fully legitimate* both for the majority of the population in Serbia and for the international community, had little to do with rule of law standards – it simply was unconstitutional. On the other hand, there was a general feeling in Serbia that universal justice had triumphed at last in a cynical manner, since Mr. Milosevic was treated in the same way that he had treated his enemies. Nonetheless, it is worth remembering what H. Arendt wrote in *The Human Condition*: "When forgiveness is not possible at all, or is possible but not sufficient, *punishment* is the only acceptable alternative to revenge!" Punishment, as such, is a category of the rule of law. Put differently, the legality of proceedings is, in principle, a *sine qua non* for justice, which – again – must be seen to be done.

## 7.5 Democratic Constitutionalism

Thesis 5: Both “international constitution-making,” which often imposes unviable solutions, and the lack of effective guarantees for the international rule of law inherently challenge the credibility of legal responsibility as an instrument for dealing with the past.

The preceding discussion on the rule of law in transitional countries argued that legal responsibility in dealing with the past can only successfully work if the legal framework is legitimate. As mentioned above, Western constitutional democracies, unlike countries in transition, build upon an inherent identity between legality and legitimacy. More importantly, with respect to democratic constitutionalism, legality as such is immanently legitimate only under two, equally indispensable conditions: 1) that legality relies upon a consensus of those concerned (government by consent); and 2) that it is universally applicable (legal security and equality before the law). These conditions have not been fully accommodated in the cases of “international constitution-making” and the international rule of law respectively.

To start with, in the last ten years, the internationalization of national constitution-making has been taking place, i.e. constitutional arrangements have been promoted and mediated by the international community as part and parcel of peace agreements (Dayton Agreement, Ramboulet Agreement, East Timor) or mediation (Serbia and Montenegro, Cyprus). In all of these cases, we have been witnesses of constitution-making without a process of consultation with the representatives of different social sectors. In consequence, such constitutions in principle cannot constitute polities, since they do not build upon a democratic consent. Instead, this manner of “constitution-making” produces, as a rule, constitutional fictions and unviable solutions and these give no reason to the concerned population to take constitution and law as such seriously or to believe that their common future remains guaranteed. (In this respect, it would be, for example, interesting to explore the structural differences and similarities between an unviable constitutional temporary measure such as the Agreement on Principles of Relations between Serbia and Montenegro, which was mediated by the EU and celebrated as “successful” by the international community, on one side, and those pertaining to the supra-national constitutionalism of the EU, on the other!)

The international rule of law is based upon international law and upon the political symbolism of human rights as immanent for legitimating international law. Globalization has already posed a principal question of effective legal control for those global actors whose decision critically affects human rights. The credibility of the principle of universality of human rights directly depends upon effective guarantees against their violation by international actors. Namely, the new models of peace-keeping and peace-enforcement rely more and more upon global (UN) and regional actors (NATO, EU). The international rule of law has been challenged in cases when representatives of the international community remain, in principle, legally unaccountable in terms of international law for decisions which affect the human rights of the local population. Thus, although Kosovo, according to UN Resolution 1244, is legally still within FR Yugoslavia, now Serbia and Montenegro, the UNMIK has made clear that they will accept neither the jurisdiction of the European Court for Human Rights once Serbia and Montenegro will have joined the Council of Europe, nor do they feel themselves bound by the Framework Convention on Minority Protection which has been ratified by FR Yugoslavia. The problem becomes even more

serious when the global actors involved are international financial institutions. In this case, the mechanisms for judicial review in order to ensure that there is no violation of human rights are “sadly lacking.” Such global actors operate outside the established framework of international human rights law and no particular judicial or other authority can hold them accountable.

As a result, those who are acting and intervening on behalf of international law have often, by their very actions, put its authority in question! Undoubtedly, this is not a good message for a concerned local population in the Balkans which is expected to embrace international justice as a catalyst in dealing with its own past of injustice and grave human rights violations, including war crimes. In this respect, the attitude of the majority of the population in Serbia towards the Hague Tribunal can be taken as a paradigmatic example. The problem of this tribunal lies for them not only in the fact that it is difficult to make a predominantly common-law procedure at the court understandable to a country which belongs to a continental legal tradition with a totally different manner of proceedings before the court. First and foremost, the problem lies in the way in which the Tribunal, especially its Chief Prosecutor, communicates its messages and how they are perceived by the local population – as biased, one-sided, and with the intention of proving the collective guilt of Serbian nation. There have been a number of public gestures demonstrating an incredible lack of professionalism: For example, upon the arrival of Mr. Milosevic in Hague, the *Porte-parole* of the Chief Prosecutor said in a press conference that Mr. Milosevic would certainly have a fair trial and the opportunity to prove his innocence! Furthermore, people are not blind to both the obvious selectivity of international justice (cf. Chechnya, alleged war crimes committed by NATO) and the timing of the indictment during the Kosovo war since most of those, who negotiated with S. Milosevic in 1995 and 1996 and celebrated him as factor of stability and predictability in the Balkans, should have known about Srebrenica much before 1999.

## 7.6 Swiss Foreign Policy

Thesis 6: The decision whether Swiss foreign policy should engage in the processes of dealing with the past in other countries should primarily build on an assessment of whether Swiss internal politics can be seen as a related point of reference. Accordingly, Swiss foreign policy should, first of all, sustain decentralisation and federalisation strategies for multi-ethnic societies as part of structural reforms which, in turn, would provide the environment for dealing with the past.

When doing so, the Swiss foreign policy:

- Should always start with pilot projects;
- Need not proceed as a visible foreign actor, but should rather sustain internal processes of democratization and the rule of law.

The last option would imply that Swiss foreign policy additionally should take the following lessons learned into consideration:

- It should not ignore structural obstruction effects caused by reforms and it should sustain the development of the pre-conditions for democracy and human rights (for example by sustaining social policy programs);
- It should support the state in its efforts to play a more effective role in the process of democratic consolidation. In this respect, where necessary, political conditionality should also be related to constitutional reforms.



## 8 International Norms and Dealing with the Past

Adrien-Claude Zoller

### 8.1 Introduction

In many cases, in the aftermath of a conflict or in a period called “transition,” the first political consensus among former enemies, belligerents, or adversaries consists in their agreeing to put human rights in parentheses. The cease-fire, the political conciliation, the peace accords are often negotiated among those who have committed the crimes. Priority is given to silencing the weapons, to political stability, but not to justice. The crimes have taken place under the cover of silence and the victims are ignored. Yet, not surprisingly, in many countries, including our own and our neighbors’, problems that are left un-addressed may re-emerge forty, even fifty years later.

Therefore, it is crucial to recall the international norms on this subject before undertaking any initiative for peace and reconciliation.

### 8.2 International Human Rights Law

Since the end of the Second World War, in the framework of the United Nations and other international organizations (such as the International Labor Organization and UNESCO) or regional organizations (such as the Council of Europe, the Organization of American States, and the Organization of African Unity), nation states have adopted numerous treaties referring to human rights.

#### The United Nations

The principal treaties negotiated and adopted by the member states of the United Nations are the two international conventions (economic, social, and cultural rights and civil and political rights) and the conventions on genocide, the status of refugees, apartheid (two), the elimination of racial discrimination, the elimination of discrimination against women, torture, the rights of the child, and the rights of migrant workers.

All of these treaties rest on two fundamental principles: equality and non-discrimination, which are confirmed in dozens of international declarations, sets of principles and minimal rules on specific themes (for example, freedom of religion and belief, conditions of detention, independence of the judiciary, forced disappearances, etc.). Since the international conferences on human rights held in Teheran (1968) and in Vienna (1983), the United Nations has reaffirmed another basic principle – the universality of human rights: All rights are equal, indivisible, and interdependent. The majority of the international instruments underline that their implementation depends on the independence and the impartiality of the judiciary and on the respect of the rights of all actors in society, especially of the defenders of human rights.

In numerous reports and resolutions, Special Rapporteurs and Special Representatives, commissions of inquiry, the supervisory treaty-based bodies, and more recently the Tribunals on former Yugoslavia and Rwanda have contributed in clarifying these international norms. Given the brevity of this overview, we cannot go into further detail here.

### **Non-Derogable Rights**

During – and sometimes even after – internal or international conflicts, the states involved stress the exceptional character of the situation in order to suspend the application of a number of rights. It is true that Article 4 of the International Convention on Civil and Political Rights (ICCPR) foresees the possibility of derogation, but many states forget that this is tied to precise conditions. The principle of proportionality is essential. Moreover, the same convention specifies that no derogation is possible for a whole series of rights under any circumstances, including situations of internal violence. The rights specifically mentioned include the following:

- The right to life;
- The right not to be submitted to torture;
- The right not to be held in slavery or servitude;
- The right not to be imprisoned for the non-execution of a contractual obligation;
- The right not to be made the object of retroactive penal measures;
- The right to be recognized as a person before the law;
- The right to the freedom of thought, conscience, and religion.

A reading of the international instruments in the field of human rights shows that nothing would justify that acts judged illegal in normal times and in situations of armed international conflict could be considered legal in situations of internal violence. It is worth noting that international humanitarian law is even more explicit in matters of principles and non-derogable rights.

## **8.3 The Importance of International Penal Law**

Until recently, the instruments of the United Nations only concerned offences and crimes committed by states. According to the current state of international law and conforming to the principles of national sovereignty and to the international responsibility of the state, only the state and its agents commit violations of human rights.

Yet, the mechanisms of control created by the United Nations depend on these same states. Generally, the lack of initiative or decision in face of grave and massive violations of human rights does not come from a lack of information, but the absence of political will. As judges and involved parties, the states take their decisions within the organs of the United Nations according to their political and economic interests. Even the supervisory treaty-based bodies, although useful for implementation purposes, can see their initiatives blocked by budgetary devices. In other words, the states can manage their own impunity.

How to explain the growing importance of international penal law, which saw a rapid development in the 1990s? In making individual authors of crimes responsible and liable to

punishment on an international level, every holder of a public office (just like the member of a non-state armed group) now knows that he (or she) can no longer depend on a state or a group of states to protect him (or her) from international prosecution. Contrary to the Nuremberg and Tokyo Tribunals, created by the victors to prosecute the vanquished (which did not prevent the two tribunals from making progress in international law), the Tribunals on former Yugoslavia and on Rwanda were established by the Security Council in accordance with the UNO Charter which has been ratified by practically all the existing states. It is significant in this context that their mandates extend to all actors in both conflicts. In spite of the slowness and weightiness of their procedures (But should not one take a maximum of precaution when creating judicial precedence?), the two tribunals have already provided an interesting case of jurisprudence that should enable considerable progress to be made on the international level.

That the two tribunals were created for former Yugoslavia and Rwanda, and not for Uganda, Vietnam, Cambodia, El Salvador, or Guatemala and that the Security Council is trying without much success to do the same for Cambodia, Sierra Leone, and East Timor, but not in other cases, can be explained by the fact that it is (still) states that make the decisions. This will certainly change (in part, only if the United States manages to impose its conditions) with the International Criminal Court.

## 8.4 Crimes According to International Law

Besides the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) which applies to a specific situation, there are three categories of crimes which qualify as crimes according to international law in the many conventions adopted in the framework of the United Nations and during the international conferences on human rights: genocide, war crimes, and crimes against humanity.

### Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide (1948) describes genocide, "whether committed in time of peace or in time of war" (Article 1), as an act or acts "committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group" (Article 2). These acts include genocide, conspiracy to commit genocide, the direct and public incitement, attempt, and the complicity in genocide (Article 3). This definition unfortunately excludes politically motivated genocide (for example, during the genocide in Rwanda the Hutu regime also assassinated thousands of their Hutu opponents).

### War Crimes

Defined in the "Statute of the International Military Tribunal in Nuremberg" (1945) and confirmed by resolutions of the General Assembly (1946), war crimes constitute notably the grave infractions enumerated in the Geneva Conventions in August 1949 for the protection of the victims of war. Article 3, common to the three Geneva Conventions of 1949, protects persons who do not directly participate in the hostilities. These provisions clearly belong to customary international law. The diplomatic conference at Rome (June 15 – July 17, 1998), which represented a major step in the elaboration of international penal law and human rights, also marked an advance on the level of humanitarian law. The statute of the

International Criminal Court ("Statute of Rome") represents, in effect, the first major multilateral treaty that extends the codification of war crimes to acts committed in non-international armed conflicts.

### **Crimes against Humanity**

In addition, Article 7 of the "Statute of Rome" broadens and specifies the definition of crimes against humanity to include the following violations:

- Murder;
- Extermination;
- Enslavement;
- Deportation;
- Imprisonment or any other form of grave privation of physical liberty in violation of the fundamental provisions of international law;
- Torture;
- Rape, sexual slavery, forced prostitution, forced sterilization, and any other form of sexual violence of comparable gravity;
- Persecution of any group or identifiable collective for reasons of a political, racial, nationalist, ethnical, cultural, religious, or sexist nature;
- Forced disappearance;
- Apartheid;
- Other inhuman acts of an analogous character intentionally causing widespread suffering or grave attacks on the physical integrity or the physical or mental health of a person or persons.

We have noted elsewhere that the Statute does not define crimes against humanity in connection with armed conflict. Thus, it dissociates these crimes from any type of armed conflict.

### **Non-Applicability of Statutory Limitations**

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) declares that no statutory limitations pertain to war crimes and crimes against humanity, "irrespective of the date of their commission" (Article 1), that this applies to the "representatives of the state authority and to private individuals" (Article 2), that the state parties should undertake all measures necessary to enable the extradition of the guilty (Article 3), and that they "undertake all legislative or other measures necessary to assure that statutory or other limitations" shall not apply to these crimes (Article 4).

## 8.5 The Question of Impunity

Impunity for the perpetrators of grave and massive violations of human rights is too widespread, its facets too numerous, and its contextual diversity too broad for anyone to treat this question in an exhaustive manner in such a short paper.

During the 1980s, an intense debate took place in the United Nations on the measures taken to promote national reconciliation after a military dictatorship and peace after an armed conflict. At the center of these discussions were the initiatives undertaken by the "new" democracies of Latin America. Was it permissible for criminals to grant amnesty to themselves? Could anyone conclude judicial inquiries or legal proceedings without having first initiated them, by simply drawing a line through the past? How can you grant amnesty to those who have not yet been judged? Is it possible, as a consequence, to deny victims the right to obtain reparations?

In 1985, the Special Rapporteur to the UN Sub-Commission, Mr. Louis Joinet, submitted his final report on amnesty. Acknowledging the fact that every judicial system provides for the possibility of putting mechanisms of impunity into place (statute of limitations, measures of pardon, amnesty, principle of opportunity in proceedings), the report studied the justification and finality of these measures and proposed a certain number of minimal conditions, which should be respected.

In 1991, the Sub-Commission requested a study on impunity. During the 49<sup>th</sup> session of the Sub-Commission in 1997, the same French expert, Mr. Louis Joinet, submitted his final report on the question of impunity for perpetrators of violations of civil and political rights. He proposed a collection of 50 principles presented in a synoptic fashion covering the three fundamental rights:

- The right to know (general principles, non-judicial commissions of inquiry, preservation and access to archives for the purpose of establishing violations); this concerns the right to the truth not only for victims and their relatives, but also for the public; for the state, the counterpart is the duty to preserve (historical) memory;
- The right to justice (general principles, division of competency between national, foreign, and international jurisdictions, restrictive measures allotted to certain legal regulations and which are justified by the struggle against impunity); every victim should be able to assert his or her rights while enjoying the benefit of an equitable and efficient appeal;
- The right to reparations (general principles, individual measures of reparation, measures of general significance or collective measures, guarantee of non-renewal of the violations); the state should solemnly recognize its responsibility and guarantee that such things will never reoccur; it should, for example, dissolve paramilitary groups.

The Joinet report and that of the Secretary General on the comments received from states and organizations concerned were adopted in 1999 by the UN Commission on Human Rights (resolution 1999/34). The general principles formulated by Mr. Joinet still need to be adopted by the UN General Assembly. The work of more than a decade within the United

Nations on the question of amnesty reminds us that the major criterion of a well functioning governmental administration is a judicial system desirous and capable of defending the integrity of the human person and that impunity undermines the primacy of law. A number of thematic Rapporteurs of the Commission on Human Rights have elsewhere shown that the persistence of forced disappearances, arbitrary detention, torture, extra-judicial assassinations explain to a great extent the general climate of impunity existing in numerous countries.

Impunity represents the principal obstacle to the implementation of norms adopted by the international community in favor of the respect of human rights. Therefore, no policy of peace and reconciliation should include any elements of impunity.

## 8.6 The Right to Reparations

The right of victims to reparations belongs to the same category as the question of impunity, because it is not only a question of fairness, but also a means of dissuasion.

According to customary international law, the right to restitution, to compensation, and to rehabilitation is intimately tied to the principle of state responsibility. It refers to both individuals and to collectives. In the United Nations, beyond the norms contained in several juridical instruments, the question has been treated by several supervisory treaty-based bodies, notably on the level of complaint procedures. Since the eighth Congress on the Prevention of Crime, held in Havana in August 1990, the Inter-American Court of Human Rights, the European Court, and the African Commission on Human and Peoples' Rights also have a clear jurisdiction on the subject.

In its resolution 1988/11, the UN Sub-Commission recalled that all the victims of flagrant violations of human rights ought to have the right to obtain reparation, to be compensated equitably, and to receive the necessary means for their complete rehabilitation. In 1989, it instructed the Dutch expert, Mr. Theodoor van Boven, to prepare a study in order to clarify certain fundamental principles and directives on the subject. The study put a question, which had been neglected at the United Nations, back into the center of debate, namely the fate of the victims. In 1993, Mr. Van Boven presented his final report on the right to restitution, to compensation, and to rehabilitation of victims of grave violations of human rights. After having analyzed the international norms, the work of specialized international agencies, and the initiatives undertaken by several states, he underlined the irreparable character by nature of grave violations and he concluded that the measures taken were far from being proportional to the damage suffered; that the majority of persons directly concerned demanded the truth and insisted on their dignity; and that it was thus crucial to establish clearly the responsibility of the perpetrators of grave violations of human rights.

In the appendix to his report, Mr. Van Boven submitted a set of principles and directives concerning the compensation of victims. The proposal was examined in committee in 1994 and 1995 and the Special Rapporteur presented a revised version of fifteen principles in 1996, which the Sub-Commission then passed on to the Commission on Human Rights. The violations of humanitarian law were included in the submission. In 1998, the Commission appointed an expert, Mr. Chérif Bassiouni, to revise the proposal based on the comments of the states. The text should be submitted shortly to the General Assembly.

## 8.7 Elements of a Swiss Policy

When reflecting on the principle elements of a Swiss policy that would enable it to deal (better) with the past, the following points should be highlighted:

- The struggle against impunity, which includes the realization of the rights of victims to reparations, ought to be the focus of concern in the elaboration of any strategy of contributing to the process of peace and democratization;
- International penal law, even if its rapid development is a cause for rejoicing, does not constitute a panacea. The system, which is being put into place, is one based on subsidiarity, which means intervention on an international level when the national mechanisms do not offer an adequate response with respect to the obligation of a government to implement international norms;
- Capacities on the national level should therefore be strengthened. As a step towards the objective of good governance which constitutes an important criterion for Swiss technical assistance, it is advisable to place a larger priority on strengthening the judicial system, on the support of commissions of inquiry, of national institutions for the promotion and protection of human rights, and, especially, on organizations of civil society, in particular organizations representing victims and organizations defending human rights;
- Strengthening national capacities implies also a concern to take the views and needs of victims and concerned populations as a starting point, rather than arriving on the scene, as international organizations often do, with finished "products" which are completely indigestible.

As for the diplomatic initiatives undertaken by Switzerland to promote peace, notably by means of dialogue, good offices, and mediation, the following points should also be taken into consideration:

- Priority for human rights and for strengthening national capacities (cf. above);
- Credibility of initiative. It is certainly correct to stress the positive aspects of the Swiss dossier (a country without a colonial past, strong action on the level of humanitarian law), but one should not neglect another aspect, namely that dealing with the past is indissoluble from dealing with the present. The role played by Switzerland in certain negotiations with the World Trade Organization will sooner or later pose painful questions about the past to this country;
- This illustrates the need for coherence in Swiss policy. Let us recall, for example, that the treatment of refugees and the return of rejected applicants for asylum to countries where there are massive violations of human rights is contrary not only to the international obligations of Switzerland, but also to its foreign policy. Even before joining the United Nations, Switzerland supported as a co-author (to its credit) numerous resolutions condemning grave violations of human rights in the very same countries that the Swiss Ministry of Justice and Police certified as "safe." Coherence implies a more pronounced role for the Swiss Foreign Ministry in coordinating the formulation and gestation of Swiss foreign policy.



## 9 Memory, Money, and Law

### How to Come to Terms with the Injustices and Atrocities of the Second World War

Jakob Tanner

#### 9.1 Introduction

To mention memory, money, and law in one breath might provoke irritation. It is my contention in this paper that the concept of restitution is able to link these three different notions together in a coherent way. Starting with the case of Switzerland, my presentation will explore the attempt to negotiate the wrongs of the past in a more general way and then focus on the financial dimension of historical justice.

The topic is strongly linked with concepts of time and temporality. The idea that history can be reduced to narratives of the past is completely misleading and obscures the fact that a choice between retro- and pro- has to be made. Whereas a retrospective standpoint aims at rectifying historical injustices, thereby particularizing the problem and expressing it exactly in terms of the past which should be overcome, the opposite position is prospective, future-oriented and tries to strengthen a post-national consciousness of the disasters of the past. From this viewpoint, the challenge is to foster a transnational awareness of ethical standards and political obligations towards human rights in order to prevent (or to limit) future crimes, injustices, and offences. Such a cosmopolitan memory tries to disconnect the ominous link between the willingness to pay restitution to victims (who are outside the national community) and the restoration of the community's own "national honor." An alternative approach should certainly be based on an acknowledgement of history, but, at the same time, would oppose the nationalist approach to the politics of remembering in which perpetrators and the supporters of a terrorist regime try all too often to present themselves as victims (as was the case in Germany) and in which the recognition of suffering tends to be exploited for nationalist aims. Symptomatically, this has also been the case with entire populations – the Serbs, based on their experience during the Second World War, for example – who have good reason to see themselves as victims in the past and who use the memory of suffering as a source of national pride.<sup>26</sup> In many cases, these emotions were purposely instrumentalized by nationalist leaders and have had disastrous impacts upon the mutual understanding among peoples in the present. The Milosevic Government of the 1990s is a case in point.

The starting point for the development of an alternative concept is a "national self-consciousness" which tries to connect the "guilt of nations" with a growing sensitivity for the intrinsic relevance of human rights in the context of an insecure future on a global scale.<sup>27</sup> For this reason, not only restitution, but also political forgiveness is dependent upon the willingness to globalize memory.

<sup>26</sup> Ian Brurma 1999: The Joys and Perils of Victimhood. In: The New York Review of Books (April 8). Quoted in: Elazar Barkan 2000: The Guilt of Nations. Restitution and Negotiating Historical Injustices. New York and London: John Hopkins University Press, 17.

<sup>27</sup> Ibid. 2000. 17; Natan Sznaider 2003: Political Forgiveness and Global Justice. Towards a New Global Politics (Conference-Preview). In: IF Know 1: 24 -25.

In the following paragraphs, I ask the question whether restitution (or reparations) for victims is a pre-condition for a process involving a future-oriented perspective in coming to terms with the historical legacy of brutal and terrorist states, particularly the Nazi regime. I would like to support the thesis that the readiness to pay financial compensation for the injustices and atrocities of the past is an important element of such a new approach. After a short overview of the debate about the role of Switzerland in the Second World War, the central thesis of the paper will be explained in three steps, focusing on the three keywords: memory, law, and money.

## 9.2 The Swiss Debate

Up to the 1990s, the argument that Switzerland had above all been a “victim of developments in world politics” had dominated the historical consciousness of the “small and neutral country” (as the auto-stereotype says). In the mid-90s, however, this faint-hearted and feigned version of the past was increasingly challenged by the counter-argument that Switzerland was extremely dependent in economic terms and had aided the Nazi regime in several – mainly economic – areas. For professional historians, this insight was not surprising. The entanglement of Switzerland (as an international center for asset management and a highly developed industrial workplace) in the German war economy and the Nazi crimes had been a focus of historical debate since the 1970s. At that time, a series of studies appeared which provided evidence for Switzerland’s involvement and its corresponding responsibility. Since the early 80s, it has been a well-established fact that Switzerland was the most important market for gold from the territories controlled by the “Third Reich” during the Second World War. Almost four-fifths of the *Reichsbank*’s gold shipments abroad were arranged via the Swiss financial market. These gold transactions enabled the Nazi regime, whose national currency was no longer accepted as a medium of payment in the international markets, to acquire foreign purchasing power in order to obtain strategic raw materials and other key resources for the war effort – especially tungsten, manganese, and other ores from Spain, Portugal, and South America, but also crude oil from Romania and bauxite from Yugoslavia.<sup>28</sup>

Already during the war years, the Allies as part of their strategy for economic warfare had condemned the gold transactions. Switzerland was warned that the comprehensive restitution of looted gold would be demanded after victory. But in 1946, in connection with the Washington Agreement between Switzerland and the Western Allies, the Swiss had to pay only 250 million francs, which was about one fifth of the whole amount of the gold purchases. As to the second main problem, the “unclaimed assets,” transferred to Swiss banks after First World War and owned by Nazi victims, there was neither factual transparency nor a clear politico-legal regulation. Although efforts to return looted property and to make individual restitution can be traced to the wartime period, the Washington Agreement contained only a non-binding pledge from the Swiss negotiators. To be sure,

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<sup>28</sup> Independent Commission of Experts 2002: Switzerland, National Socialism, and the Second World War. Zurich: Pendo Verlag, 243-260.

there was legislation on looted assets in the years 1945/46 which led to the creation of a special Chamber of Looted Assets in the Federal Supreme Court for the final settlement of disputed cases. Up to 1947, works of art, other cultural assets, and looted securities were restituted.<sup>29</sup>

In this period, the question of compensating the victims of Nazi persecution individually was – and this is an important background for a proper understanding of the Swiss attitude – discussed only tentatively among the Allied powers; “restitution to nations” was generally regarded as much more important than “restitution to victims” which was given only marginal consideration. An additional factor was the growing influence of the Cold War that lowered the pressure put on Switzerland as a neutral country. In this context, the Swiss efforts to restore assets, stolen by the Nazis and transferred to Switzerland or deposited in Swiss banks by people, especially Jews, who become subsequently victims, were reduced and finally stopped. This development took place in 1947 at a moment when the German debate just began to heat up. Obviously, the problem remained unsolved and the critical voices never became silent. The discussion continued in the 50s – but no convincing steps were taken. In 1962, Switzerland came under such strong attack by the international mass media and restitution organizations, that the Swiss authorities decided opportunistically to issue a Registration Decree, which aimed at identifying bank accounts of NS-victims. The implementation of this measure was carried out by the banks themselves with no substantial result. So the question of whether Swiss banks had profited from the Holocaust remained.

In May 1995, when Switzerland was faced with renewed international pressure, a task force of the Swiss Bankers Association finally tested a system for simplifying the search for deposited assets of Nazi victims. The publication of the results of a survey on unclaimed assets in Swiss banks (which had identified 775 accounts containing a total of 38.7 million francs) elicited vehement reactions from representatives of Jewish organizations in February 1996, who rejected the estimations as being “unacceptable.” Three months later, in May 1996, international Jewish Organizations and the Swiss Bankers Association came to an agreement in the form of a “memorandum of understanding” according to which an “Independent Commission of Eminent Persons”(ICEP), also known as the “Volcker Commission,” was created with the mandate to audit the search for assets of Nazi victims in Swiss banks. The Commission published a first activity report in autumn 1998. In the meantime, other economic actors also became involved. Together with the banks, industrial enterprises and the Swiss National Bank provided the finances for the Swiss Fund for Needy Victims of the Holocaust/Shoah (Schweizer Fonds zugunsten Bedürftiger Opfer von Holocaust/Shoah). In March 1997, the then Federal President Arnold Koller announced a plan to establish the Swiss Solidarity Foundation (Stiftung Solidarische Schweiz), a project that could not be realized in the end mainly due to strong opposition on the part of the conservative Swiss People’s Party.

Already in December 1996, both chambers of the Swiss parliament unanimously approved a Federal Decree to appoint an “Independent Commission of Experts Switzerland – Second

<sup>29</sup> Ibid. 441-515.

World War" (ICE) which was endowed with a budget of CHF 22,5 million and whose task was to conduct a historical and legal probe into the fate of the assets which reached Switzerland as a result of the National Socialist regime. The ICE was not active on the level of individual restitution; this difficult and costly, large-scale research was carried out by the ICEP which spent more than thirty times more than the ICE in checking about 7 million accounts which were opened and/or held by Swiss banks up to 1945. On August 12-13, 1998, the major Swiss banks, US joint action plaintiffs, and Jewish organizations arrived at a comprehensive settlement in the amount of US\$1.25 billion (CHF 1,8 billion). With this agreement the demands on the Swiss government were no longer valid. The settlement did include claims against (most of the) insurance companies, however. The research-project of the "historical commission" was not affected by this agreement; the ICE continued its investigations in Swiss and foreign archives and, after a five-year period of research activity, the so-called Bergier-Commission presented 25 monographs and its 600-page Final Report.

### 9.3 Memory

The Swiss case is a good example of how the repression of the past was challenged by the "return of repressed memory". In recent decades, "memory" has developed into a broad and controversial field of historical research. The notion of memory seems to have a strong link with history – nonetheless, it is important to see that memory is not entirely limited to the past. In his essay "The Abuse of Memory," Tzvetan Todorov takes a statement by Jacques Le Goff as his motto, in which he proposes that memory retain the past in order to serve the present and the future: "Let us ensure that collective memory serves to liberate and not to enslave humanity."<sup>30</sup> It is important to see that the individual "I remember" is always integrated into a normative setting and a social context. Maurice Halbwachs, who has developed a theory of the social conditions of collective memories states, "But our memories remain collective and are recalled to our minds by other people – even when they cover events which we alone have experienced and objects which we alone have seen." He then draws the conclusion: "In reality, we are never alone." Collective memory is, in this interpretation, a key concept of historical science. It abolishes the antagonism of (the) individual and social memory; it neither eliminates the active subject nor the socially produced unconsciousness. In the 19th and 20th centuries, the nation was the predominant framework for the shaping of collective memories; it was fostered by both a broad support from below and a deliberate policy of remembering from above.<sup>31</sup>

A cultural analysis of historical consciousness designates the dialectics of memory and oblivion (or of remembering and forgetting) as a central field of investigation. There is no integral retention (or preservation) of the past; every memory is – as Ernest Renan argued in his famous essay "What is a Nation?" already in 1888 – the result of a selection. Forgetting and "historical error" are essential factors in the formation of a nation. At about

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<sup>30</sup> Tzvetan Todorov 1996: The Abuse of Memory. In: Common Knowledge 5: 6-26.

<sup>31</sup> See Jakob Tanner 1999: Die Krise der Gedächtnisorte und die Haverie der Erinnerungspolitik. Zur Diskussion um das kollektive Gedächtnis und die Rolle der Schweiz während des Zweiten Weltkrieges. In: *Traverse. Zeitschrift für Geschichte/Revue d'histoire* 1: 16-37

the same time, it was Friedrich Nietzsche who questioned, in particular, the pre-suppositions of human behavior in an age of rational self-empowerment of human beings. "Forgetting" belongs to every action, he wrote in his essay "On the Utility and Liability of History for Life." Anyone "who did not possess the power to forget would be condemned to see (a) genesis everywhere: such a person no longer believes in his own existence, no longer believes in himself, sees everything dispersing like moving points and loses himself in this current development."<sup>32</sup> Therefore, for Nietzsche, there is a degree of insomnia, of rumination, of historical sense, whereby the living come to suffer damage and finally succumb whether it is a human being, a nation, or a culture. For this reason, Nietzsche believes that the "health" of individuals and groups depends on the appropriate ratio between the "non-historical" and the "historical:" "In the case of an excess of history, the human being again ceases to exist and in the absence of any protection from the non-historical, he would never have begun or even dared to have begun to exist."

This eventuality of a "collapse of life through an overdose of memories" might prevent us from claiming a "full history." But what is the difference between forgetting and repressing? In my view, the main contrast is based in the idea of historical justice. Whenever a social group (whether an elite or a whole people) tries to fade out events or processes from the collective memory which are unforgettable for other groups, because they are connected to traumatic experiences and injustices, oblivion will take on the character of repressed memory which will eventually strike back.

With regard to Switzerland, the ICE made the observation that even a methodologically sound history is not immune against this repression. The critical studies of Swiss-German financial links, the banking system, and the industrial sector, which had been published since the 1970s, had a blind spot, which corresponded with the mainstreaming of memory in Swiss society. The real history of the Holocaust victims and the whereabouts of assets which were either handed over to the Nazi authorities prior to 1945 by Swiss banks and insurance companies or which after 1945 had – or were to – become "unclaimed assets" and "dormant accounts" were remarkably absent in these studies. This was surely also due to the fact that historians had no access to the relevant sources. Documentary evidence of the banking system was (and is still) protected by strong measures of secrecy. But this fading-out of the perspective of the victims, which was compatible with Switzerland's national ideology, can also be explained by the power of cultural memory over history (as a scientific enterprise). It is not only history that tries to enlighten (national) memory, it is vice versa memory which shapes the questions and the research designs even of those historians whose intention is to be critical of the invention of traditions and the politics of the memory.

<sup>32</sup> Friedrich Nietzsche 1995: On the Utility and Liability of History for Life. In: Ernst Behler ed. The Complete Works of Friedrich Nietzsche. Vol. 2. Stanford : Stanford University Press.

## 9.4 Law

The language of law is a medium in which injustices can be expressed in a precise, but (historically) de-contextualized way. In fact, the Nazi-regime was a thoroughly planned and executed violation of lawful conduct in the realm of international law and private law – the observation that a bureaucracy functions according to its own rules is no argument against this fundamental assertion. As to Switzerland, we can discern two different developments: Whereas the Swiss state and its constitutional order underwent profound changes during the Nazi era (with the emergency plenary powers for the government as the main example), there was an astonishing continuity in the field of private law. Both aspects were problematic. With the adaptation of public law in the direction of an “authoritarian democracy,” Switzerland incorporated anti-democratic trends that had become dominant all over Europe at that time. On the other hand, private law scarcely reacted to the looting policy of the Nazis. In this situation, the policy of “doing nothing” and the policy of non-decision were objectively supporting the deprivation of rights of the victims in Germany and the occupied territories. Under such circumstances, “business as usual” is never innocent. The exceptional disruption of the rule of law, as was the case in Germany after 1933, should have had an impact on private law in a country like Switzerland, which had strong financial ties with a criminal system. An exceptional breach of law calls for exceptional counter-measures.<sup>33</sup>

But Switzerland bet on normality and the political system abstained from taking preventive action against the Nazi-regime and enacting protective measures in favor of the victims. Therefore, after the war, a paradoxical reversion of roles took place. As noted above, the “neutral country” was forced by the western Allied powers to pass legislation on restitution. This was a reaction in the domain of public law to the continuity of the system of property law between 1933 and 1945. Temporarily, the “normality of private law,” which had been defended successfully during the war years, was suspended in Switzerland. Although this was in accordance with major changes taking place in international law, a broad section of the Swiss elite was consternated and gave alarm. They feared that the legislation on looted assets (especially cultural goods and securities) would jeopardize the legal foundations of the Swiss state. In the early 50s, when the issue of victims’ assets was put on the agenda again, the authorities tended to reduce the meaning of the Swiss concept of *ordre public* to the mere liability of law. A broader understanding of the *ordre public* clause (which encompasses the protection of the “fundamental core of legal and ethical value”) was excluded. Statements by Jakob Diggelmann, then president of the Legal Commission of the Swiss Bankers Association, are typical for the nature of that debate. In April 1952, he informed the Board of Directors of the Swiss Bankers Association: “The banks and insurance companies have pointed out that these holdings and deposits are assets that have been deposited in Switzerland on the basis of private contracts and a special relationship of trust. It was not right for the state to interfere in these private contracts. An end should now, finally, be put to special laws, such as those, which were passed in the post-war period, each time damaging our legal system. Otherwise, the

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<sup>33</sup> Independent Commission of Experts 2002: Switzerland, National Socialism, and the Second World War, 407-439.

economy will never receive the legal certainty it needs.”<sup>34</sup> The insistence on a legal standpoint was directly tied to a cultural memory of the nation in which victims of the Nazi-persecution had no place and were expelled. In December of the same year, Diggelmann made a statement along the same lines at a session of the working group of the Legal Commission of the Swiss Bankers Association, which he chaired. He claimed that after having studied the annual report of the Swiss Federation of Jewish Communities (Schweizerischer Israelitischer Gemeindebund, SIG) which outlined the restitution project, proposed by international law expert Paul Guggenheim, he had the impression: “...that by way of ethically moralistic tergiversation, a haul on private assets is to be made in gross contempt of our system of public order, the concept of ownership, the Federal Law of 1891 on the Residence and Settlement of Foreigners, the standards of international agreements, and the foreign legal provisions until now respected by Switzerland. Such special legislation would therefore be even worse in its legal and practical effects than the legislation on looted assets and the Washington Agreement.”<sup>35</sup>

Statements from banking circles, such as these, show how strong the resistance against any form of compliance was and to what extent the measures that Switzerland was forced to take in the years 1945/46 under pressure, particularly from the Americans, were regarded as a sign of Swiss powerlessness. In fact, there was little willingness to come to grips with the matter of property law without massive external pressure. In the Swiss imagination, restitution, reparation, and “Wiedergutmachung” was the task of the Germans who were the source of all evils. In its Final Report, the ICE analyses carefully the semantic implications of the whole spectrum of notions which are used to denote the efforts to hand back private property or to pay compensations to nations. Whereas reparation is rather oriented towards the state level, restitution has directly to do with the private property of individuals. In contrast to the notion of “reparation,” which was an old and well established one, the concept of restitution based on the protection of private property was introduced in international law only after the First World War; after the Second World War, the effective sanction of this principle was gradually approved. The term restitution can be used in very different ways. In its narrow, precise juridical sense, it means a natural restitution, a *restitutio in integrum* by returning the property (be it a dwelling, a painting, or another object of value). Unlike reparations, a claim for restitution is based on the existing property of any persons whose possessions and valuables of all kinds have been “expropriated,” i.e. taken away, stolen, or looted. These are generally referred to as “transactions under duress.”

The German idea of “Wiedergutmachung” was introduced in order to avoid the negatively associated notion of “reparations” which was applied by the Treaty of Versailles in 1919 to the huge amount of financial compensation demanded from Germany for the damage and losses caused by the war. The word formed a nucleus for German efforts at revenge, contributing considerable material for nationalist agitation and resulting in the disastrous consequences of which we are all aware. In the post-war period, “reparations” was therefore a highly emotionally charged word. German usage replaced it with

<sup>34</sup> Ibid, 460.

<sup>35</sup> Ibid.

“Wiedergutmachung” (making amends for something; literally “making good again”), which was almost the exact equivalent in meaning, but erased the negative memory of an unjust obligation in favor of a positive and legitimate duty in the present. That this semantic shift did not go unchallenged is demonstrated by the fact that even former Nazi officials could now feel they were “victims” and accordingly claimed “Wiedergutmachung” which they received, in fact, in the early days of the Federal Republic.

Aside from such cases (which were equivalent to an institutional mockery of the victims of the Nazi-regime), the notion “Wiedergutmachung” obscured the asymmetrical structure of the problem. This asymmetry consists in the irreversibility of the crimes, on the one hand, and the reversibility of the assets transfer, on the other. It is impossible to make crimes and persecution “good again.” In such a context, the notion of “Wiedergutmachung” reveals a deeply rooted contradiction. Crimes are, in fact, committed and they can only be reinterpreted in the memory of both perpetrators and victims. After the war, memory and restitution were separate spheres and there was a huge gap between the perpetrators and the victims, most of whom had been murdered and had disappeared in the exterminatory “machine” of the holocaust. The nations of the perpetrators paid restitution and reparations only under strong pressure by the victorious powers or as a strategy to regain respectability and legitimacy on an international level. Today, such a nationalist approach is outdated and offers no perspective to cope with the problem nor does it fulfill obligations and commitments in a prospective way. For this reason, it is of utmost importance to link memory and money. But how can one expedite the two processes of financial compensation and remembering the past? How does one prevent the substitution of moral guilt for material debt? How to overcome the trade-off between the ethical and the moral dimension of the problem and how to replace it by a convergence of repenting and paying in a “moral economy of restitution”?

## 9.5 Money

In his book entitled “The Guilt of Nations,” Elazar Barkan defines restitution on a more comprehensive basis “to include the entire spectrum of attempts to rectify historical injustices.” Such a broad notion of restitution transgresses the legal category and can be developed into a “cultural concept.” Restitution as a “growing moral trend”<sup>36</sup> implies, as Roy Brooks puts it, that “Sorry Isn’t Enough.” Although the role of apology as a medium of symbolic communication should not be underestimated, the new narrative, which makes such an attitude possible, commands more credibility when it is combined with a financial compensation.

The controversy over apologies and reparations for human injustice illustrates the ambivalence when it comes the issue of money. There is an unholy alliance between those who denied any responsibility for the looted assets of the victims after 1945, those who try to see themselves as victims of a conspiracy, and those who are nowadays denouncing the

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<sup>36</sup> Barkan 2000: The Guilt of Nations, 317.

marketing of the holocaust. To cite an example for each of these positions, beginning with the last mentioned: Norman Finkelstein is perhaps the most vehement critic of what he describes as an "industry" which has grown up around the holocaust. In his book "The Holocaust Industry," published in 2000, he tries to give us an idea of a malevolent "Exploitation of Jewish Suffering" (so the subtitle of the book). In his view, the "holocaust industry" is the result of a transformation of the Nazi holocaust into an "ideological representation" and – as a consequence – into "an indispensable ideological weapon" which allows certain groups to capitalize on the memory of Hitler's "Final Solution."<sup>37</sup> The author reproaches Jewish organizations for making money out of the sufferings of the victims, instead of "letting them, finally, rest in peace." The same argument from a somewhat different political perspective was formulated in Switzerland. On December 31, 1996, Jean-Pascal Delamuraz, then president of the Swiss Federal Council and Minister of Finance, accused the World Jewish Congress of using "extortion and blackmail" in order "to destabilize and compromise Switzerland" and of manipulating Washington and London "to demolish the Swiss financial center." In doing so, he provoked the very same anti-Semitic reaction that, in his opinion, had arisen as a result of claims of the Jewish organizations themselves.<sup>38</sup> This argument was much in line with the anti-Semitic stereotypes that were used in the 1950s by representatives of the Swiss banks in the fight against restitutions. "Jews are only interested in money" is a frequently heard cliché that inflicts insult upon injury to the victims and their descendants who are seeking justice. In 1952, the already quoted Jakob Diggelmann stated that demands for a Registration Decree on unclaimed (also referred to as "heirless") assets had entered "an acute stage:" "The Federation of Jewish Communities is not concerned with transferring heirless assets to possible claimants, but is endeavoring to establish such heirless property in a special procedure so as to benefit by taking possession of it. The actions of the opposing party therefore constitute a veritable raid on assets lying in Switzerland."<sup>39</sup>

In all of these cases, financial claims are associated with conspiracy theories and with low "material" values. The argument is that money is a vehicle for normative degradation and for the transformation of high feelings and noble emotions in materialistic gratifications. Instead of mourning for the victims of the Shoa, the memory of this unprecedented crime is irreverently used for a capitalization strategy. Against such an ideological approach, which lacks sensibility for individual property rights and aims at depreciating claims which are basically rooted in principles that are at the very heart of any democratic society, it could be argued that the history of money was strongly linked with the history of social degradation of minorities. In his "Philosophy of Money," Georg Simmel puts it this way: "(There is) no need to underline the fact that the correlation between the centrality of the interest in money and social depression finds its best example in the Jews."<sup>40</sup> The ruling elites invested in immobile property; real estate was the very basis of political power. In contrast, foreigners and marginalized cultural and religious groups had to try their luck

<sup>37</sup> Norman G. Finkelstein 2000: *The Holocaust Industry. Reflections on the Exploitation of Jewish Suffering*. London and New York: Verso.

<sup>38</sup> Barkan 2000: *The Guilt of Nations*, 99.

<sup>39</sup> Independent Commission of Experts 2002: *Switzerland, National Socialism, and the Second World War*, 448.

<sup>40</sup> Georg Simmel 1989: *Philosophie des Geldes*. Frankfurt a.M.: Suhrkamp, 284.

with mobile property. They were relegated to the volatile monetary sphere where commerce was risky. The "sublimation towards the pure money commerce" and the "release from the land" are therefore complementary aspects of the same precarious status of the Jews in the European history.<sup>41</sup>

This history of the marginalization, degradation, and persecution of cultural minorities, especially of the Jews, is preserved in the memories of European countries – but this is not the main focus of the current discussion. The actual debate about whether restitution or reparations are a necessary precondition for a revised memory of the past, based on mutual recognition and the awareness of a shared history, is a twofold one. The first claim is tantamount to the restitution of violated individual property rights. Since the implosion of the "real socialist" regimes in 1989/91, property rights have won new relevance, respect, and reputation. It is no wonder that victims (or the organizations which legally represent victims) demand their stolen assets back with interest. This is very simple to understand. The second question, on the other hand, is much more complicated. Here, the problem is not restitution but reparation (which cannot be individualized). In the minds and memories of individuals and in externalized memory-stores (books, records of any kind), there is any number of historical injustices, which reach back into remote antiquity. The question is which of these memories – based on individual experience or remembered through narratives handed down through the generations or recorded in archives and books – should be debated in terms of financial compensation? In his inspiring book "The Burden of Memory, The Muse of Forgiveness," the Nigerian author and Nobel Prize Laureate Wole Soyinka points out that Pan-African organizations talked about compensation for colonialism and slavery already in the beginning of the 20th century. A century later, Soyinka advances the same claim when writing that reparations serve as a critique of history and thus a potent restraint on its repetition.<sup>42</sup> In this and in other cases like the Native Americans, the Herero, etc., restitution is not a legal concept, but a political option.

For a better understanding of the problems linked with this option, it is helpful to take a glimpse at the economic theory of money. From a scientific viewpoint, money is neither a monstrous entity nor a material substrate for luck, but a medium with three indispensable functions for any working version of a modern society based on economic growth. Money is firstly a medium of exchange, secondly a unit of account (or a measure of value) and thirdly a store of value (i.e. one of the many media in which wealth may be held). Whereas property rights link the past to the present, money connects the present with the future. Money – as purchasing power – is a common denominator, a leveler of concrete values that puts those in possession of it in command of material and personnel resources in accordance with their own personal designs. It is one of the factors that is capable of shaping the future, both materially and in terms of meanings. However, the transfer of purchasing power is not the main point in operations involving restitution. Rather, ideally the payment of compensation would take place in a political and institutional context, which would foster the ability of societies to combine good economic performance with a participatory democracy. Any country which asks for restitution (beyond the sheer

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<sup>41</sup> Ibid., 287.

<sup>42</sup> Wole Soyinka 1999: *The Burden of Memory, the Muses of Forgiveness*. New York : Oxford University Press.

restoration of violated property rights) must be willing to follow the rules of law. A brutal dictatorship, which demands compensation for crimes committed in the past, lacks credibility and will not be heard. At the very least, an illegitimate ruler would be confronted with a paradox. The violation of human rights cited as a basis for his own claims for financial compensation would undermine in principle his own claim to power. Countries with a democratically elected and therefore a legitimate form of government or international organizations, representing this type of political system, however, are able to pursue claims rooted in historical experience. This connection between restitution, international rule of law, and good governance was already evident by the end of the Second World War. In a memorandum to the President of the U.S.A. (that he did not send), Henry Morgenthau stated: "The respect which the people of the world have for international law is in direct proportion to its ability to meet their needs."<sup>43</sup>

## 9.6 Conclusion

Restitution or reparations – in this future-oriented context, the semantic difference is no longer important – means enhancing the capacity of former victims to cope with present challenges. When historical injustices, which happened generations ago, are at stake, the ones who pay the compensation are not responsible in a strict sense. But when they make the choice and decide to regard money as a symbolic language of recognition and reconciliation, we discover that the debate about reparations is able to begin a multifaceted and polyvalent negotiation process about the future that deals also with history. The plasticity of the collective memory creates room for a new understanding of the past. It is apparent that perpetrators, victims, and bystanders have had (and have) very different histories, which cannot be lumped together. Yet, the narratives of this past can be adjusted to each other in such a way that a common "ethic of memory" is introduced into each version. Such a negotiated past (which is equivalent to a negotiated justice) cannot emerge in national contexts, but has to be transposed onto a cosmopolitan level which would enable us to mediate between abstract universal values and concrete local contexts. Only such a process of mediation is capable of changing the focus from a problem in the past to a task in the future and to develop solutions, which can mutually be accepted as "just."

<sup>43</sup> Memorandum for the President, Mai 29, 1945, in: Morgenthau Diary, Vol. VII, p. 1544 f. Quoted in: Gary J. Bass 2003: Atrocity and Legacy. In: Daedalus. 132,1: 82.



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