

# **Reconciliation and Democratisation: Outlining the Research Field**

Siri Gloppen

**R 2002: 5**

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Chr. Michelsen Institute *Development Studies and Human Rights*

## **CMI Reports**

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Web/URL:<http://www.cmi.no>

Price: NOK 50

ISSN 0805-505X

ISBN 82-8062-011-7

## **Indexing terms**

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Democratisation

Transition justice

Truth commissions

War crimes

Peace-building

United Nations

South Africa

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## Executive Summary

The report presents an overview of institutional strategies to deal with the problem of past atrocities and the main debates and dilemmas raised by these efforts, as reflected in the transitional justice literature. The picture is complex. The relationship between the aims of reconciliation and democratisation and the different measures employed to achieve them – trials, purges, truth commissions, restorative efforts, reforms, amnesty and amnesia – are ambiguous and disputed. Moral and theoretical arguments can be made for each strategy as a road to reconciliation, but in many cases the relationship can not, or at least has not, been convincingly demonstrated empirically.

### Main findings:

- There is no single superior strategy or institutional model for addressing the problem of past human rights violations. Each case must be addressed on its own terms. The power context and the nature of the repression are central factors that need to be taken into consideration in the search for a suitable approach.
- Timing is important. Optimal institutions for addressing a specific transitional justice problem is not sufficient, they also need to be introduced at the right time. A measure that is ruled out at one stage may be an option later on, and interventions that go on for too long tend to be politicised.
- Local ownership and legitimacy is crucial, and is often a function of the process through which the transitional justice institutions are established. It is in other words, not only a matter of *what* is done, and *when*, but *how* and *by whom*. Experience with international and UN engagement in tribunals and truth commissions is mixed, and the UN factor is difficult to isolate, but strong and direct international engagement combined with physical distance appear to make the process of generating legitimacy more difficult.
- A single strategy is rarely sufficient. In countries that have undergone truth commission processes, a pressure for trials has resurfaced at a later stage (Chile, Argentina). In countries starting out with trials, demands for a truth commission have emerged (Bosnia-Herzegovina). Claims for compensation are raised in various contexts. And demands for reform are near universal.

Thus it is clear that each society needs to search, not for *the* road to reconciliation, but for paths traversing different parts of the war torn social terrain. It is equally clear that for most societies traumatised by gross human rights violations reconciliation is not a destination, but an ongoing process. It is naive to believe that transitional justice institutions, however sophisticated, can bring reconciliation once and for all. The challenge should thus be conceived not in terms of finding the formula that will deliver reconciliation, but rather to search for tools and procedures that can facilitate various forms of reconciliation processes and keep them going.

**Recommendations, research needed**

- With the massive resources dedicated to reconciliation processes of various kinds, there is a need for more empirical research into whether these strategies achieve their purpose, and which strategies are the most effective.
- More should also be known about how different reconciliation efforts and processes affect each other on the ground, and how they in fact impact on democratisation.
- We also need more knowledge about why states chose particular transitional justice strategies and the factors that influence and restrain their choice. Some work has been done, focussing in particular on the power of the former regime to prevent reactions, and the strength of civil society in pushing for them. Still, there is a need for a better theoretical framework to help us understand why states – and the international community – act they way they do. And we need to better understand how the suitability of different strategies is affected not only by political factors but also by differences in the cultural context.

# 1 Introduction – Roads to Reconciliation<sup>1</sup>

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Political developments over the past two decades have actualised questions of how societies should deal with past atrocities and injustice in order to move towards long-term goals of reconciliation and democratic consolidation. In country after country transitions from authoritarian and repressive rule have confronted newly established democratic regimes with the challenge of how to handle the dark chapters of their recent history. The problems are particularly acute in countries coming out of a bloody civil war or the abyss of genocide, but at some stage a need to address past human rights violations seems to surface in most countries with a history of repressive rule.

We also see that in such situations, focus is increasingly set on the need for *reconciliation*.<sup>2</sup> The need to create a climate in which conflicting parties can resolve their differences through non-violent means, a political climate where former enemies may continue to disagree, but nevertheless interact and communicate on the basis of a shared normative framework and mutual recognition. This aim, which can be termed *political reconciliation*, is the focal point of this report. And while political reconciliation is also relevant relation to international conflicts, our focus here will be on intra-state processes.

*How can reconciliation be brought about?* This fundamental question engages politicians and scholars alike. In this report we seek to take stock of current knowledge that may contribute towards a better understanding and possibly some answers. After discussing notions of reconciliation and their relation to democracy, we analyse the various strategies aiming for reconciliation in contexts of past repression. In the last part of the report we address the role of international agents, and particularly the United Nations, in national reconciliation processes.

Up to the early-1980s there seemed to be basically two alternative responses to systematic human rights violations. Trials (by domestic courts or a Nuremberg-type tribunal) or some form of amnesty and public amnesia. While amnesty and prosecutions remain important responses, we have in latter years witnessed a proliferation of new strategies to come to grips with the challenges posed by the need for justice and reconciliation in the shadow of past injustices. These include truth commissions, administrative purges and prohibitions on holding public office, access to secret files, reparations and other forms of compensation, symbolic restoration, civic education, and projects to advance peace-building, socio-cultural integration and psycho-social healing, as well as social, political and legal reforms. The strategies may be grouped in different categories according to the underlying logic:

First, there are strategies focussing on the need for *justice*. The basic assumption is that lasting reconciliation requires that perpetrators responsible for past atrocities are held accountable and punished for their crimes.

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<sup>1</sup> I would like to thank Elin Skaar, who leads CMI's project of *Reconciliation and Democratisation* of which this report forms part, for valuable contributions.

<sup>2</sup> While after the Second World War, war crimes tribunals were justified by reference to the need for justice – such institutions are now held to serve the broader goal of reconciliation. See section 8 below.

Institutional mechanisms for meting out justice include prosecution and sentencing in domestic courts or tribunals, in international tribunals, in joint international and domestic tribunals, or in foreign courts. Administrative procedures to lock perpetrators and collaborators out of jobs and positions in public institutions, and various forms of public exposure and social shaming, are weaker mechanisms that nevertheless function according to the logic of retributive justice.

A second type of responses centres on the need for *truth*. It is based on the assumption that knowledge about what actually happened in the past and who were responsible for planning and executing crimes and abuses, can be a road to reconciliation. Institutional mechanisms to this effect are mainly different forms of truth commissions and commissions of inquiry (but also testimony in trials). The operation of such commissions varies greatly. Some rely on open hearings, others on secret testimony. In some cases names of perpetrators are released, in others only acts and patterns of abuses are reported. Most commissions rely on voluntary co-operation, but some have quasi-judicial powers, such as the power to grant amnesty in return for truth, to subpoena witnesses, search premises and seize evidence.

A third category concentrates on *restoration* and rehabilitation. These responses are based on the presumption that for reconciliation to take place the physical, psychological and social damages caused by the violations and injustice of the past must be acknowledged and healed. Reconciliation requires that the victims' situation change. Mechanisms to bring about restorative justice include various forms of compensation, provision of physical and mental health services, symbolic restoration, public apologies and various efforts to advance social integration and peace building at community level.

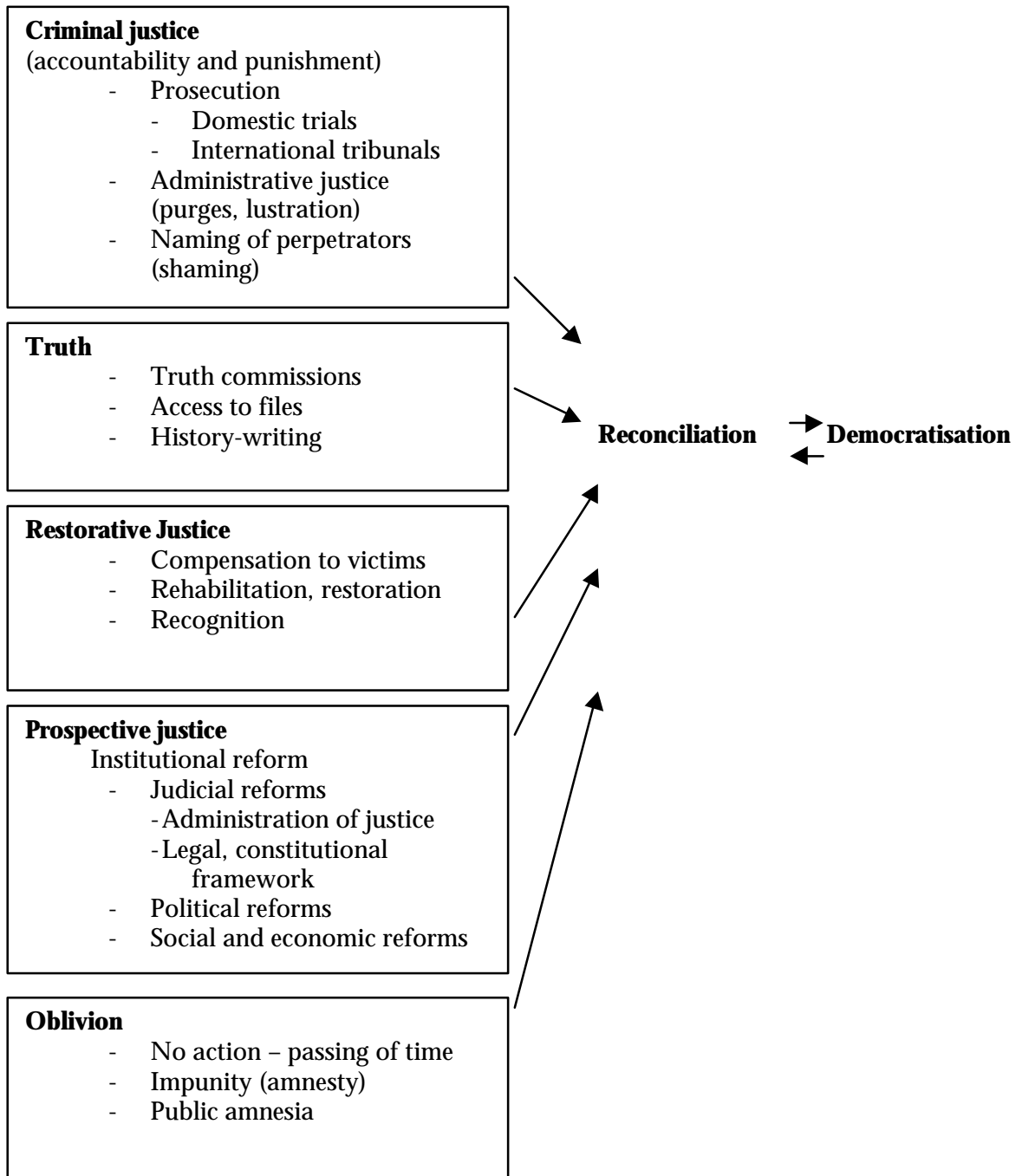
Then there are the responses focusing on *reform*. The underlying premise is that reconciliation requires a focus on the future, rather than on what happened in the past. The best route is to concentrate efforts on securing an institutional framework that can prevent human rights abuses in the future, and promote social justice by creating reasonable terms of social co-operation. Constitutional reform, economic reform, reforms of the justice system, and in sectors such as education, health and housing, are here seen as more important to reconciliation than any attempt to respond to past injustice.

Public amnesia and amnesty (or impunity due to inaction) for crimes committed by the former regime may be part of a reform strategy, but does not necessarily follow. To do nothing – or actively pursue a strategy of *oblivion* through amnesty legislation and public amnesia – should thus be seen as a separate type of response to the problem of past atrocities. The reasoning is that if the wounds of the past are left alone they will heal with time.

While it is useful analytically to distinguish between these concerns for justice, truth, restoration, reform, and oblivion – it should be borne in mind that in actual politics strategies and institutional mechanisms often seek to include all or several of these. Figure 1 below illustrates the range of responses to the challenges of reconciliation and democratisation.



Figure 1



Vibrant scholarly debates accompany – and partly also drive – the development of new responses to past human rights abuses. The academic literature on *transitional justice* as this field of research has come to be known, is substantial and growing, spanning both case analysis, comparative and theoretical work in academic disciplines such as law, political science, psychology, philosophy, sociology, anthropology and history. We will outline some of the most important issues and debates, highlight central insights and dilemmas emanating from this growing body of literature, and point to areas where more research is needed. Taking reconciliation as our focal point we address the following sets of questions:

- *On democracy and reconciliation.* What do we mean by reconciliation? What is the relationship between reconciliation and democracy?
- *On justice and reconciliation.* What is the relationship between retrospective/retributive justice (accountability and punishment for past crimes) and reconciliation? Is the former a precondition for the latter – or are there circumstances under which justice is contrary to national reconciliation and democratic consolidation? How, and under what terms can and should perpetrators be brought to justice?
- *On truth and reconciliation.* What is the relationship between truth and reconciliation? Is knowledge – establishment of 'the truth' – a precondition for reconciliation, or necessarily conducive in this regard? Is official truth-seeking an alternative to justice?
- *On restoration and reconciliation.* What is the relationship between 'restorative justice' (compensation, rehabilitation, recognition, healing) and reconciliation? What forms of restorative justice are most likely to advance reconciliation?
- *On institutional reform and reconciliation.* Is institutional reform to prevent future human rights abuses, advance social justice and create reasonable terms of political and social interaction, more important for reconciliation than 'reckoning with the past'? Are the two contrary? And, if so, under what conditions should reform take precedence?
- *On oblivion, time and reconciliation.* How does time affect reconciliation efforts? Does reconciliation require that we forget the injustice of the past? And does time bring oblivion? If the mere passing of time is the best cure for wounds of past repression, does it mean that societies should 'do nothing' in the way of transitional justice and accept impunity?

The questions addressed here have important policy implications. The different policies advocated or implemented to bring about reconciliation are implicitly or explicitly based on assumptions about these relationships. So while these are theoretically complex questions to which there are few clear answers, it is crucial that practitioners and policy makers confront them. In particular, it is important to take stock of what we currently know about how different transitional justice strategies impact on processes of reconciliation and democratisation, and why states choose particular strategies.

It is also important to address the *role of the international community* in relation to reconciliation processes. International actors and organisations (particularly the UN) have sought to contribute to national reconciliation processes through a range of efforts, such as the establishment of war crime

tribunals, truth commissions, and support for judicial reform. What are the impacts of these efforts? And what determines the response of the UN?

The report addresses these questions, but does not provide firm conclusions. Rather, it seeks to provide categories and tools to systematise and critically reflect on these issues as they apply to particular political situations.

## 2 Democratisation and Reconciliation

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What do we understand by reconciliation, and how does it relate to democratisation? Reconciliation is a multifaceted concept that refers to processes of different kinds and taking place at various levels. In brief reconciliation

- is about individuals forgiving each other.
- is about how societies torn apart by internal conflict mend their social fabric and reconstitute the 'desire to live together'.<sup>3</sup>
- is about peaceful coexistence and social stability.
- may refer to an ambitious goal of creating a shared comprehensive vision of a common future (and/or a common past) –
- or to a situation where former enemies may continue to disagree, but respect each other as equal citizens in a democratic society.

*Individual reconciliation* regards not only how people come to terms with each other at the interpersonal level after traumatic periods or events, but also how they come to terms with their own past experience and present condition. Individual reconciliation has primarily been the domain of psychology and religious counselling. In this literature reconciliation is primarily understood a therapeutic goal.<sup>4</sup> The psychological conception of reconciliation with its connotations of healing and restoration has influenced thinking on reconciliation beyond the interpersonal and individual level. Similarly, theological thought on reconciliation, related to ideas about confession, forgiveness and catharsis, has influenced conceptions in the transition literature as well as the political rhetoric.<sup>5</sup>

At a *collective level* reconciliation regards “how a society torn apart by internal conflict can mend its social fabric” (Skaar 1999a:121). How it can “reweave thread by thread the fabric of that society and reconstitute... the 'desire to live together'” (Jorda 2001). Reconciliation in this sense refers to processes at the level of local communities, as well as between groups at national or regional level.<sup>6</sup>

Research on reconciliation processes at the community level has primarily been the focus of anthropology and sociology, and is understood in terms of processes of inclusion, acceptance and forgiveness. *National reconciliation* – which is the main concern of the current report – has been the main focal point in the disciplines of political science, history and law.

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<sup>3</sup> Jorda (2001), see also Skaar (1999a).

<sup>4</sup> See for example Basoglu (1992), Cienfuegos and Monelli (1983), Sveaass (2000), Sveaass and Lavik (2000).

<sup>5</sup> This is most evident in the discourse surrounding the South African Truth and Reconciliation Commission (TRC), where theologians were prominent in the conception, as well as the running of the Commission. We will not, however, venture into the terrain of theological thinking, only refer to it where it is manifested in other academic or political debates.

<sup>6</sup> Reconciliation is also relevant in relation to international conflicts, but as noted above this report focuses on intra-state processes.

Within the literature on national reconciliation, it is useful to distinguish between 'thinner' and 'thicker' notions of reconciliation, with non-violent coexistence as a minimal definition and, at the other end of the scale, a shared comprehensive vision of a common future (Crocker 2000: 108). In between there are conceptions of reconciliation as the creation of conditions where former enemies may continue to disagree, but respect each other as citizens.<sup>7</sup> It is this latter notion – which we have earlier referred to as *political reconciliation* – that is our main focus.

*Between whom reconciliation is needed depends on the nature of past repression*

Besides the importance of realising that reconciliation takes place at different levels – individual, interpersonal, local and national – it is also necessary to address the question of between *whom* reconciliation needed. This is usually understood as a matter between *victims* and *perpetrators*, either individually or between *conflicting groups* (where there may be victims and perpetrators on each side). But whether this is the most relevant focus, depends on the nature of the repression under the former regime. In some contexts a repressive and unjust social and political system victimised large sections of the population while other groups benefited. Here it may be more relevant to focus on reconciliation between victims and *beneficiaries*, rather than only on a relatively small number of perpetrators of gross human rights violations and their immediate victims.<sup>8</sup>

Where there has been what Tina Rosenberg has called a *criminal regime*,<sup>9</sup> as opposed to a *regime of criminals* there may be a need for a wider process to reconcile the population and the State apparatus. The need for reconciliation is particularly acute with regard to the army, police and intelligence agencies responsible for the most overt human rights abuses, but it may also be called for in relation to the bureaucracy more generally. In societies coming out of a violent and repressive past there is not only the need to reconcile individuals and groups as such, but also to reconcile conflicting understandings of this part of their history, its meaning for the present, and for the political direction to be taken.

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<sup>7</sup> "Among other things this means that people hear each other out, enter into a give-and-take with each other about matters of public policy, build on areas of common concern, and forge compromises with which all can live" (Crocker 2000: 108). Other conception of reconciliation along these lines are what Gutmann and Thompson (2000) refer to as *democratic reciprocity*, and what Mark Osiel (1997) terms *liberal (or discursive) social solidarity*.

<sup>8</sup> This is forcefully argued by, among others, Mahmood Mamdani in relation to the South African context (Mamdani 1996).

<sup>9</sup> A *criminal regime* is one in which the repression is integral to the regime itself, a function of its laws and regular operation (such as in former communist regimes in Eastern Europe), whereas in a *regime of criminals* the repression is in breach of the laws of the land (Rosenberg 1996). See also Kritz (1995), Rosenberg (1991), Rosenberg (1999).

*How is reconciliation related to democracy?*

The relationship between reconciliation and democracy depends on how reconciliation is conceived and the level at which it is addressed.<sup>10</sup> In the literature on national reconciliation the two are usually seen as intimately related, almost to the point of being analytically indistinguishable. This holds regardless of whether national reconciliation is conceived as a process through which a common set of values is developed upon which a democratic society can be built – or it is equated with social stability and peaceful coexistence within a democratic framework of government. Reconciliation is seen as a precondition for, or integral aspect of, democratisation in the sense that democratic consolidation requires and involves the forging of a significant degree of national reconciliation. And lasting reconciliation is held to be possible only within a democratic framework.

It is often (implicitly) assumed that all reconciliation processes in a society are mutually reinforcing. Reconciliation at the individual level and at the level of local communities is generally held to be necessary for (or at least conducive to) national reconciliation and the consolidation of democracy, understood as a democratic form of government at the national level. Such assumptions are, however, often founded more on moral and theoretical arguments than on empirical evidence. The extent to which a process addressing the need for individual psychological healing is conducive towards national reconciliation and democratisation is, however, an empirical question, and must be established on the basis of each particular case.

*Do processes of individual healing match what a nation must undergo?*

In the literature, reconciliation processes of different kinds and at different levels tend to be seen as closely related – reasoning derived from experience with individual psychological and religious counselling is applied to debates on national reconciliation. But reconciliation in the sense of psychological healing and closure is very different from national reconciliation, whether understood in the 'thin' or 'thick' sense. For analytical purposes – as well as for practical policy-making purposes – it is important not to conflate the different processes by regarding them as essentially the same phenomenon, and assume that all forms of reconciliation can be advanced through similar processes. Whether "the process for individual healing matches what an entire nation must undergo" is an empirical question (Minow 2000: 240). Although these assumptions are not easily tested, it is crucial that they are critically examined – particularly given their role in policy decisions.

The same holds for other fundamental and oft-repeated assumptions in the scholarly and political debate on transitional justice. 'Justice is a precondition for reconciliation'. 'Reconciliation requires that victims be compensated.' 'Truth is a precondition for reconciliation'. 'Reconciliation requires oblivion and a focus on the future rather than the past.' Such propositions cannot be taken at face value, but must be scrutinised to see how, and under what conditions, they may be expected to hold, and to what extent they are

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<sup>10</sup> It also depends on how democracy is conceived. We will not go into a discussion of different conceptions of democracy here, but this can be found for example in Held (1996).

supported by available empirical evidence.<sup>11</sup> In the following sections we seek to untangle the arguments and discuss how, according to current knowledge, reconciliation is best advanced. Again, the aim is not to provide general answers, but rather to provide 'tools for thought' – an overview of the field, and a set of categories to guide reflection of these issues in practical political decision-making.

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<sup>11</sup> For each of these propositions a strong moral and ethical case can be – and is – made, and it seems as if their normative force is converted into assumptions about empirical relationships. It should be noted that a substantial part of the transitional justice literature consists of, or proceeds from, normative theory, and normative arguments appear to be significant in relation to policy formulation nationally as well as internationally.

### 3 Justice and Reconciliation

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In accordance with basic norms of criminal justice, people responsible for gross human rights abuses such as genocide, ethnic cleansing, murder, torture and rape, should be held accountable and punished for their actions. What form of punishment that should be meted out for crimes where no measure can be adequate in any real sense of the term, is disputed, likewise what should count as extenuating circumstances. But that victims and survivors have a *moral* right to see perpetrators brought to justice is hardly controversial. According to influential interpretations of international law they also have a *legal* right to justice for gross human rights abuses, even in cases where such acts are not illegal according to domestic jurisdiction. There are, of course, debates both regarding the moral or legal justification for successor trials.<sup>12</sup> Our main concern, however, is not whether prosecution is justifiable, but if and under what conditions it is conducive to reconciliation. For these purposes it is sufficient to note that there is a strong *prima facie* case for bringing perpetrators to justice.

It is often argued that reconciliation requires justice, in the sense of accountability and punishment for former perpetrators.<sup>13</sup> The link between justice and reconciliation is substantiated with reference to reconciliation processes both at the individual and social level. Findings from psychological research indicate that bringing perpetrators to justice is often vital to reconciliation at the individual level, that it enables victims of human rights abuses to attain closure and restore healthy relations toward others, and their own selves. At the social level, bringing perpetrators to justice demonstrates a clear break with the past and responds to and acknowledges a sense of justice in the population which is needed to build trust in the new social order. Conversely, we are warned that failing to prosecute past atrocities creates a culture of impunity that is detrimental to the rule of law and to reconciliation in the sense of peaceful coexistence in a democratic system of government. And it is noted that countries where amnesties are granted often experience high and rising crime rates.

The merits of retributive justice as a means to advance reconciliation is, however, not undisputed. It is frequently argued that to impose justice on

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<sup>12</sup> Successor trials prosecuting acts that were legal according to the laws of the country at the time they were committed have been held to violate principles of due process and the rule of law. This was a large debate in the aftermath of the Nuremberg trials after WWII. As human rights norms have come to be widely accepted as principles of international law, prosecution for gross violations of human rights is less controversial as a case of retrospective legislation. Other problems of due process may, however, arise. For example, will prosecution, given the time and costs involved, in most cases be selective, which means that decisions to prosecute may be vulnerable to criticisms of arbitrariness and/or political bias.

<sup>13</sup> This is normally seen in terms of criminal justice – the prosecution and sentencing of individual perpetrators in courts of law or international tribunals, and forms the main focus on the discussions in this section. Other means to impose accountability and punishment include sanctions imposed through administrative justice, purges in the civil service, prohibitions on holding public office, and public shaming. These approaches have their own advantages and shortcomings and will be commented on in due course.



members of the former regime or their agents is likely to increase tension and social conflicts in ways that prevent national reconciliation.

Among those who hold that justice for past crimes is conducive to reconciliation, and thus in principle *desirable*, there are different views regarding the circumstances under which it is a *feasible* strategy. There are also different views regarding the form the pursuit of justice should take in different contexts, and on whether alternative approaches are as, or more, likely to advance reconciliation – in particular given the costs involved in conducting trials.

*Under what circumstances can and should perpetrators be brought to justice?*

Chances for successful prosecution of those responsible for past abuses depends on political and institutional factors as well as the nature and scale of abuses.

*Political factors* – most notably the balance of power between the new regime and representatives of the former – may make prosecution untenable. To prosecute representatives of former regimes for human rights abuses is a feasible option only where the former regime has been defeated or so severely discredited that they no longer pose a viable threat, military or otherwise (Skaar 1999b). This was the case with the Nazis after the Second World War, where successor trials were held in a number of countries. A more recent example is the Derg trials in Ethiopia, trying alleged perpetrators from Mengistu's military dictatorship.

Where the former regime has retained some support, or managed to control the transition process, prosecution is unlikely. In the latter case, amnesty guarantees are normally demanded by the former regime as a condition for reforms, and concessions granted in the transition process may thus effectively block recourse to prosecution, as happened in several Latin American countries. If the previous regime has retained significant support in the population and/or in the armed forces, this is likely to deter prosecution for fear of increasing conflicts or the chances of a military coup. Prosecution is also unlikely if atrocities occurred in a context of armed conflict or civil war with massive violations on both sides – particularly if the former antagonists now co-operate in the new political system, as is the case for example in Mozambique.

Even if political considerations do not prevent the new regime from meting out justice for past crimes, the *institutional conditions* may be lacking. In many cases the domestic judiciary and the entire justice system is so weak or compromised by its links to the former regime, that it is unlikely to have the ability to investigate and conduct trials in a way that is perceived to be fair. Often the documentation needed to prosecute has also been destroyed or cannot be located. There is also the problem of *scale*. In most cases – but particularly where the number of perpetrators is overwhelming, as in Mozambique and Rwanda, the capacity of the criminal justice system to hold perpetrators accountable is bound to be limited (even without taking into account the dismal state of the justice system in these countries).

In yet other cases, the *nature of the abuses* makes criminal justice a difficult route. Prosecution is most feasible as a strategy for transitional justice

where a relatively limited number of perpetrators are responsible for clearly identifiable criminal acts against individual victims. Particularly when these are criminal also by the standards of the regime itself, and can be linked to the former regime by relatively clear lines of command.

This is most typical of the pattern of repression in Latin American military regimes. In Eastern Europe repression had a broader scope and was to a larger extent incrementally implemented through bureaucratic procedures, which makes it more problematic to use criminal trials to impose accountability and punishment. But neither the political, institutional or structural obstacles to justice are absolute. Different strategies have been sought to overcome them so that those responsible for past atrocities can be held to account and punished for their crimes. An overview of different institutional strategies is provided in Table 3.1.

**Table 3.1 Institutionalisation of Transitional Justice**

	<b>Domestic institutions</b>	<b>Mixed institutions</b>	<b>International initiatives</b>
<b>Permanent judicial structures</b>	Trials in ordinary courts by domestic judiciary (Ethiopia, Argentina, Nazi trials in Norway and other countries after WWII)	Trials by judiciary under UN-administration (East Timor)	International Criminal Court (Enabling mandate adopted, but not ratified)
			Trials in foreign courts Spain (- Chile) Belgium (- Rwanda)
<b>Ad-hoc judicial structures</b>	Ad hoc domestic tribunals (Rwanda)	Joint tribunals – domestic & international judges (Cambodia, Sierra Leone)	International ad-hoc tribunals (Former Yugoslavia, Rwanda)
<b>Non-judicial measures</b>	Administrative justice - Purges, prohibitions (Czechoslovakia, Eastern Europe)		
	Shaming – exposure through truth commissions naming perpetrators (South Africa)	Shaming – joint truth commissions	Shaming – internationally organised truth commissions (El Salvador)
	Shaming – exposure through access to files (East Germany)		

### *What are the options?*

The normal mechanism for delivering criminal justice is the *domestic justice system* – to prosecute and try offenders before the normal courts of law or some form of special tribunal. Where this is feasible, it is widely regarded as the preferred option, though there may be factors that make this an impossible or unlikely route to justice.

The most unfavourable context in this regard is where the position and continued support for the past regime and/or groups responsible for past human rights violations, give them a significant disruptive potential. Where this is the case the new regime will not go for trials, even where there is a pressure for justice in civil society (Skaar 1999b).<sup>14</sup>

In the past few years we have, however, seen considerable activity on the part of international actors, applying various forms of pressure to affects the internal balance of power, or circumvent it. The attempt to have Chile's former dictator Augusto Pinochet tried before a Spanish court is well known. In this case a domestic courts in one country is trying citizens (including former leaders) of another country for particular crimes (war crimes, crimes against humanity) committed on the latter country's own territory. This introduces a new mechanism to impose justice: *trials in foreign courts*.<sup>15</sup>

A second strategy by the international community to hold former regimes accountable for past atrocities is illustrated by the recent successful effort to pressure Serbia to hand over Slobodan Milosevic to the War Crimes Tribunal in The Hague: *international tribunals*, created and authorised by the UN Security Council.

Both of these strategies are in the process of being more firmly institutionalised. The former (trials in foreign courts) is provided for and taken up by several countries (Belgium, France, Italy, Spain, the US). And the process to establish a permanent *International Criminal Court* (ICC) is underway. It is, however, a question whether such processes – where perpetrators are tried far away from the country where the crimes took place and with large sections of the population rejecting the process, or viewing it with considerable scepticism – can contribute to national reconciliation.

A third strategy is *joint tribunals*, where domestic and international judges work side by side. This is the mechanism set to be implemented in Cambodia, where the US in particular has exerted considerable pressure in order to bring the Khmer Rouge leaders to trial.<sup>16</sup> To establish a co-operation between foreign judges and the domestic courts is also the route taken in Indonesia and Sierra Leone. It can be seen as response to the problem of creating domestic ownership of and legitimacy for an internationally driven process, while at the same time compensating for problems in the domestic justice system.

International tribunals, trials in foreign courts, and joint tribunals are strategies that seek to surmount obstacles created by the domestic political balance of power, as well as to overcome institutional problems of lacking infrastructure and judicial independence. The latter is also addressed by various strategies to strengthen the domestic justice apparatus, through technical and financial assistance, training, and support for judicial reform.

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<sup>14</sup> Domestic actors can overcome formal obstacles, such as amnesties granted prior to or as part of the transition if the power position of the former regime changes.

<sup>15</sup> This is gaining ground, with Belgium's trials of Rwandan war criminals being an even clearer case, since Belgian individuals were not involved on either side.

<sup>16</sup> As of February 2002, it is unclear whether and when a joint tribunal will in fact be implemented, after a breakdown in the negotiations between the Cambodian government and the UN. According to the previously agreed framework, domestic judges were to be in majority on the tribunal, but in order for decisions to stand, an international judge would have to side with the majority.

Problems related to the scale of the abuses – overwhelming numbers of perpetrators and criminal acts – are sought met by *selective prosecution* of the so-called ‘big fish’, i.e. the planners and administratively responsible, rather than the foot soldiers.

Capacity problems have also been addressed by establishing an *alternative domestic system* outside the courts, where alleged perpetrators are tried (Rwanda). This has, however, been criticised for not meeting standards of due process and for creating a system where the foot soldiers are sentenced much more severely than the ‘big fish’<sup>17</sup>.

*Lustration* – administrative purges and prohibitions on holding public office – is another route taken to ensure some form of retributive justice where the scale or nature of abuses have made prosecution difficult (because they are linked to the very structure and operation of bureaucratic and social structures).<sup>18</sup> Other weaker mechanisms rely on *social shaming*. The names of perpetrators and the nature of their crimes are disclosed through truth commissions processes or by granting victims access to secret files.<sup>19</sup>

We will return to some of these mechanisms later. In the following, when addressing the effects of justice on reconciliation, we will concentrate on the paradigmatic case: criminal justice through some form of domestic or international trial.

*Is justice a precondition for reconciliation – or is it contrary to national reconciliation and democratic consolidation?*

Besides the practical, and in some cases also moral, problems involved in meeting out criminal justice to those responsible for past human rights abuses, it is also a question of whether this – even when feasible – is conducive to reconciliation.

There is a range of positions on this issue. The disagreements are due both to different assumptions about the *effects* of imposing criminal justice, and to differences in the way reconciliation is understood. Some argue that true reconciliation is impossible unless those responsible for past atrocities are brought to justice – that a culture of impunity is the main obstacle to long term reconciliation in the sense of creating social conditions for mutual

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<sup>17</sup> For a discussion about how different categories of the population are related to and affected by past abuses see Adam (2001).

<sup>18</sup> Surveillance by the secret police was common in most of the former East European regimes, such as in East Germany, where a quarter of the population was registered in the Stasi archives. In these countries *lustration* laws were passed, first in the former Czechoslovakia and later in most Eastern European regimes. These banned former officials and police collaborators from higher political (and certain other) positions for a period of time and specifying legal criteria to identify them. See Christie (2000), Hayner (2001), Rosenberg (1999). These responses have been widely criticised for lack of due process safeguards. It is, however, argued that as far as punishment goes, responses by way of administrative justice and public law are more feasible than trials in former communist regimes, where human rights violations were often committed incrementally by ‘the system’ (anonymous bureaucrats) against a large number of suspected dissidents. As noted above, trials are more feasible when more easily identifiable agents have committed criminal act against specifically targeted individuals, as is the case in many Latin American countries (Rosenberg 1999).

<sup>19</sup> In East Germany the Stasi Archives were opened and citizens were given access to their files. This had a similar effect as *lustration* laws in that a large number public servants at were dismissed and office-holders various levels discredited. See Christie (2000), Rosenberg (1996).

tolerance between citizens of a democratic state.<sup>20</sup> Others hold that the prosecution of offenders rarely contributes to reconciliation, but rather is likely to lead to renewed conflict and violence. Yet others hold a position somewhere in between, where the benefits of trials for reconciliation are seen to be dependent on the particular nature of each social and political context.

Those warning against prosecuting crimes of former regimes fear that it might destabilise a fragile peace and increase tension and violence. As noted earlier, the likelihood that this might happen is particularly great if those responsible for human rights violations in the past, continue to hold significant power or social support. This has been the main argument against trials in Latin American countries coming out of repressive military dictatorships, and where the military continued to be a potential threat. Similarly, in Cambodia, where the Khmer Rouge was seen to have considerable disruptive potential, fears were that prosecutions would bring the horror back. In countries such as South Africa and Mozambique, where those politically responsible for past violations continue to have a significant base of social support, it was feared that attempts to prosecute them might spark a (new) civil war. In these cases prosecution is seen as an immediate threat to reconciliation in the sense of peace (absence of violence). While there may be different views of how realistic such a scenario is in a particular case, few would totally ignore the political dynamics and advice prosecutions in a situation where this is seen to constitute a real, grave security threat.

In cases – or at times – where prosecution is unlikely to result in immediate threats to the new regime, views are more divided.<sup>21</sup> Some, nevertheless, advise against trials, on the grounds that the likely effect will be to further divide the society by creating martyrs of victors' justice, feeding sentiments of collective victimisation, contrary to the aims of reconciliation. Others hold that the positive long-term effects of ending impunity offset the possible negative effects in the short and medium term. It is also argued that reconciliation is necessary for (or greatly conducive to) reconciliation at the individual level – by prosecuting those responsible for past human rights abuses victims are recognised, the wrongs they suffered are acknowledged and responsibility is allocated, which may bring closure and healing.<sup>22</sup>

As we have seen, the purposes of successor trials are manifold: to demarcate the boundaries of the new legal order and signal respect for the rule of law by ending impunity; to establish the truth about particular crimes; to establish accountability; to acknowledge wrongs done; to punish (retribution); and to recognise the rights of victims and in certain conditions compensate them. Given the problems that in many cases are raised if former perpetrators are brought to justice, and the ambivalent effects on reconciliation, much effort has gone into the search for other mechanisms that can fill some of the

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<sup>20</sup> This is the position held by most Human Rights NGOs such as Amnesty International, advocating trials in foreign countries for perpetrators who are not brought to justice in their home countries.

<sup>21</sup> The time dimension is very important. The relative strength and position of the former regime/ perpetrators changes over time, as does other aspects of the social context affecting the likelihood and impact of successor trials. See discussion in section 7 below.

<sup>22</sup> This is a major argument for trials in the psychological literature, and has been central in the Latin American context.

same purpose without the practical problems and potential disruptive effects of trials.

Those who reject or seek alternatives to criminal justice more suited to advance reconciliation in particular contexts, often argue that the element of punishment (*retributive justice*) should be avoided or downplayed. What matters to reconciliation is primarily *knowledge* about what happened, steps to rectify the harm suffered by victims (*restorative justice*) and to create conditions preventing human rights violations in the future (*prospective justice*). These aims, it is argued, can also – and possibly better – be achieved by other means.

## 4 Truth and Reconciliation

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As noted above, a central aim of successor trials is to establish the truth about the crimes of the past – what happened and who were responsible. Among those who reject trials as a suitable road to reconciliation, generally or in particular contexts, it is a widespread understanding that to bring out the truth is a precondition for reconciliation.<sup>23</sup> This idea is in fact a central dogma underlying much of the contemporary debate on transitional justice. But what evidence is there to support this claim? In what sense is truth a precondition for reconciliation? And through which means can the truth be established?

While some argue that the legal process, with its procedures of cross-examination and evaluation of evidence, is superior with regard to establishing the truth about past crimes, others hold that the narrow focus of the legal process produces too limited a truth. It can, at best, uncover elements of *forensic truth* – about whether a particular person did or didn't commit particular acts against a particular victim at a particular time and place.<sup>24</sup> Other aspects of the truth about the past – why the crimes happened, the political strategy behind them, the social and cultural dynamics enabling them, the effects on the victims and society more broadly – are not captured. The acknowledgement of the victims and their experience provided by court processes is limited and unlikely to have a restorative effect, as those who testify are only asked for particular aspects of their experience, and may have to undergo hostile inquiries. A notable type of new institutions has developed in the past few decades, responding to the shortcomings discussed here, and capable of uncovering truth in contexts where trials have been ruled out, namely *truth commissions*. These are the focus of the present section, where we present an overview of the truth commissions carried out so far. When discussing the potential benefits of – and limits of – the truth commission approach, we take as our point of departure what has come to be seen as 'the model' case, namely the South African Truth and Reconciliation Commission.

### *Truth commissions – an overview*

Truth commissions are institutions outside of the judicial apparatus that have been established by a government or intergovernmental institution to uncover evidence about abuses committed under a previous regime or during a civil war. They are non-judicial bodies in the sense that they do not have the power to punish perpetrators by imposing legal sanctions. The focus is on victims and their stories of past human rights violations. The names of these institutions vary, as do their scope and modes of operation. Rather than consider truth commissions as a unified response to the problems of past crimes, this should be seen as a range of distinct strategies. Table 4.1 provides

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<sup>23</sup> There is also a separate argument made by many human rights activists for an inherent right to truth, seen to exist in international human rights law, arising from the obligation of states to investigate and punish violations of human rights. See Kritz (1995: 230).

<sup>24</sup> For a discussion of various forms of truth relevant to truth commissions (*forensic truth, personal/narrative truth, dialogical truth, restorative truth*) see Boraine (2000b). See also Villa-Vicencio and Verwoerd (2000).

an overview of the main dimensions on which truth commissions differ, and the range of variation.

**Table 4.1 Truth commissions – institutional choices**

<b>Institutional feature</b>	<b>Range of variation</b>
Process of creating commission	Executive decision – Parliamentary process – Civil society input– Internationally driven
Composition	Partisan (new regime) – Politically balanced – ‘Neutral’ – International
Resources	Small budget, no staff – Staff of several hundred, with ditto budget
Source	Domestic budget not guaranteed – Domestic guaranteed budget – International donor funding
Time of operation	6 months – Set time limit of up to 3 years – Unspecified
Mandate	Narrow (few forms of human rights violations/short period) – Wide (all violations/long period)
“Even-handed”?	Violations by one party only (former regime) – By the two main parties – By all sides
Amnesty provisions	Blanket amnesty – Conditional amnesty (upon disclosure) – No amnesty – TC + Prosecution
Investigation	Few/weak powers (voluntary co-operation) – Strong powers (subpoena, search & seizure)
Hearings	Secret – In camera – Public – Widely publicised
Reporting	Secret report – Public, perpetrators not named – Perpetrators named – Widely published
Policy recommendations	None – Advisory – Obligatory

Compared to trials, truth commissions generally provide a more supportive environment for victims. They also provide for a richer *narrative* and *social truth*, an *interpreted truth* that not only establishes what happened in the past, but also the context and meaning of these violations.<sup>25</sup> Proponents of truth commissions hold that this, as a general rule, render them a more appropriate route to reconciliation than quests for criminal justice. Others argue that a broader truth commission process should supplement criminal justice through trials. Yet others endorse truth commissions as a second best option in contexts where trials are not feasible. In sum, this has resulted in a

<sup>25</sup> Unlike trials, which "focus on particular individuals and their conduct in particular moments in time, with decisions of guilt or non-guilt"... (Minow 2000: 299), truth commissions seek to establish the broader patterns of violations and their causes.



rapidly growing interest for truth commissions as an institutional mechanism to deal with the problems of transitional justice.

The first major truth commission was established in Argentina in 1983, and by the turn of the century around 20 commission had completed their work or were underway, most of them in Latin American and African countries.<sup>26</sup> An overview of the main truth commissions is provided in Table 4.2.<sup>27</sup> As indicated in Table 4.1 their mandates and powers, resources and modes of operation have varied greatly. The tendency has been that the commissions have expanded over time, both in terms of resources and powers.

In Latin America, where many of the early truth commissions were established, the operations were generally small in terms of staff and conducted within a short time frame (6-12 months).<sup>28</sup> Statements were heard in closed chambers – sometimes the whole process was conducted in secret. The commissions were normally established by and reported to the President. In most cases perpetrators were not named, or the names were not made public. In some cases, publication of the report was long delayed, or was never made public at all. Besides reporting on the abuses covered by their mandate (which was often limited to narrow categories such as disappearances or deaths in detention, excluding serious and often more frequent violations such as torture, lengthy detentions and forced exile), the commissions were frequently asked to recommend reforms. The commissions in some cases also identified victims and survivors who would later qualify for compensation.

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<sup>26</sup> The first Latin American truth commission was established in Bolivia in 1982, but due to lack of resources it disbanded after a couple of years without producing a report. For an overview of truth commissions see Hayner (2001), Kritz (1995). On Latin American truth commission see also Popkin and Rohtarriaza (1995).

<sup>27</sup> The main source is Hayner (2001). Definitions of "truth commissions" differ. We only include commissions set up by a government or the United Nations to investigate abuses under a former regime or during a civil war. We thus exclude:

- Commissions of inquiry by regimes into abuse under their own rule, such as the commission set down by Idi Amin in Uganda (1974) to investigate abuses during the first year of his reign, and the Zimbabwe Commission of Inquiry into government repression in Matabeleland (1985).

- Similar commissions set down by non-state parties, such as the ANCs commissions of inquiry into human rights violations in their own camps (1992 and 1993).

- Commissions of inquiry by non-state agents (human rights NGOs, domestic or international). This is normally not included in definitions of truth commissions, but there are exceptions. The Rwandan commission, created and funded by international NGOs in 1992 is often included, as the president had acknowledged it and the parties had agreed to establish a truth commission.

<sup>28</sup> For a comparison of truth commissions in terms of resources and responsibilities see Hayner (2001: 318-322), Kritz (1995: 251-253).

## Truth Commissions

- **Bolivia (1982-84)**, *National Commission of Inquiry into Disappearances* established by the President. 8 commissioners, representative of a cross section of society. Mandate limited to disappearances, excluding torture, lengthy detention etc. Support staff of 6, limited financial support from government. Investigated 155 cases (1967-1982). Disbanded after 2 years without producing report. Trials against former officials were instigated in mid 1980s.
- **Argentina (1983-84)** *National Commission on the Disappearance of Persons*. Established by the President. 13 commissioners, staff of 60. 9 months duration. Narrow focus, mandated to investigate disappearances (8960 cases) by the former military regime (1976-83). (Victims of torture or prolonged detention interviewed and included in report, but not defined as victims, significant violations excluded.) Report *Nunca Más* published in 1985 and widely distributed. Names of perpetrators not made public, but leaked. Material later used for purposes of compensation and in trials against the military regime. Prosecutions were subsequently halted and pardons given.
- **Uruguay 1985** (*Investigative Commission on the Situation of 'Disappeared' People and Its Causes*) established by Parliament. Around 9 commissioners worked for 7 months. Mandate limited to disappearances during 11 years of military rule, excluding more prevalent abuses (torture, lengthy detention etc.) Reported on 164 disappearances and evidence of security force involvement. Forwarded this to the Supreme Court, but this has not resulted in prosecution. Public, but not widely distributed report.
- **Uganda (1986-95)** *Commission of Inquiry into violations of human rights*, established by the President. Broad mandate, investigating human rights abuses by public officials (1962-86). 608 deponents. 6 commissioners and 5-10 staff, operated for 9 years with progressively deteriorating funding. Presented findings, conclusions and recommendations in 1994.
- **Nepal (1990-91)** *Commission of Inquiry to Locate the Persons Disappeared during the Pnchayet Period*, established by the Prime Minister. During its year of operation 4 commissioners investigated 100 cases occurring between 1961 and 1990. The 1991 report was made public in 1994. Perpetrators were not named.
- **Chile (1990-91)** *National Commission on Truth and Reconciliation* established by the President. 8 commissioners, balanced between the parties, were tasked with investigating disappearances (3428), killings, torture resulting in death and kidnappings by both sides of the conflict (1973-1990). Commission operated for 9 months and had a staff of 60. Investigated 2920 cases in depth. The 1991 report was made public, but perpetrators were not named. Material was used to identify victims for compensation. 1978 amnesty law barred prosecution, but TRC report later basis for the Spanish extradition request for General Pinochet.
- **Chad (1991-92)** *Commission of Inquiry on the Crimes and Misappropriations Committed by the Ex-Predident Habré...* Established by the new president to investigate killings (3900 cases), torture and arbitrary detentions committed by the former regime (1982-1990). 12-16 commissioners operated for 10 months before finalising the 1992 report. First commission to name perpetrators (only so far to publish photos of the perpetrators) – many of whom were in high offices. No purges or trials.
- **Germany (1992-94)** *Commission of Inquiry for the Assessment of History and Consequences of the SED Dictatorship in Germany* was established by Parliament to investigate human rights abuses in DDR between 1949 and 89. Composed of political representatives and experts. Focus on political-historical analysis rather than investigation of individual human rights violations. Academic papers commissioned and presented at public hearings. 27 commissioners and a staff of around 20 took three years to complete the lengthy (15 000 page) report. This academic exercise was combined with individual's right to review own *Stasi*-files.

- **El Salvador (1992-93)** *Commission on the Truth for El Salvador* was established by the United Nations as part of the UN moderated peace accord. Staffed and funded entirely by non-nationals. Broad mandate. The three-member commission and a staff of 15-45 were faced with 22 000 cases of human rights abuses (disappeared, killed, tortured or kidnapped) committed by both sides of the conflict (1980-1991). 32 cases were investigated in depth during the 8 months the commission operated. The 1993 report named perpetrators and made mandatory recommendations. Shortly after publication of report, amnesty law was passed, but some of the named perpetrators were removed from positions. Key recommendations were implemented after international pressure.
- **Sri Lanka (1994-1997)** *Commissions of Inquiry into the Involuntary Removal or Disappearance of persons*. Three geographically distinct commissions, each with 3 commissioners and a staff of 5-20, were established by the President. Mandated to investigate human rights violations in the 1988-1994 period. 20 000 cases were presented to the commissions during their 3 years of operation. Each commission presented a separate final report. Released after international pressure. Some perpetrators were named, and several have later been prosecuted. Limited reparations programme.
- **Haiti (1995-1996)** *National Commission for Truth and Justice* was established by the President to investigate human rights violations committed by the former regime (1991-94). 8600 cases were presented to the commission. 7 commissioners and a staff of 50-100 operated for 10 months. Report was presented in 1996, and made public a year later. List of perpetrators were included, but not released. Recommended an international tribunal to try perpetrators.
- **Burundi (1995-96)** *International Commission of Inquiry*. Established by the UN Security Council on request by Burundian government to report on human rights abuses occurring between 1993-1995. The 5 commissioners operated for 10 months before presenting their report to the UN in June 1996. (Due to coup the release was delayed until October.) International prosecution and new commission to investigate pre 1993-abuses. Renewed violence prevented further action.
- **South Africa (1995-2001)** *Truth and Reconciliation Commission* was established by Parliament. The 17 commissioners were mandated to investigate gross human rights abuses of all sides to the conflict (1961-1994). Staff of 300, annual budget of UD\$18 mill. Strong powers of investigation. Amnesty for political crimes upon full disclosure. Public, broadcast hearings. Report naming perpetrators and more than 21 000 victims were published in 1998, after 2,5 years of operation. Recommendations on reparation policy (partially implemented) and prosecution (not implemented). Amnesty committee continued hearings. Final report to be submitted end 2001.
- **Ecquador (1996-97)** *Truth and Justice Commission* was created by the ministry of Government and Police to investigate human rights violations between (1979-96). Due to lack of resources and support the 7-member commission disbanded after 5 months, before finishing report.
- **Guatemala (1997-1999)** *Commission for Historical Clarification* was established by the United Nations as part of the UN moderated peace accord to investigate killings, disappearances, torture and rape committed by both sides of the conflict (1962-1996). Broad mandate. Cases of 42 275 victims presented to the commission (which estimated a total of 200 000 were killed or disappeared in the 34 years of armed conflict). The commission operated for 18 months, had 3 commissioners (one international two nationals) and a staff of up to 200. Restricted reporting powers, no naming of perpetrators, but documented involvement by "the highest authorities of the State".

**Truth Commisions are currently underway or in the process of being established in Nigeria (1999-), Sierra Leone (2000-), East Timor, Indonesia, Bosnia among others.**

### *South Africa's TRC as international model*

While the Latin American commissions – and in particular Chile's Truth and Reconciliation commission (1990) – served as a model for other countries in the early 1990s, the role of a 'model truth commission' was gradually taken over by the South African Truth and Reconciliation Commission (the TRC). It was established in 1995 and is the most ambitious operation to date both in terms of powers and resources. The South African commission had several unique features: It was established by Parliament and mandate was publicly debated and passed as law.<sup>29</sup> Commissioners were selected in a public process. The commission conducted public and widely broadcast hearings. It had the power to subpoena witnesses, search premises and seize evidence. And it had the power to grant amnesty to perpetrators who made a full disclosure.

The large scale, ambitious aims, and public drama surrounding the TRC, combined with the high public profile of the commissioners (in particular of the TRC chairman Archbishop and Nobel Peace Prize laureate Desmond Tutu) has generated much attention, political and academic. Numerous delegations have visited the TRC, and much of the research that has been done on truth commissions has concentrated on the South African case.<sup>30</sup> Although views differ on the extent to which the South African commission was in fact successful and whether other countries should follow in its step, few dispute that it has become "the new standard-setting model of the practice" (Rotberg and Thompson 2000: 4). It is also the commission that most explicitly advocated truth telling as a route to national reconciliation. We will therefore discuss the TRC in some more detail, taking it as a point of departure when addressing the benefits of truth commissions for reconciliation and democratisation.<sup>31</sup> The main features of South Africa's TRC are set out in Table 4.3 below.

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<sup>29</sup> The Promotion of National Unity and Reconciliation Act, no 34, of 1995.

<sup>30</sup> See for example Asmal, Asmal and Roberts (1997), Boraine (2000a), Christie (2000), Dyzenhaus (1998), James and Vijver (2000), Jeffery (1999), Mamdani (1996), Meredith (1999), Nuttall and Coetzee (1998), Rotberg and Thompson (2000), Sarkin (1996), Villa-Vicencio and Verwoerd (2000), Wilson (2001).

<sup>31</sup> For a more thorough discussion on South Africa's TRC as an international model, see separate paper (Gloppen 2001).

**Table 4.3 South Africa's Truth and Reconciliation Commission**

- Established and mandated by Parliament after public debate (*The Promotion of National Unity and Reconciliation Act*).
- 17 commissioners, 'persons of integrity without high party political profile' – demographic balanced, but predominantly pro ANC/government. Selected in open nomination process, public interviews.
- Staff of more than 300. Budget in excess of USD \$35 mill. (cost more than all previous truth commissions combined). Mainly domestic funding.
- Mandate covered gross human rights violations committed by all sides of the conflict in the period 1960-1994 (Only acts that were criminal also under *apartheid* legislation).
- Quasi-judicial powers of subpoena, search and seizure.
- Power to grant amnesty upon disclosure.
- Human Rights Violations Committee (responsible for investigation, documentation and reporting of violations) conducted public, broadcast victim hearings around the country.
- Reparation and Rehabilitation Committee established to recommend compensation and restoration for victims and policies to facilitate reconciliation and prevent recurrence.
- Separately appointed Amnesty Committee headed by judges heard amnesty applications, mostly in public. 7000 applications received, many by convicted criminals, some from police and military, few from political leaders. About 850 granted amnesty.
- Institutional hearings examining the role of legal system, churches, business etc.
- Witness protection programme established.
- Victim focus. Welcoming environment for victims to tell their story. Comforters engaged during hearings. But victims support initiatives not followed through.
- Established the identity of more than 20 000 victims. Only these would qualify for compensation.
- TRC Recommendations were not binding and have largely been ignored by Parliament.
- Compensation was slow and less than recommended, but Parliament contributed 60 million Rands in March 2001
- Unlikely to be prosecutions of perpetrators who failed to apply or were denied amnesty.
- TRC process increasingly politicised. Rejected by most of the opposition as biased. Criticism by the government for treating human rights violations occurring in the struggle against *apartheid* with crimes committed by the regime.
- Drawn-out process. Established 1995. Victim hearings 1996-97. Report submitted late 1998. Amnesty process finalised mid 2001. Final report is yet to be submitted.

*Is truth the road to reconciliation? Lessons from South Africa*

The assumption that a process to establish the truth is a necessary step towards reconciliation – or at least conducive in this regard – figures prominently in the debates on transitional justice. But there are also strong arguments to the opposite – that a process to establish ‘the truth’ of the past is more prone to perpetrate divisions both at individual and social level and increase tensions, and that reconciliation rather requires a form of *oblivion*, putting the past behind.<sup>32</sup> Yet others see the relationship between truth telling and reconciliation as an empirical question – pointing to empirical evidence to support both views.<sup>33</sup>

In the Latin American context the importance of knowing what had happened and have it publicly recognised was primarily seen to be important for closure and healing at the individual level. Increasingly, the focus has shifted, and the value of truth telling for social and national reconciliation is increasingly emphasised. This is most striking with regard to the South African TRC. *Truth – the Road to Reconciliation* was the central TRC slogan, brought home to though ads and huge banners draped on the wall during the televised public hearings. And demonstrators compelling apartheid officials to testify before the TRC carried banners declaring *No reconciliation without truth*.

The argument is that by uncovering the facts about past abuses and the wider set of factors and conditions causing them, and by hearing stories about the suffering and harm caused, individuals and societies can find closure and processes of reconciliation and healing take place. Metaphors were drawn from the medical field: ‘festered wounds must be opened and cleaned out before healing can occur’, and even more so from religious ideas of ‘confession as a cathartic process leading to forgiveness and reconciliation’. The central position of theologians on the commission and among its central ideologues probably contributed to the centrality of these notions.

The idea of giving and hearing testimony as a cathartic and healing process for society, made it imperative to facilitate a process whereby not only victims would come forward, but also perpetrators. In addition to allowing as many as possible to tell their stories, the process should create as broad a listening community as possible.

These challenges lead to institutional innovations, some of which are now often taken as integral to truth commissions as such. Most striking were the open hearings and the provision that perpetrators guilty of politically motivated gross human rights violations would be granted amnesty provided they made a full disclosure to the South African TRC.

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<sup>32</sup> The relationship between oblivion and reconciliation is highly disputed, but in most contexts some form of construction of collective memory (including aspects of selective remembrance/ forgetfulness) is seen as a central to reconciliation processes. See discussion in section 7 below.

<sup>33</sup> In her comprehensive review of truth commissions, Hayner (2001) notes that advocacy for truth commissions is often based on the argument that ‘truth is a precondition for reconciliation’. She finds that this oft-repeated and often uncritically accepted argument does not, as a general claim, hold up to empirical scrutiny. Without dismissing the thrust of the argument – or the value of truth commissions – she argues for the need to qualify and contextualise the assumption that a search for the truth necessarily advances reconciliation.

### Conditional amnesty as incentive for truth telling

Some form of amnesty as a part of a truth commission process was not novel as such. Many earlier commissions had been conducted in the context of a blanket amnesty for the former regime, and amnesty is often seen as an aspect of 'the truth commission approach' to transitional justice. It should, however, be noted that there is no necessary link between the two strategies. Amnesty has been granted without a truth commission, and materials from truth commissions have been used in (or available for) subsequent trials.<sup>34</sup>

What was particular to the South African model of individual, conditional amnesties, was that it provided an incentive for perpetrators to contribute information. If they failed to apply for amnesty – and disclose their actions – they risked prosecution.<sup>35</sup> And the risk of exposure increased. In addition to being accused by victims and witnesses, they could be named by colleagues applying for amnesty. Contrary to the expectations of observers, regarding it as unlikely that those responsible would see this as a credible threat, amnesty application came in large numbers. Many of the 7000 applications came from convicted criminals with little to lose and much to win if they could come up with a credible political motive.<sup>36</sup> But there were also a large number of applications from *perpetrators* – police, military personnel and people affiliated with the liberation forces, who had actually committed the crimes. The TRC thus succeeded in uncovering new material and establishing links of responsibility in a way that previous commissions generally were unable to do.<sup>37</sup>

The provisions failed, however, to convince the *instigators* (the policymakers and strategists responsible for the planning, and for the institutional and political framework for the cause of which the human rights violations were committed). Having much to lose by exposing themselves, and little to fear, as their responsibility would be difficult to prove, they generally did not apply for amnesty. Some political parties made submissions and had their leaders accept a general responsibility for violations committed in the course of the struggle, but in very few cases did those politically responsible accept individual responsibility for violations occurring as result of their own actions or omissions. Although the TRC in some cases managed to establish links of responsibility all the way to the top of the political hierarchy, and recommended that a number of political leaders be prosecuted, this is unlikely to happen. In this sense, the TRC process let the 'big fish' off very lightly, while many of the foot soldiers paid a price in the form of exposure and public shaming. This may be a cause of resentment among victims and amnesty-seekers alike. More generally, the integrity of the process is

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<sup>34</sup> Most notably in Argentina the truth commission process was combined with trials of those responsible for the human rights violations of the former regime. Several military leaders were convicted, although pardons were later given.

<sup>35</sup> Other conditions also applied, most notably that the crime had to be politically motivated, and that the harm should not be disproportionate to the aim. These are known as the Norgaard principles after the Danish judge who developed them for the Namibian context.

<sup>36</sup> Most of these were dismissed. Of the 7000 applications only about 850 were granted amnesty by October 2000 (TRC –homepage 2001).

<sup>37</sup> It should be noted that also previous commissions have succeeded in getting confessions and testimony from perpetrators, particularly those collecting testimony in closed chambers and refraining from naming perpetrators. See Hayner (2001).

jeopardised unless there is a process to hold to account those who did not apply for, or who were denied amnesty. While conditional amnesty proved to be a powerful investigative tool, the problems that it raises should not be overlooked.

### **Reconciliation through public truth-telling?**

The TRC process sought not only to contribute to reconciliation by compelling perpetrators to disclose their actions – and to do so publicly.<sup>38</sup> It was also central that the stories of victims should be told – and heard – to the greatest extent possible. The aim was that the entire society should know the extent of human rights violations committed during the conflict of the past, and the suffering caused to victims on all sides.

For this to happen, victims had to come forward. To many the opportunity to relate the stories of their trauma and have it form part of a public account of the past, was valuable in itself. This is noted also by truth commissioners taking up statements *in camera*, and to many victims the public platform provided by the TRC made this an even more valuable opportunity (for others publicity would be a barrier, particularly in contexts where this might cause retribution). That only those identified as victims by the TRC would qualify for reparation payments, was clearly also an incentive to come forward.<sup>39</sup>

Social reconciliation required not only that the stories be told – they also had to be heard. This required public relation efforts that no previous commission had undertaken. The TRC held *public* victim hearings throughout the country and developed close co-operation with the national media. The hearings were given extensive coverage, in the daily news, and in weekly *TRC Special Reports* on national television.<sup>40</sup> Thousands of hours of radio reports were transmitted from the hearings – several hours daily, and in all the eleven official languages – providing first hand knowledge also to poor and illiterate people around the country.

### **Did this large-scale exercise in public truth-telling advance reconciliation?**

The widely broadcasted hearings spread the knowledge and acknowledgement of apartheid's atrocities throughout South African society and the TRC was generally successful in "*limiting the range of permissible lies about the past*" – to use Michael Ignatieff's famous phrase. No one could any longer deny that awful things happened in the apartheid years, that these were not accidents, but planned activities, or that the state security agencies were involved. Although few might read the TRC report, everybody knew. The apartheid regime was discredited among its former supporters and beneficiaries and this was in itself an important achievement.

While the TRC did not uncover the whole truth about the past, it was reasonably successful in its investigative efforts. And the facts brought out by

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<sup>38</sup> There were provisions for amnesty hearing to be held *in camera*, but most of the hearings were public and broadcast.

<sup>39</sup> With hindsight, and in light of the fact that reparations have been delayed and are smaller than expected and recommended by the TRC, it could be argued that also the victims were compelled to come forward on false pretences.

<sup>40</sup> There were 81 programmes, totalling more than 100 hours of prime-time documentary. These were widely watched.



the TRC were not widely disputed as such.<sup>41</sup> But this did not hinder politicisation of the commission. Contrary to what might have been expected, the TRC-truth did not seem to bring reconciliation. A survey in July 1998 – three months before the TRC handed in its report – indicated that a large majority of South Africans felt that the process had increased racial tension.

This is no conclusive answer. We don't know how it will affect long term processes, or what the situation would have been had the TRC not been established. Still, in the light of the South African TRC's status as 'international best practice', it is important to acknowledge that, despite its virtues, it did not become the 'road to national reconciliation' that so many had hoped for. We need to seek answers to why this was so. Should the process have been organised differently? Or does the underlying assumption about the 'healing power of truth' just not hold?

Some critics dismiss the TRC's philosophy as empirically unsound. As a "confusion between moral discourse and socio-political analysis" ...

"it is naïve and dangerous to predict that the one (truth) will necessarily lead to the other (reconciliation), or that amnesty will necessarily have "a healing effect". There are perhaps more factual case studies that demonstrate that truth, such as it is presented, leads to bitterness, anger, revenge and disillusionment and that amnesty can lead to a pervasive sense of injustice and aggrievement" (Adam, Slabbert and Moodley 1997:5-6).

### **Individual healing and national reconciliation**

Another possible problem might be that the assumption about the 'healing power of truth' is valid only at the individual level. That it was wrongly assumed that "the process for individual healing matches what an entire nation must undergo" (Minow 2000: 240). As discussed earlier in the report, reconciliation is a difficult concept, referring to processes of different kinds and at various levels. While – politically – the main aim of the TRC was *national* reconciliation, to unify the divided South African population, the process was geared mainly towards *individual* reconciliation, between victims and perpetrators, drawing on experience from psychological and religious counselling. The social and political dynamics of truth telling are thus to some extent obfuscated.

### **The political nature of the truth**

Truth commissions have in many cases been perceived as a form of *vengeance*, a way for new regimes to discredit their predecessors and/or opponents. The South African TRC, unlike most of the early commissions, was mandated to investigate gross human rights violations committed by all sides, and took care to demonstrate 'even-handedness' by also focussing on ANC related abuses. Still, the majority of the crimes raised by the victims were attributed to representatives of the former regime, the white right wing or Inkatha. This – and the fact that the commissioners were perceived as sympathetic towards the

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<sup>41</sup> In some cases there are also disputes over the factual correctness of the material.

new regime – lead to perceptions of the TRC as a ‘witch-hunt’.<sup>42</sup> A process collectively stigmatising particular parties and population groups, and an effort to write the authoritative story of the past in a way that favoured the ANC.<sup>43</sup> Criticism was, however, not confined to the opposition. While the ANC supported the commission and its ‘even-handed’ mandate,<sup>44</sup> the support faded when the report was presented and found the ANC guilty of a number of violations (albeit only a fraction of what was attributed to the former regime and Inkatha).<sup>45</sup>

This shows the importance of recognising the inevitably political nature of truth commissions and the constraints of the political context on their operation. The South African attempt to de-politicise the TRC – through provisions for even-handedness, broad deliberation on the mandate, an open process of nomination and appointment of a demographically representative group of ‘people of integrity without a high party-political profile’ – was not successful. As will be argued below, a commission where the various parties are directly represented might actually have fared better in this regard. One reason is simply that truth commission by their very nature can never be politically neutral.

The central task for all truth commissions is to give an authoritative, officially sanctioned account of ‘the relevant past’. But in any society – and particularly in a plural society – the meaning of the past is inevitably contested and highly political, and history is central to the ongoing struggle for political legitimacy.

Parties to a conflict normally have different understandings of the past – of what constitute relevant wrongs and with whom responsibility rests – and how this reflects on the present and the future. At the same time, there is a widespread understanding that national reconciliation and democratisation require some form of reconciliation between the different versions of history. Hence, truth commissions are given the task of building a collective memory

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<sup>42</sup> The National Party, who as the former government was on the receiving end of most of the allegations made in the hearings, argued from early on that the commission was biased towards the ANC. It was supported in its critique by the conservative press and aided by some very unfortunate TRC decisions. (Most notably the granting of amnesty to a group of ANC cadres without proper disclosure, a decision that was later reversed.) The Inkatha Freedom Party denounced the Commission as a witch-hunt and refused to co-operate. Left-wing parties criticised the amnesty-provisions for taking away victims' right to legal redress and to prevent civil claims for compensation. The Azanian People's Organisation brought a case to the Constitutional Court to have the Act ruled unconstitutional – but without success.

<sup>43</sup> On the TRC as a legitimisation exercise see Wilson (2001).

<sup>44</sup> Although central leaders, including President Mandela, are known to have been sceptical that the TRC might increase racial tension. They would have accepted a general amnesty had the apartheid leaders been willing to apologise for the past and ask forgiveness of the victims. Many also felt that it was unfair that human rights violations that occurred as part of a just war against an evil regime should be treated on par with crimes committed by the apartheid government and its agents. Nevertheless, ANC cadres, including cabinet members, applied for amnesty. The party handed over documentation and made a lengthy submission to the TRC in which it took collective responsibility for abuses.

<sup>45</sup> The ANC leadership sought a court interdict to stop the publication of the report, which it failed to get. The incident also revealed the difference in policy and priorities between President Mandela – who publicly disagreed with his party's decision – and the current president Thabo Mbeki who does not share Mandela's emphasis on reconciliation, nor his loyalty to the TRC.

of the past repression and its meaning for the future, on the basis on which to proceed.

For 'the truth' to contribute to the process of national reconciliation truth commissions must negotiate a difficult terrain – and there is little consensus on what is the best way to go about it. In the current academic debate warnings are frequently voiced against striving towards 'the Truth' or a common understanding of history. Attempts to give a single, authorised story of the past – even if every effort is made to be fair and even-handed – inevitably make some feel that their 'history' is not done justice, and that they are politically or socially damaged as a result. Even when the authoritative truth represents a broad consensus it is undemocratic, in the sense that it has a stifling effect on democratic debate. While national reconciliation may require a process of working towards more *compatible versions* of the past, it is crucial for a democratic society to recognise different voices and distinct stories.<sup>46</sup>

### Lack of remorse

Some have also argued that a vital link is missing in the truth-reconciliation logic. As noted above, amnesty applicants had to make a full disclosure and provide a credible political motive. They did not, however, have to apologise or show any form of remorse, and few did.

Critics have noted that this undermines the central argument of the TRC process, namely that of confession leading to forgiveness. To forgive a person it is not enough to know details of the wrongs committed, or even to hear from their own mouth what was done and why. If there is no repentance, no willingness to rectify, such revelations are as likely to harm the relationship as to contribute to reconciliation. Public apologies – even without full disclosure – is more likely to lead to reconciliation than truth without contrition (Van Zyl Slabbert 2000).

### Lack of rectification

A related argument is that merely to know the truth is unlikely to lead to reconciliation as long as the injustices caused by the violations persist (Hendricks 1996). This is an argument for the primacy of restorative justice – in which the main problem becomes the failure to implement the reparations component of TRC process timely and on an adequate scale.

It may, however, also be an argument for a structural focus and reforms rather than reparations. It is argued that the focus of the TRC is irrelevant for most of apartheid's victims. In a context where the majority was victimised by racist and unjust policies, rather than individual crimes, the focus should have been less on (the relatively few) perpetrators of gross human rights abuses and their immediate victims and more on the many *beneficiaries* and victims of the apartheid system.<sup>47</sup> We return to both of these discussions later.

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<sup>46</sup> There is a growing literature on the problems of oblivion, creation and transmission of memory, (history writing, art, literature, film, music, theatre), see for example Roniger and Sznajder (1999).

<sup>47</sup> This argument is frequently raised in relation to the South African TRC (Mamdani 1996). It should, however, be noted that the TRC, unlike previous commissions, did attempt to come to grips with this through conducting institutional hearings, where focus was set on the role of social institutions (business, the faith communities, the judiciary, the medical profession etc.).

*Is quest for truth a substitute for justice?*

It is often argued that truth commissions, at least to the extent that the perpetrators are named, represent a form of justice in the sense of *social shaming*.<sup>48</sup> Thus, it mitigates against impunity in contexts where other forms of punishment are not feasible.

Critics have argued that the ostracising effect depends on rejection of the named perpetrator by his or her relevant community. In many divided societies, those named as perpetrators by a body seen to represent the new power-holders, are considered heroes or martyrs by their own group (Adam 2001, Moodley and Adam 2000). This can to some extent be avoided if the commission – as was the case in Chile – is balanced between commissioners drawn from, or known to be congenial to the old regime and commissioners supporting the new (alternatively representatives of all the conflicting groups). The lack of commissioners seen to represent the views of the *apartheid* regime (National Party/white right wing) and the Zulu nationalist Inkatha party, is often cited as a main problem with the South African commission. Regardless of its efforts at even-handedness (investigation of abuses by all parties to the conflict), it made the TRC prone to rejection on grounds of bias among those responsible for the bulk of abuses. It is much more difficult for the different groups to reject findings supported by their own representatives. This consideration should weigh heavily, even though it may be more difficult to reach consensus on conclusion in a politically representative commission.

In a context where the naming of perpetrators does not appear to have a detrimental effect on their lives – where those publicly known to be responsible for horrible human rights violations continue to live under conditions far superior to those of their victims – this is not likely to be seen as a step mitigating against impunity. Rather, the naming of perpetrators demonstrates the extent to which serious crimes go unpunished.

Some of those who hold that naming of perpetrators represents a form of punishment (social shaming, loss of reputation and possibly positions) criticise truth commissions where perpetrators are named (in public hearings or in the report) precisely on this ground. Ostracism represents an – often severe – form of punishment for perpetrators and their families, handed out without the safeguards that a proper legal process entails in the forms of rules of due process and probing of testimony through cross-examination (Jeffery 1999).

Apart from the possible punishment effect of truth commissions, they are frequently held to be a substitute for justice in another sense – namely, providing a form of restorative justice, more relevant to reconciliation.

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<sup>48</sup> See for example the Report of the South African Truth and Reconciliation Commission (1998), Borraine (2000a).

## 5 Restoration and Reconciliation

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### *Is restorative justice the road to reconciliation?*

Some argue that what really matters to reconciliation – for the individual and at the social level – is not retribution through punishment for perpetrators. Nor is it to know the truth about the past. The important question is whether steps are taken to address the victims' situation and restore the physical, psychological, social and economic damage caused by past abuses.

Restorative justice may take different forms, ranging from reparation payments to victims, via rehabilitation programmes, peace-building projects in conflict-torn communities, memory projects, and the construction of memorials. Table 5.1 provides an overview of the most important restorative justice strategies and their institutional manifestations.

**Table 5.1 Restorative justice strategies**

<b>Strategy</b>	<b>Institutional mechanism</b>	<b>Source</b>
Reparation payment, monetary compensation	Trial awarding compensation	Perpetrator/ Public/ Donor (national or international)
	Truth commission reparation policy	Public/ Donor
	Administrative reparation policy	
Rehabilitation	Administrative – public records, Education	Public/ Donor
Healing	Social services to victims (somatic and psychological health services)	Public/ Donor
	Truth commission (testimony as therapy)	
	Traditional practices	Local
Acknowledgement	Trial	Perpetrator/ Public
	Truth commission	Public/ (Perpetrator)
	Public apologies	Public representatives, Public/Perpetrator
	Memorial projects	Public/ Donor
Peace-building	Conflict resolution programmes	Local/Public/Donor

Which form of restorative justice that is most likely to advance reconciliation depends on the context – as does the feasibility of the various approaches.

The most direct form of restorative justice is where those who caused the harm directly compensate their victims, voluntarily or as the result of a trial. This may take the form of monetary compensation for loss and damages, other forms of reparation and/or an apology. In such contexts – particularly where the restorative measures are forthcoming voluntarily – the argument for reconciliation is convincing. This requires, however, a situation where the relationship between perpetrators and victims is individualised and where the perpetrators have the means to compensate and can be compelled to do so.

When restorative measures by those directly responsible is not an option, for practical or political reasons, more indirect measures may be employed. In most cases this is done through public efforts to provide reparation and rehabilitation for victims. This may be done through some form of reparation payments (sometimes undertaken on the basis of truth commission reports); health services for victims who suffer physically or mentally as a consequence of the past violations; education for victims or their families; public apologies; and various forms of symbolic restoration, ranging from rectification of public records to street-names and memorials. The funding may be provided by the state, by the society through some form of earmarked 'sorry' tax, or by national or international donors. The feasibility of such efforts, and how substantial they can be, depend on number of victims, the nature of the harm and the resources available.

Where there are many victims and limited resources, the healing effect of symbolic reparations and other non-monetary efforts are often emphasised. There are also examples, among others from Mozambique, of traditional practices aimed at healing individuals and communities traumatised by violent conflict (Hayner 2001, Honwana 1997). As already mentioned, it is also argued that truth commissions have a restorative effect.

### **Truth-telling as restorative justice**

By giving the victims a public platform to tell their story, a truth commission (or trial) may function as therapeutic process, providing victims with closure. Due to the healing effect of testimony, truth-telling processes can be seen as a form of restorative justice. This was an argument often made in relation to the South African TRC. Stories coming out of the hearings indicate that some did experience the process of giving and listening to testimony as healing. But clearly this was not the case for all.

Psychologists hold that testimony may have a therapeutic effect at the individual level, but emphasise that for this to be the case there must be a follow-up process. In South Africa this was not in place. There was no organised support for victims experiencing post-traumatic stress after reliving their traumas.

In a situation where the social and economic dispossession caused by past human rights violations are perpetuated and even grow worse, it is also difficult to speak of restorative justice if the victim's situation does not change in material terms. A quote from an elderly woman speaking to the South African truth commissioners at a meeting in the Eastern Cape puts it succinctly:

"(Y)our lives have changed ... it is alright for you to forgive and embrace the perpetrators of heinous crimes for the sake of reconciliation. Indeed, it's all right for Nelson Mandela to forgive since his life has also changed. But our lives have not changed. We still live in the same shacks... how can we forgive if our lives have not changed?" (Hendricks 1996).

The TRC commissioners, while insisting that the provision of a platform for victims to tell their story and have it publicly acknowledged, in itself is a form of restoration, also emphasises that restorative justice in most cases also require a material change in the lives of the victims. To the commissioners the slow and limited political response to their recommendations for reparation and rehabilitation of victims has been a great disappointment and is seen to compromise their efforts to provide restorative justice (Orr 2000).

The various efforts at restorative justice raise many questions. One is whether restoration by the collective (or an external donor) has a similar reconciliation effect as that paid by the erring part. In cases where violations were carried out by state agents this may be less of a problem, and in any case it may be argued that the practical help and acknowledgement victims receive is more important than its source.

A more difficult question is whether restoration of individual victims likely to lead to social reconciliation at the national level. There are several reasons why this may not necessarily be the case. To make a material difference, the reparations must be substantial. Experience shows that where there has been comprehensive compensation and restoration efforts, these have tended to be exclusive in the sense that they are confined to a narrowly defined set of victims, as was the case in Chile. (The 1991 Truth Commission was followed by significant restoration efforts for those who qualified as victims, but the criteria excluded many who suffered severe human rights abuses under the military regime). The problem of defining who should qualify as victims becomes a controversial and divisive issue.<sup>49</sup> It is particularly difficult in countries where large sections of the population were affected in some way or other, such as in Eastern Europe or in South Africa.

In this context a focus on restoring the harm caused to a certain group of victims or particular forms of abuses may cause divisions rather than reconciliation. It is argued that at least under such conditions it is more appropriate to adopt a forward-looking approach and focus on reforms that can address the needs of the population as such, regardless of whether these needs arise from a particular set of gross human rights violations committed by one or more group of political agents in a particular period of the past.

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<sup>49</sup> Such issues arise at the international level, where the reparation payments to the Jewish people after the Holocaust has led to claims from several African states, that transcontinental slavery be similarly compensated.

## 6 Reform and Reconciliation

Proponents of reform or *prospective justice* as the best route to reconciliation argue that, at least at the social and national level, reconciliation depend less on how the past is addressed than on the fairness of the present and future terms of social co-operation.

This does not mean that past crime and injustice are irrelevant, but rather that this should be addressed in terms of present needs and levelling of the playing field, rather than in terms of guilt and entitlement. According to this logic, social inequality created by past repression is best addressed through social reform and affirmative action programmes, rather than individual compensation to victims (identified through more or less arbitrary criteria). In this perspective, recurrence of human rights violations is best prevented through carefully institutionalised legal and constitutional reform.<sup>50</sup>

### *Is reform a viable route to reconciliation?*

The main criticism against the argument for reform as the road to national reconciliation is that it ignores the need to address the problem of impunity. A focus solely on prospective justice, letting horrendous crimes by known perpetrators go unpunished, violates the sense of justice in community and jeopardises the rule of law.

While this is an argument against reform as the only approach to past injustice, few would, however, argue against the need for reform as part of a broader reconciliation strategy. Amnesty (or impunity due to inaction) for crimes committed by the former regime may be part of a reform strategy, but it does not necessarily follow. Table 6.1 presents an overview of strategies to advance reconciliation based on the logic of prospective justice.

**Table 6.1. Institutionalising prospective justice**

Transitional justice problem	Human rights problem	Institutional response
Create a basis for peaceful co-operation	Lack of peace, lack of equality	Constitution-making
Prevent recurrence	Lack of due process and civil rights safeguards	Constitutional/legal reform Reform of the justice system, capacity-building
	Lack of political rights to secure fair terms of participation and representation	Constitutional/legal reform Reform of political institutions – capacity-building
Address the legacy of past repression	Right to equality denied	Legal reform (anti-discrimination clauses), affirmative action
	Social rights denied	Social and legal reforms (health, education, housing, water...)
	Cultural rights denied	Legal reform, cultural and educational programmes

<sup>50</sup> This appears to be the position endorsed by the present South African Government. See also Gervel (2000).



The nature of reforms required depend on the social context, of which the nature of the previous regime is an important element. The important question is to what extent the human rights of citizens are protected and advanced. The challenge is to devise reforms addressing the shortcomings in the current human rights situation. From the perspective of prospective justice and reconciliation, not only the nature and scale of reforms are important. Also the process through which they are developed and implemented, and how the necessary resources are provided, matters.

The resources required for the different types of reforms (competence and finances) may be provided by domestic sources, but are often, at least in part, provided by international donors. International agents have also often been central in instigating and shaping the reforms. This, it is argued, has led to adoption of blueprints that are not the most suitable for the context and – even when the reforms may be adequate as such – to a lack of local ownership. This may hamper the implementation and effectiveness. Strong external influence may also obstruct processes with potentially important benefits in terms of reconciliation such as constitution-making and legal reform. Such processes, when conducted in ways that encourage wide participation and input from diverse sections of society, enhance dialogue on the terms of social co-operation that may contribute to national reconciliation.<sup>51</sup>

The ambivalent role of international actors in relation to national reconciliation processes is not only a question in relation to reform strategies. The dilemmas raised here are even more acute in relation to other measures undertaken by the international community to address problems of transitional justice and national reconciliation. We return to this issue below, but first we want to draw attention to the role of time in relation to reconciliation processes.

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<sup>51</sup> For a discussion of constitution making as nation building see Gloppen (2000).

## 7 Time, Oblivion, and Reconciliation

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*Time* affects reconciliation processes in various ways. It is held to be a main road to reconciliation through *oblivion*, and it affects the feasibility and reconciliation potential of other transitional justice strategies.

### *Oblivion and reconciliation*

It is often argued that to forget – to close the door on the past – is a requirement for reconciliation in the shadow of massive human rights violations, and that in this process of forgetting past injustice, time is the key factor. On the basis of this logic – reflecting common sense notions that ‘time will heal all wounds’ and ‘in a hundred years all is forgotten’ – the inference is made that the best a new government can do about past human rights violations in order to advance reconciliation, is – nothing. Public amnesia and impunity for the perpetrators is the best available route.<sup>52</sup>

To *do nothing* about past crimes, and thereby seek reconciliation through oblivion, should thus be regarded as a separate type of response to the problem of dealing with past atrocities, a strategy which may or may not, be combined with reforms. It is a commonly chosen path, particularly in countries where those responsible for the atrocities continue to command some form of power.

The two main assumptions underlying this argument are, however, contentious. It is not clear that oblivion leads to reconciliation. An equally strong case can be made for the need to remember in order to prevent recurrence and promote long-term reconciliation. It is also important to note that processes of remembering and forgetting are selective. What is forgotten and remembered by the different groups in society will be central to whether the process reconciles or rather reinforces conflicts and animosity. This brings us to the second assumption: time produces oblivion. There is much evidence to demonstrate that this is not necessarily the case. Demands to deal with past crimes often grow stronger over time or only surface decades – even centuries – after the deeds were committed. The claims for reparation payments raised in recent years by victims of Nazi-crimes during WWII, is a point in case. Another current example is the demand for compensation for the damages and distortions caused by the crime of slavery.<sup>53</sup>

### *Temporal distance and the feasibility of transitional justice strategies*

Even if we conclude that time does not – at least not always – produce oblivion and reconciliation, the time that has passed since the violations occurred may nevertheless be of great relevance to how past crimes are

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<sup>52</sup> *Impunity* may be explicit through amnesty legislation or an implicit understanding that no prosecutions will be undertaken.

<sup>53</sup> Several African countries raised this issue as part of the process leading up to the UN Conference on Racism held in Durban, South Africa in September 2001.

treated. The feasibility of the various transitional justice strategies and their effects on reconciliation change over time, due to shifting power relations, changes in public sentiments, or the capacity of the relevant institutions. Thus, time may make way for options that were closed or deemed too risky at one stage. In countries as diverse as Chile and Cambodia, trials were ruled out for decades due to the status of the previous power holders, but once their position weakened, criminal justice became a real option.<sup>54</sup>

We also see that in cases where at one stage international initiatives stood as the only feasible route to address past crimes, national engagement becomes stronger and more viable over time. For example, in the former Yugoslavia there is an increasing demand for national processes to deal with the crimes of the past, rather than leaving it to the International War Crime tribunal in The Hague (to which we return below).

In other instances, windows of opportunity close, and the demand for radical strategies soften. In several cases we have seen that the political will to rectify past injustice that was manifest in the very first phase after the transition, fades within a few months or years.

### Effects on reconciliation of the duration of the process

The *duration* of processes of transitional justice also affects their reconciliatory potential. Experience with truth commissions as well as trials indicates that if such processes are too drawn-out they may lose momentum and/or go sour. (Such tendencies are manifest in relation to several of the processes discussed here, such as the South African TRC, the Ugandan Truth Commission, the Derg trials in Ethiopia, and the international War Crimes Tribunals.) With regard to successor trials (such as the Nazi trials after the Second World War) sentences also tend to become more lenient with the passing of time.

### *World time*

A very important aspect of the temporal dimension in relation to transitional justice strategies is what is often referred to as *world time*. This denotes the impact of the external context, both in terms of power relations (geopolitics), but even more so the norms and ideals that dominate international society (*Zeitgeist*). Time in this sense greatly influences the range of strategies open to domestic actors. The strong involvement of international actors in national processes to address past human rights violations, can be seen as a direct manifestation of the current 'world time'.

In sum we may conclude that it is important not to underestimate the significance of time for reconciliation – and of carefully timing national and international reconciliation efforts.

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<sup>54</sup> The fact that the previous power-holders die may open up new space for reconciliation strategies. A notable example is the death of Pol Pot, the Khmer Rouge dictator responsible for Cambodia's killing fields. His death seems to have been a major factor in opening the way for negotiations on a joint war-crimes tribunal.

## 8 International Actors and National Reconciliation

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An important aspect of *world time* in the last decade, is an acceleration of a development which may be characterised as "the globalisation of justice" (Adam 2001). Where steps are not taken nationally to address gross human rights violations under a previous regime or conflict (due to institutional weakness, lack of capacity or will), it is increasingly seen as the responsibility of the international community, and the United Nations in particular, to prevent impunity for perpetrators.

This should be seen in relation to developments in international law, where basic human rights principles are regarded as binding on all states whether or not these form part of national legislation. It can also be regarded as a corollary to the principle of humanitarian intervention, stating conditions under which national sovereignty can be overridden by the right and duty of the international community to prevent gross violations of human rights.

The principle in itself is not new. The Nuremberg and Tokyo trials after WWII set a standard for international reactions to genocide and crimes against humanity. With the Cold War the ability of the international community – more concretely the UN and the veto-powers in the Security Council – to react to such atrocities declined sharply. Only with the changes in the geopolitical context in the late 1980s was it again becoming possible to forge sufficient agreement to facilitate joint responses from the international community to certain grave human rights abuses.

International transitional justice measures may take any of the forms discussed above. In the various tables and discussions different kinds of international involvement is indicated (financial and/or technical support, joint operations, pure international operations). A summary of the main forms of international efforts to advance transitional justice and national reconciliation is given in Table 8.1.

Table 8.1. International transitional justice measures

	<b>UN</b>	<b>Joint UN-national</b>	Individual states/ other international actors	Cooperation national / external
<b>Justice</b>	<b>International Criminal Court (not yet established)</b>	<b>Trials in national courts under UN administration (East Timor)</b>	Trials in foreign courts (Guatemala, Chile – in Spain. Rwanda – in Belgium)	
	<b>Ad-hoc war-crimes tribunal (Yugoslavia, Rwanda)</b>	<b>Joint tribunal (Cambodia, Sierra Leone)</b>		
<b>Truth</b>	<b>Truth commission (El Salvador)</b>	<b>Truth commission (Guatemala)</b>	Truth commission (Rwanda)	Truth commission (donor, technical support)
Restorative justice			Advocacy	Donor support for reparation policies, victim support, peace-building programmes
Reform		Financial and technical support for various reform processes	Advocacy, conditionality	Financial and technical support for various reform processes

In the following sections we will look closer at two types of efforts by which the international community – through the UN – has sought to step in the breach where domestic agents have been unable or unwilling to deal with the crimes and perpetrators of the past. War crime tribunals and truth commissions, conducted independently by the international community or jointly with domestic agents, are means by which the UN has explicitly sought to advance national reconciliation (these are the interventions located in the top-left quarter of Table 8.1 above).

The advantages and problems of criminal prosecution and truth commissions discussed previously, obviously also relate to international efforts, but in this context there are also other factors that need to be taken into consideration.

## *War crime tribunals*

Almost 50 years after the end of World War II and the establishment of the Nuremberg and Tokyo tribunals, the United Nation's Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) in May 1993. A year later a second tribunal - the International War Crime Tribunal for Rwanda (ICTR) - was established following the massive killings. Joint tribunals, consisting of domestic as well as international judges are in the process of being established in Cambodia and Sierra Leone. In East Timor successor trials are conducted under the auspices of the UN.

### **The International Criminal Tribunal for the former Yugoslavia (ICTY)**

The Yugoslavia tribunal, which is located in The Hague, in the Netherlands, is mandated to prosecute and try alleged perpetrators of serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991.<sup>55</sup>

It is a large and expensive operation. The 14 judges are drawn from as many countries and the tribunal has a total of 1 103 staff members from 74 countries. The regular budget for 2001 was USD 96 443 900.<sup>56</sup> By May 2001, eight years after the tribunal was established, only 19 people were convicted (for twelve of these appeals were still pending).<sup>57</sup> The first conviction for genocide came in July 2001. This, and the arrest and eventual extradition of former President Milosevic to the ICTY around the same time, are arguably the greatest achievements of the tribunal so far. On the other hand, the protests against the extradition, and the demands that the former president first be tried in a domestic court, illustrate the problems with international tribunals, to which we return shortly.

### **The International War Crime Tribunal for Rwanda (ICTR)**

After the genocide in Rwanda in April – June 1994, where between 500 000 and 800 000 Tutsis and moderate Hutus were killed, the UN Security Council established an international war-crime tribunal to investigate those politically responsible for the mass-killings. Due to the political situation, and the dismal state of the Rwandan justice system and infrastructure, the tribunal was set up in Arusha, Tanzania. The Appeals Chamber is shared between the ICTR and the International Criminal Tribunal for the Former Yugoslavia, and sits in The Hague.

In April 1998, three years after it started operating, the first judgement was handed down. Former Prime Minister Jean Kambanda was found guilty

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<sup>55</sup> The Tribunal is authorised to prosecute and try grave breaches of the 1949 Geneva Conventions (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4) and crimes against humanity (Article 5).

<sup>56</sup> <http://www.un.org/icty/glance/keyfig-e.htm>. Information updated 18 April 2000. Total costs since the start of the tribunal exceed USD 500 000 000.

<sup>57</sup> Since its inception 100 individuals have been publicly indicted. In 18 of the cases all charges have been dropped or the indictment withdrawn. Nine have died (two whilst in custody at the UN Detention Unit) and two of the accused have been acquitted. Of the 67 remaining public indictments, 38 are detained at the Detention Unit and 26 are still at large (three have been provisionally released).

of genocide and was subsequently sentenced to life imprisonment.<sup>58</sup> This was the first time a Head of Government was convicted for such crimes. The tribunal also delivered the first judgements for genocide by any international court, and was the first court ever to judge rape as a genocidal act, finding that Tutsi women had been raped with genocidal intent.<sup>59</sup>

The Tribunal has focused on the individuals alleged to be the 'big fish', the architects and leaders of the genocide.<sup>60</sup> Seven trials are completed and all the eight accused have been found guilty. The policy is that, to the extent possible, sentences should be served in African countries.

### **Have the international war-crime tribunals been successful?**

Both the Yugoslavia and the Rwanda tribunals had reconciliation as an explicit and central aim.<sup>61</sup> The idea is for "'Truth' and 'Responsibility' to pave the way for understanding and reconciliation" (Holthuis 2001). To what extent have these efforts been successful?

The process is slow and demanding in terms of resources, and the tribunals can at best hold a small fraction of the perpetrators to account. The priority of the international tribunals has been to prosecute the highest ranking military and political leaders, who had the main responsibility for the atrocities and "truly endangered international public order". However, particularly the Yugoslavia tribunal has had grave problems securing their arrest, even when their whereabouts have been known. Assuming that criminal justice – accountability and punishment – is necessary for or conducive to reconciliation, the limited number of alleged perpetrators tried by the tribunals means that their contribution to reconciliation is limited. This is a problem also with prosecution in national courts. The process is, however,

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<sup>58</sup> It was previously decided that the UN tribunal – unlike the domestic Rwandan courts – would not impose the death penalty.

<sup>59</sup> The mandate of the ICTR, unlike that of the ICTY, includes only the crime of genocide (Violations of Article 3 of the 1949 Geneva Conventions for the Protection of War Victims). Rape had so far only been recognised in international law as a crime against humanity and a war crime.

<sup>60</sup> The Rwanda tribunal has been more successful than the ICTY with regard to obtaining the co-operation of the international community to secure arrests. Of 53 individuals indicted so far, 47 have been arrested, including former political leaders and high-ranking military commanders.

<sup>61</sup> The stated aim of the Yugoslavia tribunal is "to contribute to restoring and maintaining the peace. ... its mission is to promote reconciliation through the prosecution, trial and punishment of those who perpetrated war crimes, crimes against humanity and genocide. By ensuring that people are held individually responsible for the crimes they committed ... prevent entire groups ... from being stigmatised ... (E)nsure that others do not resort to acts of revenge in their search for justice. (N)utralise the major war criminals and preclude them from sustaining a climate of hatred and virulent nationalism which will inevitably lead to future wars. By hearing the voices of the victims in a solemn but public forum, it must assuage their suffering and help them to reintegrate.... Finally, by establishing the legal truth ... prevent all historical revisionism" Jorda (2001).

Likewise, the purpose of the establishment of the Rwanda tribunal is "to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region, replacing an existing culture of impunity with one of accountability. Only with the commitment to justice of the international community can the architects of the Rwandan genocide... be held legally accountable for their actions. Through the creation of the ICTR, the international community demonstrates that it will not tolerate crimes of genocide" (ICTR Fact Sheet No 1 at <http://www.ictor.org/>).

even more cumbersome in international tribunals, where it is imperative to conduct model trials in terms of standards of due process, while simultaneously building entirely new judicial structures, integrating personnel from very different legal traditions.

If truth is seen as a foundation for reconciliation, the tribunals have only provided narrow fractions of 'truth' – in the form of criminal responsibility of a few individual perpetrators. A broad analysis of the historical, political, social and economic causes of the conflict is beyond the scope of trials. So are other processes of truth telling, deliberation and history-writing necessary to accomplish "the work of memory required for the reconstruction of a national identity" (Jorda 2001).

From the perspective of restorative justice for victims the tribunals have little to offer. They cannot provide a platform to the tens of thousands of victims. Those who are called upon to deliver testimony in the trial context are subjected to cross-examination and must single out the narrow aspect of their experience directly relevant to the issue on trial. The tribunals do not provide the "presence of sympathetic witnesses" believed to be crucial to individual reconciliation (Minow 2000). Nor do these tribunals offer the victims any right to claim compensation. Certain efforts have been made, however. The Registry of the ICTR has pioneered advocacy for a victims-oriented restitutive justice, to complement the retributive justice against perpetrators handed down by the tribunals.<sup>62</sup> A Support Programme for Witnesses and Potential Witnesses has been established to support NGOs providing legal, psychological, medical and limited rehabilitation assistance to Rwandan witnesses and potential witnesses at the Tribunal. The establishment of an outreach programme is another effort to increase the impact of the tribunal's work inside Rwanda and foster national reconciliation.<sup>63</sup>

The tribunals have to a large extent succeeded in meeting world class standards of due process (respecting rights of the accused to a fair trial and protection against degrading and inhumane treatment, dismissing the death penalty etc.), while at the same time proving capable of securing convictions. The relative success of the tribunals according to the standards of the international community does, however, not necessarily mean that they have a positive effect on national reconciliation processes. This holds particularly true for the Rwanda tribunal.

For one, most observers note that the Arusha trials have received little attention in the Rwandan public. And to the extent that they do, the prestige and effort that goes into these remote and first-world-standard trials is often seen as offensive. The superior treatment given to the Arusha 'big fish' detainees as compared to the standards for those incarcerated within the country<sup>64</sup> and the absence of capital punishment (which has frequently been imposed to less prominent perpetrators tried inside the country), have evoked criticism. This adds to the lack of legitimacy that the UN and the international

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<sup>62</sup> Several non-governmental organisations and some Governments have pushed for the inclusion of a similar framework in the statute of the proposed permanent International Criminal Court, and a Trust Fund for victims is provided for in the ICC Rome Statute.

<sup>63</sup> ICTR/INFO-9-13-018, Press briefing by K. C. Moghalu, Spokesman for the ICTR, The Hague, 19 October 2000, at <http://www.ictr.org/>.

<sup>64</sup> Rwanda is trying to set up an alternative legal system to speed up trials of genocide suspects and reduce overcrowding in the country's prisons.



community have in Rwanda, partly due to the inaction and lack of concern experienced in the face of the genocide.

Another obvious problem is the financial cost. To establish and run a complex international institution based in Arusha and Kigali – including three modern and fully equipped courtrooms, translation, library and research facilities, and the first ever detention facility to be set up and run by a UN body – has incurred millions of dollars in costs for each of the accused in the Rwanda Tribunal. This stands in stark contrast to the 120 000 or so alleged perpetrators who are detained in over-crowded jails inside Rwanda, awaiting trial before an overloaded and in all respects under-resourced Rwandan judiciary.

In the former Yugoslavia there is also criticism of the tribunal, which to some extent is seen to compete with national processes and hamper domestic reconciliation initiatives. Conflicts of jurisdiction – and interests – between the international tribunal, local courts and a planned truth commission manifested themselves most clearly in relation to the demands for, and eventual extradition of, President Milosevic to the International Tribunal in The Hague and in the debate regarding a truth commission for Bosnia-Herzegovina.

As the limitations of the International Tribunals, and trials more generally, as means to reconciliation have become more apparent, the calls for a truth commission have gained wide support.<sup>65</sup> The ICTY has been highly critical of the establishment of a truth and reconciliation commission, more or less along the lines of the South African TRC, to complement its work. There are fears that it would render witnesses useless, detract attention and resources from the Tribunal and generally undermine its work, particularly if some form of amnesty provisions were to be included.<sup>66</sup> The ICTY view has been that the Tribunal-process should have priority and that a potential future truth commission process should wait, or be carefully geared towards enhancing the work of the Tribunal.<sup>67</sup> That this view is not shared by those who support a truth commission is not surprising, given that the slowness of the ICTY

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<sup>65</sup> It should be noted that many Latin American countries have moved in the opposite direction. The initial truth commissions of the 1980s and 90s are perceived as inadequate, and in countries such as Argentina and Chile, trials are now underway.

<sup>66</sup> "(C)onfessions must in no way lead to an amnesty as was authorised, for instance, before the truth and reconciliation commission set up in South Africa at the end of the apartheid years. Amnesty in fact runs up against fundamental moral problems, infringes the very mission of the International Tribunal and calls into question a major accomplishment of these last years – the refusal to grant immunity for offences like war crimes, crimes against humanity and genocide" (Jorda 2001).

<sup>67</sup> The view of the representatives of the ICTY is that "Having a criminal process in place to deal with those serious violations of international humanitarian law means that truth-seeking mechanisms, which work against the very principles upon which that criminal process is based, must be avoided. ... National initiatives to understand the past should not become an impediment to the flow of information to feed the criminal process... Arresting indicted criminals and transferring them to the seat of the Tribunal is, in my view, an act of truth seeking, and therefore, in the end, reconciliation in itself. Much the same applies to all initiatives that help create a climate in which the International Tribunal and its work are understood... At the same time, it can be envisaged that data which has been gathered by the Tribunal and the judicial determinations it has reached in the course of the criminal process should become part of national truth-seeking initiatives" (Holthuis 2001). See also Jorda (2001).

process and its limited local legitimacy are central driving forces in the establishment of such a commission.

Given the increase in international and domestic instruments to address the problems of transitional justice, this situation – where demands for a truth commission arise amidst an ongoing process of criminal justice, or where international and local courts or tribunals compete for jurisdiction – is prone to arise more often. The question of whether and how to combine various institutional mechanisms and processes to further reconciliation should thus be given careful and principled consideration.

In light of the local criticism of the international tribunals, a central question becomes for whom do they really matter. At this point in time, both tribunals seem to be more important for the international community and the UN – demonstrating ability to act to enforce the standards of international law – than to national reconciliation processes.

The costs of international tribunals combined with the extent of local criticism and lack of ownership are factors fuelling the search for other strategies. One important development over the past few years has been the adoption of a convention to establish a permanent International Criminal Court.

### **International Criminal Court**

The International Criminal Court responds to two main problems with the international tribunals. Firstly, it explicitly aims to complement rather than substitute local processes, thus avoiding some of the jurisdictional problems and conflicting interests that have surfaced with regard to the ad-hoc tribunals. Secondly, the hope is that it will be a way to economise and make future operations less costly by utilising and take care of the skills and resources developed by the ad-hoc tribunals, not least by the ICTY and the appellate chamber in the Hague.

It is 50 years since the United Nations first recognised the need to establish an international criminal court. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide identified genocide as "a crime under international law" for which alleged perpetrators "shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction".<sup>68</sup> The International Law Commission was asked to consider "the desirability and possibility of establishing an international judicial organ" for such purposes and concluded that an international court was indeed both desirable and possible. Statutes were drafted by 1951 but the General Assembly postponed consideration of the draft statute pending the adoption of a definition of aggression. The question came up periodically but due to the Cold War it was only in December 1989, that the International Law Commission again was asked by the General Assembly to resume work on an international criminal court.

In 1993 the conflict in the former Yugoslavia erupted, war crimes, crimes against humanity and genocide commanded renewed international attention. The ad hoc International Criminal Tribunal for the Former Yugoslavia was established (see discussion above) and shortly thereafter, the

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<sup>68</sup> UN Resolution 260, 1948.

draft statute for an international criminal court was completed. It was submitted to the General Assembly in 1994 and in April of 1998 the drafting of the text was completed. Two months later the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was convened in Rome where the convention was adopted in July 1998. Representatives of 139 countries signed, while the USA decided against it.<sup>69</sup> 60 countries have to ratify the convention in order for the ICC to be established. So far it is ratified by 32 countries.<sup>70</sup>

### *Joint international/national tribunals*

Another development responding to the problems of excessive costs and lack of local ownership, is the move towards *joint tribunals* where national and international judges serve on the same panels. These are not necessarily less costly than international ad-hoc tribunals, but the value added in the form of competence building in the domestic judiciary is seen to render them more cost-effective. The stronger national involvement may stem some of the local criticism and create ownership in the process among domestic actors. Jurisdictional problems are also less prone to arise, as are problems of different standards for different types of perpetrators. This may have positive effects on the legitimacy of the process and on institutionalisation of the rule of law, which in turn may lead to reconciliation and democratisation. In addition to the two processes outlined below, a joint tribunal is in the planning stage to deal with abuses in Indonesia/East Timor. In East Timor the steps taken by the local judiciary, under UN control, to bring the perpetrators to justice can also be seen as a form of joint process.

### **Cambodia**

After almost a year of talks an agreement was reached in June 2000 between the UN and the government of Cambodia on a plan to establish a tribunal to try Khmer Rouge leaders who organised the 1975-1979 genocide that killed at least 1.7 million people, approximately 20 per cent of the population. This followed a long period of foreign pressure, in particular from the US, to hold the former regime to account. Still, the move would probably have been politically impossible for the Cambodian leadership if not Pol Pot, the former Khmer Rouge leader, had died in 1998. Another reason for the drawn-out process is that China, the main backer of the Khmer Rouge when it ruled Cambodia, has opposed the establishment of a war crimes tribunal. Since China is among the veto powers in the UN Security Council, this blocked the possibility of an international tribunal based on a Security Council resolution.

In January 2001, the Cambodian National Assembly, after months of deadlock over what form the trials should take, approved legislation providing for a tribunal that will include foreign judges and prosecutors. To allay concerns that foreign judges and prosecutors would override Cambodian sovereignty, a formula was agreed where Cambodian judges are to be in majority at each level of the proposed court – but where at least one

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<sup>69</sup> President Clinton signed the convention 30.11.2000, on his last day of office, but prospects for ratification by Congress are meagre, as there is little political support for an International Criminal Court without a veto for the US.

<sup>70</sup> Source: <http://www.un.org/law/icc/general/overview.htm>

international judge must side with them for a judgement to be valid. Only top leaders and people directly responsible for the genocide will be tried and the death penalty cannot be imposed. The Senate passed the legislation in August 2001, but it still needed Royal approval.<sup>71</sup> There are speculations that the King- despite his stated intention to sign the bill into law – might still hesitate to go against the will of the Chinese.<sup>72</sup>

Due to slow progress and what the UN saw as stalling on the part of the Cambodian government, the process derailed, and as of March 2002, there is no formal process to bring the tribunal forward.

### Sierra Leone

In August 2000, the UN Security Council, on US initiative, approved the establishment of a special international court to try Sierra Leone rebels accused of war crimes in the nine-year-old war – fought mainly for control of the country's lucrative diamond mines – that has decimated the West African country. Tens of thousands of people – overwhelmingly civilians – have been killed. Foday Sankoh and his rebel group, the Revolutionary United Front, are believed to be responsible for the great majority of human rights abuses. Rebels are reported to have amputated hands, ears or other body parts from thousands of civilians whom the guerrillas suspect of sympathising with the government (Lynch 2000).

The Resolution calls upon the UN Secretary General to negotiate an agreement with the government of Sierra Leone to create an independent special court. The court will be a hybrid of international and domestic Sierra Leonian law and will try crimes against humanity, war crimes and grave breaches of the Geneva Conventions. The appeals chamber is likely to be shared with the ICTR and ICTY.

While joint tribunals may increase the capacity and integrity of the local judiciary and overcome some of the problems of the ad-hoc tribunals, particularly related to local awareness and ownership of the process, other problems are likely to be exacerbated. The quality of the tribunals will to a large extent depend on the state of the local justice system and the qualifications, skills and independence of the domestic judges. Many of the problems and issues discussed previously also remain – such as the questions raised concerning the reconciliation effect of retributive justice, and the limited ability of the judicial apparatus to attend to the victims' need for acknowledgement and restoration. While these tribunals might theoretically be more cost efficient, the problem of how to get the funding remains. There are substantial costs involved and a donor fatigue seems to be spreading among the (relatively few) countries traditionally contributing to these kinds of requests.

The problems of funding is less acute in relation to UN involvement in truth commission processes, simply because these are less costly. But also in this context there are dilemmas regarding how to create local legitimacy and

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<sup>71</sup> BBC, 2 January, 2001 at

[http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid\\_1096000/1096866.stm](http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1096000/1096866.stm)

<sup>72</sup> China is believed to have put pressure on the Cambodian government to delay the trials, but Cambodian Representatives denied this. BBC, Saturday, 19 May, 2001 at

[http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid\\_1339000/1339371.stm](http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1339000/1339371.stm)

ownership for the process, while avoiding problems of bias and lack of institutional independence.

### *Truth commissions*

The establishment of a truth commission was part of UN-brokered peace accords both in El Salvador (1991) and in Guatemala (1994/97)<sup>73</sup>.

*The Commission on the Truth for El Salvador* was appointed and administered by the UN and funded by UN member states. The three commissioners were respected international figures and no Salvadorans were included on the staff (Hayner 2001). After a thorough process of investigation and collection of evidence, the commission published a highly critical report where it blamed the government and its agents for 95 per cent of the abuses and naming dozens of perpetrators.<sup>74</sup> The new, civilian-lead government reacted by criticising the failure of the report to meet the needs of national reconciliation "which is to forgive and forget the painful past" (Hayner 2001: 40), and five days later it released a sweeping amnesty law. Several of those who were named in the report were, however, subsequently removed from their positions, and several of the reforms recommended by the commission were adopted and implemented after strong international pressure.

In Guatemala the national involvement was stronger, with both international and domestic commissioners and staff. The military insisted that, unlike in El Salvador, perpetrators should not be named. The commission concluded, however, that the Guatemalan State had committed acts of genocide against groups of Mayan people and that the "majority of human rights violations occurred with the knowledge or by the order of the highest authorities of the state" (cited in Hayner 2001: 48). The truth commission's report was later submitted as back up for a case filed in a Spanish court against the Guatemalan president of Congress.

### *The reconciliation effect of international measures for transitional justice*

The role of the international community in relation to transitional justice – and the effects of such measures on national reconciliation processes – is difficult to isolate and determine. What is clear, however, is that international interventions are controversial. A main cause of controversy is the arbitrariness with which the international community acts. While the geopolitical context does not prevent all forms of actions, it clearly influences the cases in which international action for transitional justice is an option. As discussed above, it is also a problem for international mechanisms to gain legitimacy and support locally. They are often perceived as geared more towards the needs of the international community than the local context, and in many cases they appear to have little effect on processes of national reconciliation. Critical judgements by international tribunals or commissions

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<sup>73</sup> The commission was originally agreed to in Oslo in June 1994, but only when the final peace accords were signed three years later could the commission start its work (Hayner 2001).

<sup>74</sup> It was, however, criticised for failing to report on the role of US support to the Salvadoran government during the 12-year war.

are more easily discarded than when they come from respected 'insiders'. Local ownership of transitional justice processes is crucial to reconciliation, and to find ways to administer international support that is more suited to this aim is a major challenge.

It is, however, still early days to assess the international engagement in this field. Of the efforts undertaken by the UN to establish transitional justice mechanisms, the two truth commissions discussed above (El Salvador and Guatemala) are the only ones yet completed. The rest are ongoing, and only the two ad hoc war crime tribunals have been in operation for long enough to warrant an assessment of their effects on reconciliation. Of the two truth commissions the Salvadorian commission seems to have had the most profound impact on the society – despite the fact that this commission, unlike the Guatemalan, was fully staffed, administered and funded by the UN. This indicates that while local participation and ownership is central, this may also be achieved by international mechanisms. More generally, the truth commissions have not experienced problems of rejection by the local community on near the same scale as the tribunals. One reason for this may be the pace at which these processes proceeded. The commissions have lasted for 6-12 months, while the tribunals have been in operation for 6-8 years and are nowhere near their completion. This increases risks on politicisation and is not necessarily positive. It should be noted that while the truth commissions have had a set time frame, this has not been the case with the tribunals. How and when to end such international engagements is in itself a difficult and potentially divisive issue.

### *What determines UN response?*

At the level of principle, the UN acts in situations of transitional justice where the country itself is unable to address its problems of impunity for gross human rights violations due to lack of capacity, resources, or will. But the UN clearly does not act in all such situations, and the scale of violations does not go a long way towards explaining when the international society intervenes.

This is easier to understand on the basis of pragmatics and *realpolitik*. We have noted the debilitating impact of the Cold War on international action to impose justice in contexts where crimes against humanity otherwise go unpunished. Also in the present situation the geopolitical situation, goes a long way towards explaining why tribunals and truth commissions are established in certain contexts and not in others. The interests of powerful countries in the region in question, and of the veto powers of the UN Security Council, weigh heavily.<sup>75</sup>

Financial considerations clearly also play a role. It is generally a small group of countries that contributes money for such initiatives, and it is becoming more difficult to find the funds. While there seems to be something of a general 'tribunal fatigue', it is clearly more difficult to raise funds for some countries and regions than for others.

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<sup>75</sup> An international tribunal or truth commission to address human rights violations related to the Russian warfare in Chechnya, for example, is not an option (Adam 2001).

## 9 Assessing Responses to Past Human Rights Abuses

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In this report we have presented an overview of institutional strategies to deal with the problem of past atrocities and the main debates and dilemmas raised by these efforts, as reflected in the transitional justice literature. The picture is complex. The relationship between the aims of reconciliation and democratisation and the different measures employed to achieve them – trials, purges, truth commissions, restorative efforts, reforms, amnesty and amnesia – are in most cases ambiguous and disputed. Sophisticated moral and theoretical reasoning is provided in support of each strategy as a road to reconciliation, but in many cases the relationship can not, or at least has not, been convincingly demonstrated empirically.

### Lessons learned

Lessons that can be drawn from the discussions are, firstly, that there is no single superior strategy or institutional model for addressing the problem of past human rights violations. Each particular case must be addressed on its own terms and in this process the power context and the nature of the repression are central factors that need to be taken into consideration in the search for a suitable approach.

Secondly, the timing is important. It is not enough to construct the optimal institutions for addressing a specific transitional justice problem; it is also a matter of introducing them at the right time. A measure that is ruled out at one stage may become an option later on.

Thirdly, local ownership and legitimacy is absolutely crucial. This can come about in various ways, but is often related to the process through which the transitional justice institutions are established. It is, in other words, not only a matter of *what* is done and *when*, but *how* and *by whom*. Experience with international and UN engagement in tribunals and truth commissions is mixed, and the UN factor is difficult to isolate. Strong and direct international engagement – particularly when combined with physical distance – does, however, appear to make the process of generating legitimacy more difficult.

Fourthly, we see that one strategy is rarely sufficient. In several countries that have undergone truth commission processes, pressure for trials has resurfaced at a later stage (Chile, Argentina). In countries starting out with trials, domestic or international, the pressure for a truth commission has gradually evolved (Bosnia-Herzegovina). Claims for compensation are raised in various contexts, and demands for reform are near universal.

Two more general lessons can be drawn from this pattern. On the one hand, it is clear that each society needs to search, not for *the* road to reconciliation, but for paths traversing different parts of the war torn social terrain. On the other hand, it is equally clear that for most societies traumatised by gross human rights violations reconciliation is not a destination, but an ongoing process. It is naive to believe that transitional justice institutions, however sophisticated, can bring reconciliation once and for all. The challenge should thus be conceived not in terms of finding the

formula, or set of formulae, that will deliver reconciliation, but rather to search for tools and procedures that can facilitate various forms of reconciliation processes and keep them going. Rather than to look for the road *to* reconciliation, we should seek ways to construct roads or paths *of* reconciliation.

### **Recommendations, research needed**

With the massive resources dedicated to reconciliation processes of various kinds, there is a need to study their impact, critically and open-mindedly. It is necessary to know more about how effective they are in advancing their immediate aims, which calls for empirical research into whether the strategies that are introduced to advance reconciliation achieve their purpose, and which strategies are most effective.

More should also be known about how different reconciliation efforts and processes affect each other on the ground, and how they in fact impact on democratisation. As discussed, the literature often assumes a close, symbiotic relationship between national reconciliation and democracy, where the one is defined in terms of the other. It is thus difficult to test the assumption that reconciliation is necessary for democracy, and vice versa. Reconciliation at the individual and community levels is, however, normally understood in ways that are analytically distinct from the definition of democracy, which means that the relationship between the two can be subjected to empirical probing. In other words, the question “Given that aims regarding reconciliation at individual (community) level are achieved, has this proven to be favourable to national reconciliation and democratisation?” can and should be investigated.

We also need to know more about why states chose particular transitional justice strategies and the factors that influence and restrain their choice. Some work has been done, focussing in particular on the power of the former regime to prevent reactions, and the strength of civil society in pushing for them (Skaar 1999b). Still, there is a need for a better theoretical framework to help us understand why states (and the international community) act they way they do. We need to better understand how the suitability of different strategies is affected not only by political factors but also by differences in the cultural context. This in turn require more, and more systematic, knowledge about the strategies that states have in fact pursued.



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# Summary

The report presents an overview of institutional strategies to deal with the problem of past atrocities – trials, purges, truth commissions, restorative efforts, reforms, amnesty and amnesia. It discusses the main debates and dilemmas raised by these efforts, as reflected in the transitional justice literature. A central lesson drawn is that local ownership and legitimacy for the process is crucial for reconciliation to result. This, in turn, is to a large extent a function of the process through which the transitional justice institutions are established. It is in other words, not only a matter of *what* is done and *when*, but *how* and *by whom*.

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