Committed to Peace

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Practitioner's Toolkit: Dealing with the Past

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Welcome

Among the most daunting challenges facing societies in quest of sustainable transition after a period of violent conflict is the impact of gross violations perpetrated in the conflict setting. When the chatter of kalashnikovs finally stops, when the ground stops its shudder, is it not preferable to simply – gratefully – turn the page and begin anew?

Societies attempting to ignore atrocities committed in the conflict setting generally find themselves confronted by their persistence. Whether manifesting as unresolved grievance, as social dysfunctionality or an easy reversion to violence, or as a simple reiteration of old animosities, the eventual results are erosion and escalation. Victims of violational acts, especially, may feel as though the war has never ended, even after the formal peace has been declared.

Dealing with the Past (DwP) comprises a suite of creative strategies for shifting this – measures that can provide victims with comfort, some satisfaction, and sometimes even repair; initiatives that tackle perpetrators and advance the rule of law; ways of overhauling legislation and reforming public institutions, and growing a culture of democratic governance; projects capable of generating a shared understanding of the abuses and the history in which they occurred; occasions for celebrating the life that remains, with all its learnings, among those who have survived. DwP is an approach to transformation that can, at best, enable sustainable transition out of entrenched patterns of violence and violation. Both an introduction to core concepts and comparative in its orientation, this toolkit is designed to address the practicalities – the nuts-and-bolts – of making DwP work.

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Historical Context

The quest for dignity and sanctity of human life amid the horror of violent conflict has been a recurring preoccupation throughout human history. It is vividly manifest as far back as Homer's Iliad, to cite one example from Antiquity, in the poignant appeal Hector's father makes to Achilles for his slain son's remains. It is also evident in the development since the nineteenth century of the laws of war, more formally known as international humanitarian law, and, since the aftermath of the Nazi Holocaust, in the prolific growth of international human rights law.

How do the laws of war and human rights law interact with conflict?

Although precise legal definitions are readily available, suffice it here to highlight how international humanitarian law and human rights law interact with and potentially transform violent conflict.

While the death of a combatant by enemy sniper fire may bring immense sadness to the fallen soldier's loved ones, the sniper's actions represent a legal act of war: they do not hold the moral devastation of the killing of fleeing civilians, of an ambulance driver, or of a defeated soldier making a universally acknowledged sign of surrender, such as the raising of one's arms or a white flag. The laws of war prevent escalation into an unregulated, dehumanising mayhem in which there is no leverage to negotiate peace.

Whereas the laws of war only come into effect after a statement or act that signifies that war has been declared, the term international human rights law applies both in times of war and in peace and exists to regulate the behaviour of those who occupy positions of public trust – as part of the state apparatus, most commonly, the army or the police, or as part of a rebel group exerting political control in a particular territory (a de facto state).

The term "gross violations of human rights" pertains to acts, committed by such authorities, that are so heinous, so devastating, that they erode the very dignity of a human life – its meaning and exquisite, unique preciousness. Such acts include, to cite a few examples, the subjecting of a person to acts of cruelty or degradation in order to obtain information, or to make them incriminate themselves, or another person; violence designed to contribute to annhilating an entire ethnic or religious group; the use of sexualised violence to demoralise and coerce political opponents; and enforced disappearance.

Violational acts of this gravity cause immeasurable loss and suffering and when perpetrated by agents of the state (or by rebels operating as a de facto state), they hold an additionally destructive aspect: they alienate citizenry from political authority – from the state to whom they are asked to entrust their security and basic welfare, whose laws they are expected to obey, and to whom they pay taxes. Accordingly, because the term is applied to violations that are widespread or part of a system – of governance as well as ideologically, institutionally, and even culturally – they are deemed to constitute a significant threat to peace and security. Gross violations of human rights thus undermine conflict transformation and the state is obligated and duty bound to enact measures of reparations for acts for which it bears responsibility.

What led to contemporary preoccupation with tackling a history of systemic abuse?

Serious public engagement with the demands imposed on the present by an historic episode of systemic violence perpetrated en masse may be traced to debates in Germany in the late 1980s. Known as the "Historikerstreit" (literally, the dispute between historians), the debate centred on whether the violence of the Nazi Holocaust was unique or whether similar violence had occurred elsewhere and what demands this history imposed on ensuing generations in Germany – what measures were needed to safeguard against recurrence, for example, and how to make reparations as well as to whom, precisely. Phrases emerged such as "Vergangenheitsbewältigung" (literally, coping with the past) and "Geschichtsaufarbeitung" (working with, trying to overcome history), out of which the translation into English as Dealing with the Past has emerged.

Also in the 1980s, debates were emerging outside Germany over how to tackle the impact of a notoriously violent immediate past on attempts at democratic transition. Initially centred on several Latin American countries and then South Africa, these debates were driven by the policy dilemmas facing newly elected governments. On one side were the demands for accountability from victims, among them families of thousands of people who had been abducted by state forces – disappeared – as well as survivors of torture and other heinous violations. On the other side lay the political reality of a menacing military regime, bristling at its loss of power and whose leaders had established measures to block accountability for their abuses. Most notorious among the measures was the enactment of amnesty laws: immunity from prosecution.

Tackling the dilemma of how "holding to account ought to proceed in the context of real-life, often exceptionally precarious political situations" (Weschler, 1990, p. 242), the early debates were comparative, interdisciplinary, focussed on policy and marked by openness to ensuring that any compromise of victims' demand for justice would still prove productive, both for victims and for the broader society quest for transition. The chief outcome was consensus that, at a minimum, any government established in the aftermath of widespread state crimes is obligated "to investigate and establish the facts so that the truth be known and be made part of the nation's history … [and] there should be no compromising of the obligation to discover and acknowledge the truth." (Justice and Society Program of The Aspen Institute, 1989, pp. 4–5).

What then is "Transitional Justice" and how did it emerge?

The innovative compromises that emerged from these embryonic debates would prove "norm-setting" (Park, 2010, p. 27) and within a few years become loosely clustered under a broad term: Transitional Justice. A legal scholar who claims to have conceived of the term defines it as "the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoing of repressive predecessor regimes" (Teitel, 2003, p. 69; emphasis mine). Recognising the enabling, productive dimensions of the compromises Transitional Justice brought to criminal accountability, legally understood, others have opted for a more expansive understanding. Susanne Buckley-Zistel, for example, talks of "instruments and efforts to deal with the past of a violent conflict or regime in order to enable the transition towards a permanently peaceful, mostly democratic society." (Translated from German, Buckley-Zistel, S., 2007, pp. 2–7; in Romeike, S., 2016.) By the mid-1990s, the term was in widespread use, especially after Neil Kritz' three-volume publication of *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Kritz, 1995). A useful, fuller account of these developments is provided in Paige Arthur's seminal article, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice" (Arthur, 2009).

As the popularity of the concept surged in and across Spanish- and English-speaking worlds, vociferous debates ensued over the emerging conceptual and professional terrain. In this context, the United Nations Secretary-General issued a Guidance Note that integrated and refined into one broad definition the four elements long identified by practitioners as essential to Transitional Justice:

> *Transitional Justice is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation … Transitional Justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof.*
>
> *UN Secretary-General, 2010, p. 3*

The definition was quickly deemed to represent a minimum international consensus on the use of the term, Transitional Justice.

How did exponents of Dealing with the Past respond to these developments?

Around this time, DwP scholars in Switzerland drew on other developments within the United Nations human rights system to build a Conceptual Framework for Dealing with the Past. Based on principles "to combat impunity" (Joinet, 1997, p. 3) developed by two UN special rapporteurs – Louis Joinet and then Diane Orentlicher, the DwP Conceptual Framework effectively recast the elements of Transitional Justice as a suite of rights:

- the right to know (which includes individual victims' right to the truth about the violation perpetrated against them)
- the right to justice
- the right to reparations
- guarantee of non-recurrence.

The Conceptual Framework sets DwP within the broad, long-term goal of conflict transformation. What such transformation may mean is little unpacked in the Conceptual Framework, though it may be assumed to share the understanding articulated by the trailblazing exponent of the term "conflict transformation", John Paul Lederach, who uses it to describe "peace as embedded in justice", as "[emphasising] the importance of building right relationships and social structures through a radical respect for human rights and life" (Lederach, 2003, p. 4).

Transforming a conflict in which grievous violations have been perpetrated necessarily entails reconciliation (though again, the term is left unelaborated) and prevention of recurrent violations. However difficult these two concepts may be to quantify, the Framework asserts, they are supported through the exercise of the rule of law and ongoing commitment to fight impunity – two actions that hold alternative means of addressing social conflict and which, moreover, are made possible through the skilful exercise of each of the four rights. These relationships are deftly schematised in what has become known as the **DwP Circle** (figure 1 – next page).

Proponents of DwP over Transitional Justice generally see the latter as preoccupied with the use of juridical tools and enabling carefully crafted democratic transition in the short term. DwP, on the other hand, is "a long-term process and not only limited to a transitional period" (Sisson, 2010, p. 12). By expanding the timeframe thus, DwP is able to extend its point of origin, retrospectively, to the precedent setting accountability embodied by the prosecution in 1946 of 24 Nazi leaders by Allied forces at the International Military Tribunal in Nuremberg. It also encompasses Germany's efforts since then to take responsibility for the Nazi Holocaust, evidenced

Conceptual Framework for Dealing with the Past

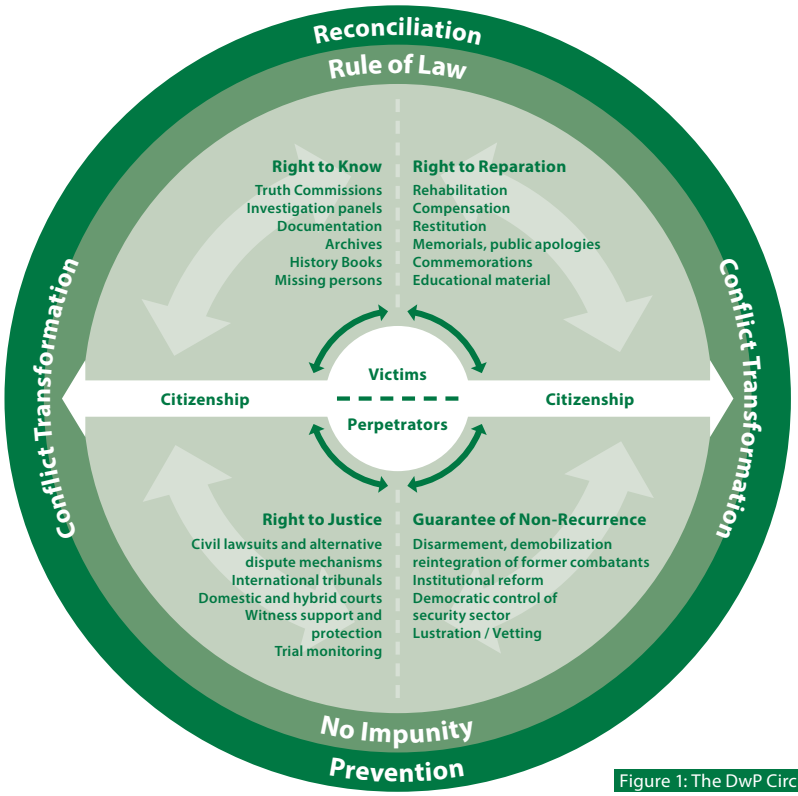

Figure 1: The DwP Circle.

in the restructuring of Germany's body politic to prevent repetition, including the subordination of the armed forces to parliamentary controls; the Reparations Agreement signed with Israel in 1962, whereby Germany agreed to pay the costs of resettling Jewish refugees as well as compensation to Jewish individuals for their suffering; the symbolic Kniefall von Warschau, in which German Chancellor Willy Brandt knelt in reverence and humility at a monument on the site of the Warsaw Ghetto Uprising – to name but a few of the most salient dimensions of Germany's attempts to cope with – and deal with – its past.

DwP not only expands the timeframe beyond the immediate transition. It also encompasses diverse activities designed to transform present day conflicts linked to a history of violation. Performing arts is one such activity. Anne Dirnstorfer, who provides training in theatre for the Academy for Conflict Transformation, observes that "staging performances on silenced stories of a violent past stimulates social dialogue. Participatory theatre approaches such as the Theatre of the Oppressed and Playback Theatre can contribute meaningfully to complex processes of transformation. Theatre of the Oppressed makes manifest the root causes of a conflict, which often go little addressed in a peace deal. Playback Theatre focusses on personal narratives and assumes the form of storytelling, which is then translated into improvised artistic expression by the actors and musicians on stage. This enables a collective witnessing of painful stories in a safe setting, thereby supporting communities as they deal with the past and endeavour to find new purpose together" (personal correspondence).

Application exercise

Is there a particular conflict setting that concerns you – one in which that you are currently working, for example, or simply one that your imagination continually returns to while using this toolkit? Which approach would you use to tackle it, DwP or TJ? Can you find ways to adopt one approach while drawing on aspects of the other? Do you see any risks, weaknesses or problems in both approaches?

2

Right to Know, incorporating the Right to Truth

The right to know forms the first of the three rights in the Joinet / Orentlicher principles to combat impunity, upon which the DwP Conceptual Framework is based. The right comprises two components:

- a society's collective right to comprehensive, detailed information about grievous violations committed within it and by the state apparatus that governs it – a right exercising which represents a defence against later "revisionist and negationist arguments" (Orentlicher, 2005, p. 7); this broad right is known as the **"right to know"**.

- the right of every victim as well as his or her family – their "nearest and dearest" (Joinet, 1997, p. 5) – to full details about the violation inflicted upon their lives; this is known as the **"right to truth"**.

Legal precedent may be traced to the Geneva Conventions of 1949, which assert the right of families to know the fate of loved ones reported missing in the context of war. However, concern with truth – as a moral right and an obligation incumbent upon the state – emerged with renewed zeal in the late 1970s, in unrelenting demonstrations by families and other nearest and dearest of people who had been forcibly disappeared, that is, people taken by state agents, without due arrest procedure or administrative trace, effectively removed outside the reach of the law's protections and, for all intents and purposes, vanished. The first demonstrations were by the Madres de Plaza de Mayo, an association of mothers whose children were forcibly disappeared by the military juntas that ruled Argentina from 1976 to 1983. Beginning in 1977, the mothers would march in a public square – the Plaza de Mayo – holding pictures of their children, about whose fate they demanded information.

How did truth commissions emerge and what do they do?

Truth commissions, example #1:
CONADEP (Argentina)

The first major example of what would later be called "truth commissions" was established in 1983 after civilian rule was restored in Argentina – a response to these demonstrations and to the gaping wound in Argentinian society they represented. The National Commission on the Disappearance of Persons (Comisión Nacional para la Desaparición de Personas) or CONADEP, as the commission became known, conducted wide-ranging investigations, receiving thousands of pages of depositions from survivors of enforced disappearance including over 1500 people who had survived the juntas' detention camps. The commission identified some 300 detention centres and numerous mass graves, uncovering 8961 cases of enforced disappearance and estimating – correctly – that the total number of persons forcibly disappeared might be significantly higher. CONADEP produced an extensive report, the ¡Nunca Mas! (translated, Never Again!). An abridged version made available to the public sold 40,000 copies the day it was released.

Much ensued in the aftermath of CONADEP, on several levels:

- **Legal developments:** In 1988, the Inter-American Court of Human Rights established legal precedent in the case of Velásquez Rodríguez v. Honduras by affirming the state's duty to investigate allegations of enforced disappearance and obligation, moreover, to inform families of the disappeared person's fate including, if the person had been killed, the location of their remains (Velásquez Rodríguez Case, Inter-American Court, 1988, para. 181, p. 32).

- **Theoretical developments:** In 1989, a gathering was convened by the Aspen Institute that would, in retrospect, be seen as the first of the interdisciplinary, comparative, "norm-setting" *(Park, 2010, p. 27)* debates that produced the field of Transitional Justice.

- **Institutional developments:** In 1990, a second commission was established, in Chile.

Truth commissions, example #2: Comisión Nacional para la Verdad y Reconciliación (Chile)

Established in the aftermath of over 15 years of military dictatorship under General Augusto Pinochet, Chile's National Commission on Truth and Reconciliation (Comisión Nacional para la Verdad y Reconciliación) was the first commission to use the word "truth" in its name. Whereas truth recovery in Argentina had led to the overturning of the junta's amnesties, such an option was not deemed feasible in the early years of Chile's restored democracy. Over the years, Pinochet had incrementally crafted, through staff appointments, judicial authorities sympathetic to his needs. The judiciary now in place averred that the amnesty he had declared in 1978 was constitutional. Challenging it would have drawn accusations of judicial interference, provoked the military – which, it had been agreed, remained under Pinochet's command – and moreover undermined Chile's embryonic reconciliation efforts. Besides this, Pinochet had secured the status of senator-for-life, which provided him diplomatic immunity.

Amid these challenges, President Aylwin sought a way both to preserve Chile's political gains while also addressing the agonising challenge of the Disappeared. Drawing on the precedent of CONADEP, he established a truth commission. Deftly, he appointed as commissioners four known supporters of Pinochet and four known opponents. All were widely respected figures of unquestioned integrity, despite the differences of political persuasion. Aylwin's hope that the truth uncovered would prove persuasive, and thereby create a basis for reconciliation, was not disappointed: upon the report's release, one hitherto pro-Pinochet commissioner remarked, "What I know now, I never would have imagined" (Hayner, 2011, p. 48).

Commissioner José Zalaquett's described the commission's objectives as "to repair the damage caused by human rights violations both to individual victims and to the society as a whole; and to prevent such atrocities from ever happening again" (Zalaquett, 1993, p. 6). This required "the whole truth, and justice to the extent possible" (Zalaquett, 1993, p. 15). Zalaquett would later unpack the priority the commission accorded to truth, as follows:

> *Truth was considered an absolute, unrenouncable for many reasons. To provide measures of reparation and prevention, it must be clearly known what should be repaired and prevented. Further, society cannot simply black out a chapter of its history; it cannot deny the facts of its past, however differently these may be interpreted. Inevitably, the void would be filled with lies or with conflicting, confusing versions of the past. A nation's unity depends on a shared identity, which in turns depends largely on a shared memory. The truth also brings a measure of healthy social catharsis and helps to prevent the past from reoccurring … And [although it] does not bring the dead back to life, but it brings them out of silence. For the families of the "disappeared," the truth about their fate would mean the end to an anguishing, endless search.*
>
> *Zalaquett, 1992, p. 1433*

Truth commissions, example #3: The South African Truth and Reconciliation Commission

The South African Truth and Reconciliation Commission (SATRC) marks an even more assertive – and expansive – approach to truth recovery. Established in 1996, two years after the country's first democratic elections, its mandate comprised "establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights … including the antecedents, circumstances, factors and context of such violations" (Promotion of National Unity and Reconciliation Act 34 of 1995, Chapter 2, art. 3(1)(a)). This necessarily entailed the following:

- hearing "the perspectives of the victims" by "granting them an opportunity to relate their own accounts of the violations of which they are the victims" (Promotion of National Unity and Reconciliation Act 34 of 1995, Chapter 2, art. 3(1)(a)).

- probing "the motives and perspectives of the persons responsible for the commission of the violations" (Promotion of National Unity and Reconciliation Act 34 of 1995, Chapter 2, art. 3(1)(a)).

The latter was enabled by a mechanism that proved controversial: an amnesty – though unlike the blanket amnesties in Latin America, South Africa's amnesty was available to individuals, conditional upon their meeting specific criteria. That criteria comprised disclosure of all they knew about the gross violations of human rights in which they might be implicated, as well as showing a political motivation – in other words, they had been acting in good faith, however heinous their actions. To be accurate, however objectionable, even grotesque, the mechanism may seem in its compromise of victims' right to justice, it was based on an expectation that individuals who did not apply for amnesty would be prosecuted.

The SATRC also brought numerous other **innovations to the concept of a truth commission**, among them,

- **a widely consultative approach,** given form in events that preceded the legislation that would establish the commission – public square meetings, open-mike debates – as well as in an invitation to the public to nominate commissioners.

- **transparency** – even the amnesty applications were made part of an open public record. The commission's report compares this approach with the commissions in Latin America, which "heard testimony only in private … information only emerged with the release of the final reports" (South African Truth and Reconciliation Commission, 1998, Vol. 1, Chapter 4, para. 27).

- **public hearings,** including a sample of victims' testimonies as well as the holding of institutional and special hearings, to which representatives of different professions – journalism, law, business – faith communities and political parties were invited to make presentations.

- **powers of subpoena, and of search and seizure,** a learning from the Latin American commissions, which encountered obstructionism when attempting to obtain official records from the state bureaucracy or from the armed forces.

- **a witness protection programme**, which, the commission noted, "strengthened its investigative powers and allowed witnesses to come forward with information they feared might put them at risk" *(South African Truth and Reconciliation Commission, 1998, Vol. 1, Chapter 4, para. 29).*

The SATRC's assertive and expansive approach to truth was also rooted in its commitment to restoring the dignity of victims, by creating a platform upon which they could provide their version of the crime committed against them. In addition to the facts the commission uncovered, it also recognised what it called "personal and narrative truth" – versions of an incident or episode recounted not as legal argument but as a legitimate human perspective. Endeavouring to create conditions in which the human dignity so abused could find empathy and restoration, the commission

heard narratives that were often profoundly intimate, detailing indignities suffered under torture or the agony of a family confronted with police denial and menace when inquiring about a loved one last seen being loaded into the back of a police van. Corroborating such testimony is often impossible. Yet many victims seized the opportunity to reformulate the violational narrative – publicly, in a setting where they could feel heard, with due reverence, and acknowledged.

Ultimately, the South African commission recognised **four categories of truth** and created a typology, as follows:

- **factual or forensic truth,** based on corroborated evidence and obtained using scientific procedures and other methods designed to ensure impartiality and objectivity.
- **personal and narrative truth,** most notably in the platform accorded victims to recount their versions of the violation wreaked upon them.
- **social truth,** forged through public debate as well as through mediated dialogues between victims and perpetrators.
- **healing and restorative truth,** which the SATRC's final report describes as "the kind of truth that places facts and what they mean within the context of human relationships – both amongst citizens and between the State and its citizens" (South African Truth and Reconciliation Commission, 1998, Vol. 1, Chapter 5, para. 43).

Truth commissions, further examples – and the establishment of a definition

Drawing much on these first three ground-breaking models, truth commissions have increasingly sought innovative strategies for truth recovery, as part of a quest for transition out of violent conflict. To cite but a few examples here, East Timor conducted community healing processes based on perpetrator confession and with the possibility of a consensually agreed amnesty – albeit only for less serious crimes. In Guatemala, the term "truth" proved so contentious that it could not be used in the name of the commission, which was eventually called "Historical Clarification Commission" (Comisión para el Esclarecimiento Histórico, CEH). Morocco too opted for a softer name, the Equity and Reconciliation Commission (هيئة الإنصاف والمصالحة ; *Instance Equité et Réconciliation (IER)*. Despite the nomenclature, both these commissions had dramatic results: the CEH was the first public institution in Guatemala to use the term genocide to describe the state's actions against Mayan people; and the IER broke new ground as the first commission in the Arabophone world.

By 2010, the notion of a truth commission was so well established that the UN Secretary General, in his Guidance Note, could provide a definition:

> *Truth commissions are non-judicial or quasi-judicial investigative bodies, which map patterns of past violence, and unearth the causes and consequences of these destructive events. Each truth commission is a unique institution, but their core activities usually include collecting statements from victims and witnesses, conducting thematic research, including gender and children analysis of violations including their causes and consequences, organising public hearings and other awareness programs, and publishing a final report outlining findings and recommendations.*
>
> *UN Secretary-General, 2010, p. 8*

What about civil society? Does it have a role?

Finally, while establishing an official, independent truth commission may help restore relations between a formerly abusive state apparatus and the citizenry, so compelling has truth recovery become that work is now also proliferating in civil society. Examples abound. One commentator has talked of the emergence of "unofficial truth projects" (Bickford, 2007, p. 1004) noting that they may serve as precursors to a widely anticipated truth commission or represent alternatives in situations where an official commission is either unlikely or deemed to be fatally flawed.

Civil society facilitated initiatives, example:
Amani Trust Matabeleland (Zimbabwe)

Suffice it here to illustrate with the work in Matabeleland, Zimbabwe, of Amani Trust Matabeleland. Beginning as a medico-therapeutic response to survivors of the Gukurahundi massacres, the work supported surviving families' wish to exhume and rebury, with due ritual, the remains of loved ones and to share loving memories using the medium in which they were most comfortable – storytelling traditions, including the use of myth. As narratives were shared, communities began participating, leading to shared, "social" truth, as well as the collection of much forensic detail.

In conclusion, societies everywhere are growingly recognising the perils of attempting to "dig a hole and bury the past" (to cite the words of Cambodian Prime Minister, Hun Sen, in Chhang, 2007, p.163). Even in Spain – a country occasionally cited as an example of the benefits of leaving the past alone – debate has surged in recent years about exhuming the remains of tens of thousands of victims of the Franco dictatorship that ruled the country for four decades. In late 2019, the remains of Franco himself were removed from a state basilica and taken to the modesty of a family crypt.

Application exercise

Assess prospects for truth recovery through a truth commission of interest to you. Among the questions you may want to ask are the following:

- *Under what political conditions has the commission been established? (Transition to democracy? Stalemated war?)*
- *What types of violations are the commission mandated to tackle and from what period? What is not included?*
- *What criteria was used in the appointment of commissioners and were victims groups and the broader public consulted?*
- *How does the commission relate to justice initiatives? Is it seen as a precursor to prosecutions, and if so what basis has been created to enable perpetrators to participate?*
- *What expectations do victims have of reparations? Does government present itself as the cornucopia of good will towards victims or as fulfilling obligations ensuing from its role in the abuses?*
- *Are there any public hearings?*
- *What is envisaged for the report? Was a commitment made at the outset of the process to publish it or do political leaders assume the right to decide whether to release it or not?*
- *Has local civil society initiated processes of truth recovery and if so, how do they relate to the work of the commission? Is it a complement, an alternative to a failing commission, a follow on from the commission?*

3

Right to Justice

The right to justice upholds the right of any victim to receive **legal remedy that is both fair and effective**. Such remedy entails the right to see their abuser held criminally accountable in a court of law as well as to receive reparations for the damage caused. The right of victims necessarily implies obligations on the part of the state, which here entails investigating an alleged violation, arresting and prosecuting the perpetrator, and, where guilt is established, enacting punishment. These obligations are enshrined in numerous international instruments, among them, the International Covenant on Civil and Political Rights, Article 2 of which requires state parties to the Covenant, inter alia, "to ensure that any person whose rights or freedoms … are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

How do prosecution initiatives contribute to conflict transformation?

The benefits of asserting the right to justice in the aftermath of widespread acts of heinous violations are numerous and often cited.

- Most obviously, prosecutions thwart any direct threat the offender may hold by removing them from society.
- Prosecutions also have a "declaratory value" (Schabas, 1997, p. 516): they offer public recognition of the wrongfulness of certain acts, and punishment of the gravity of that wrong.
- The type of truth that emerges from judicial process holds a robust authority: it is based on procedures that are rigorous and widely recognised as credible, including the use of "documents of proven authenticity and testimony which has been vigorously cross-examined and then judicially analysed" (Robertson, 2006, p. 621).
- The procedures of criminal justice can also stem the mayhem and arbitrary violence that ensue from coercion – by applying universally applicable laws, upholding a common standard and helping restore the role and rule of agreed laws in regulating society.
- Would-be offenders may also be deterred by the prospect of punishment – though this has been contested by the likes of restorative justice scholar Mark Drumbl, who argues that this assumes would-be perpetrators make rational choices, which is unlikely "when they are surrounded by hysteria, social chaos, panic, coercion, prejudice, and a government that is exhorting mass violence" (Drumbl, 2000, p. 1254).
- Crucially, victims and aggrieved communities may find judicial process offers an alternative to confrontation, vendettas and other ways of pursuing justice privately.

This alternative takes the form of a balance, according to Antonio Cassesse, first president of the International Criminal Tribunal for the former Yugoslavia, between responding to victims' demands and a broader societal need for order.

> *Criminal justice is among the most civilized responses to … violence. It channels the victims' hatred and yearning for bloody revenge into collective institutions that are entrusted with even-handedly appraising the accusations. If well founded, they assuage the victims' demands by punishing the culprit. Thus, criminal justice addresses the need to satisfy both private and collective interests. It merges the private desire for 'an eye for an eye' justice with the public need to prevent and repress any serious breach of public order and community values.*
>
> *Cassesse, 2011, p. 271*

Accordingly, Cassesse concludes, criminal justice "contributes potently to social peace" (Cassesse, 2011, p. 271).

How feasible are prosecutions after mass violence and systemic violations?

While the above benefits have been widely recognised, attempts to prosecute in societies emerging out of violent conflict are typically confronted by daunting challenges. "States emerging from years of conflict or repressive rule," notes the UN Secretary General's Guidance Note, "may be unable or unwilling to conduct effective investigations and prosecutions" (UN Secretary-General, 2010, p. 8). The challenges are myriad, and include the following:

- **unequal application of the law.** People in historically disadvantaged regions may have little memory of living under the rule of law, with the protections it sets out to provide.

- **implementation gaps.** In poor societies with little infrastructure in remote areas, gaps often occur between rulings made in the highest courts and the application of those rulings. In Nepal, for example, the Supreme Court has consistently ruled that the government is obligated to provide information about persons forcibly disappeared, as well as to prosecute those against whom credible allegations of having perpetrated the crime have been made. Yet to date very few families have learned the fate of their disappeared loved ones: the lower courts in remote, historically marginalised regions simply do not implement.

- **amnesty,** that is, a legal mechanism to block prosecution. A centuries old mechanism for sealing peace deals between erstwhile belligerents, amnesties have been used in recent decades by departing dictators to provide their forces – and themselves – with immunity from later prosecution from crimes they perpetrated against their own citizenry. One notorious example is an immunity issued in 1983 by a military junta in Argentina, covering the armed forces for crimes committed during the seven years of military rule (so impactful were the findings of Argentina's commission of inquiry into disappearances perpetrated during these years that the amnesty was overturned). South Africa sought a path in between prosecutions and a general amnesty and offered an amnesty to individual perpetrators who could show a political motivation for their actions and were willing to disclose all they knew about the gross violations of human rights in which they had participated.

- **judicial incapacity.** Especially in wars between or within impoverished states, the judiciary is typically left to decay, deprioritised by pressing needs on the battlefield. Courthouses may be left to rack and ruin and scarce copies of legal codes damaged or even destroyed in the conflagration. Delivery systems – for everything from officials' salaries to prisoner transfers – are typically severely depleted. Lawyers, among other human rights defenders, may form a particular target. So might judicial infrastructure, as in Libya, in the hometown of Colonel Muammar Kaddafi, where the archives were firebombed in 2013.

- **executive interference.** The judiciary may have been corrupted, co-opted or emasculated through executive interference. Chile's transition out of authoritarian rule, for example, was constrained by a judiciary crafted and staffed by General Augusto Pinochet over the 18 years he ruled. Eliminating outright the legislative branch of government and civil institutions, Pinochet allowed the judiciary to remain and instead contrived to render it complicit with his regime. It took almost a decade of democracy for a Chilean court to rule that General Augusto Pinochet should stand trial.

- **corruption of the law itself.** The law itself may have been taken over, as in South Africa, where the apartheid regime promulgated vast volumes of discriminatory legislation, using law to regulate a system internationally declared a crime against humanity.

What options then avail amid such challenges?

Where such challenges drastically diminish any meaningful prospect of justice, one option may be to establish an international tribunal. Among the obvious advantages of such courts are the substantial boost they provide to prosecutorial capacity, in the form of legal professionals, infrastructure and other resources. Another is their ability to bypass, confront, or render obsolete local perversions of law through their adherence to international norms and standards. They also represent moral encouragement for legislative reforms in the host country.

The challenges of such tribunals are significant, however. Securing consensus among international stakeholders – typically, the UN Security Council – to establish a tribunal is a complex undertaking. The budget and logistic heft are often prohibitively costly. And even when the political will, the necessary financing and the infrastructural reach are in place, questions abound.

Among these questions, especially after situations of mass violence, is whom to prosecute: the "low hanging fruit" of the numerous trigger pullers and torturers; the commanding officers who issued them their orders; or the few individuals most responsible, through their role in a system of violence, for the worst offences – figures that, to draw on language from Nuremberg, constitute "living symbols of … hatreds, of terrorism and violence, and of the arrogance and cruelty of power" (Jackson, 1945, in The Robert H. Jackson Center, n.d., para. 4). While the peacebuilding impact of prosecuting the latter may be greater, so are the risks – such figures are often adept at keeping themselves out of any incriminating paperwork and a failed prosecution can be more escalatory than holding no trial at all.

Another perplexing question is location: holding the tribunal in-country may risk re-igniting divisions; holding it outside the conflict setting risks losing local support for the process, rendering the courtroom procedures and rituals absurd, and the court itself irrelevant to victims. Victimologist Ivo Aertsen summarises the problem thus:

> *International courts operate in a highly formalised way. This, together with practical and financial restrictions, would not allow for much personal participation from the side of the victims or their families, unless in a status of witness. Nor would this setting give room to forms of interaction with the perpetrator. This type of international procedure is mostly – psychologically and socially – very distant from those directly affected.*
>
> *Aertsen et al., 2008, p. 417*

Still other questions, however, are intrinsic to criminal justice procedure itself: prosecution entails an economy of method designed to establish, beyond reasonable doubt, culpability – **who is responsible for what?** This preoccupation necessarily excludes much about the crime that could contribute to transforming the conflict situation, most notably, victims' needs for information about their loved one's fate – their last words, or whether they were made to suffer long before being killed. A victim's role is restricted to providing testimony in a process rigorously focussed on truth capable of convicting and condemning, or establishing doubt. The focus is firmly on the alleged wrongdoer, not on those who have taken the brunt of the wrong done, and on establishing culpability for an act in the past rather than repairing damage that remains and is abundantly manifest in the present.

Application exercise

Assess prospects for justice in a context of interest to you, asking the following questions about the condition of the judiciary.

- *Has it been corrupted, co-opted or emasculated by the executive?*
- *Do the lower courts implement rulings of the Supreme Court?*
- *Are any amnesties in place that provide immunity from prosecution to known perpetrators of gross violations of human rights?*
- *Is the rule of law respected in areas remote from the courts?*
- *What legislative reforms are under way, what are still needed?*
- *Do lawyers have copies of the criminal code and the criminal procedure code?*

4

Right to Reparations

The term **reparations** can be applied to virtually any action taken to repair something broken – from fender-bent vehicles to errors of judgement in business or politics. However, in the context of DwP it pertains specifically to measures of redress for grievous violations for which the state carries responsibility. This is articulated, as will be unpacked below, in the United Nations' "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" (UN General Assembly, 2006) (hereinafter, Basic Principles and Guidelines).

Who qualifies for reparations?

Virtually any situation emerging from violent conflict will hold a clamour to have loss and suffering recognised: civilians wounded in crossfire, the families of fallen fighters, those who have lost livestock or livelihoods, whole communities rendered impoverished by the instability of war. Such claims represent an agonising reality and a legitimate demand on the state. Yet however dire such suffering, the damage that ensues from grievous violations of human rights and the laws of war as well as from the role of the state in these actions entails a particular destructivity. Accordingly, the UN's Basic Principles and Guidelines provides a definition of those victims to whom the state owes reparations:

> *Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, victims also include the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.*
>
> *United Nations General Assembly, 2006, Principle 8*

Are gross violations of human rights reparable?

Is repair possible for the scale and type of devastation that ensues from gross violations of human rights? To the families left behind by a loved one who is forcibly disappeared and killed, what measure can suffice to replace the loss of a father's loving hand on a child's shoulder as she does her homework, or a mother's empty seat at the table. What reparation is possible to the thousands of women who have survived abduction and sexual enslavement by Daesh, for the damage and suffering to which they have been subjected? What of the activist who breaks under sustained torture and relinquishes information that will prove devastating to others? In short, we are dealing with measures to address damages that are irreparable.

Nonetheless, surviving victims have myriad needs that ensue directly from the violation to which they have been subjected. It is this challenge to which reparations policies respond – the present needs ensuing from the violation.

What forms can reparations take?

Amid growing international concern for the plight of victims, the United Nations General Assembly adopted a resolution in 2005 that provided, as its title suggests, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" (UN General Assembly, 2006). The Resolution was the culmination of an extensive process led by the work of two special rapporteurs, respectively, Theo van Boven and Chérif Bassiouni. Van Boven's report was submitted in 1993 and included examples of reparations programmes articulated by the Argentinian and Chilean truth commissions. It also refers to "the most comprehensive and systematic precedent of reparation by a Government to groups of victims" *(UN Commission on Human Rights, 1993, p. 44)*: that of Germany to victims of Nazi maltreatment. When Bassiouni submitted an update on Van Boven's report seven years later, he was able to draw on prolific developments and debates, not least in post-apartheid South Africa. The Resolution is a virtually verbatim set of principles to those presented by Bassiouni, aside from a separating of satisfaction and guarantees of non-repetition into two distinct forms of reparations.

Crucially, the suite of principles challenges the assumption that gross violations can be settled through the disbursement of funds, while also upholding a carefully crafted role for monetary payments in reparations. This is especially needful in situations of extreme poverty. To illustrate the complexity, when a woman's marital prospects – and therewith economic security – have been diminished by sexualised violence perpetrated against her by soldiers or because the state failed to fulfil its responsibility to protect, the state has an obvious obligation to now provide, among other reparations, financial support. This needs to be handled with great discretion and sensitivity, however: providing a pension in the form of a cheque, for example, that she would need to deposit at the bank would risk making the assault public and exposing her to stigma.

The Resolution identifies five forms of reparation (UN General Assembly, 2006, pp. 7–9):

- **restitution,** that is, restoring the victim to the situation they enjoyed prior to the violation
- **compensation,** specifically for and limited to the "economically assessable damage" (UN General Assembly, 2006, para 20) resulting from the violation, for example, the loss of earnings from a breadwinner forcibly disappeared; the limitation to "economically assessable damage" blocks any notion that the violation itself can be settled through payment of monies and entrenches victims right to all other reparative measures.
- **rehabilitation,** comprising medical, psychological, legal and other social services
- **satisfaction,** a term rooted in traditions whereby an aggrieved party may claim recourse to societally accepted measures of redress, especially in situations in which prevailing laws are deemed inadequate for the type of offence. Van Boven affirms the relevance of this notion to "moral damage" (UN Commission on Human Rights, 1993, p. 20), in particular, alluding to Article 41 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which talks of "just satisfaction to the victim ("the injured party"), provided that the consequences of the violation cannot fully be repaired according to the internal law of the State concerned" (Council of Europe, 1950, p. 24). The General Assembly resolution stipulates eight measures designed to provide victims with satisfaction.
- **guarantees of non-repetition,** which is discussed below, as it also constitutes the fourth quadrant in the DwP Conceptual Framework.

Whether assumed or declared, truth recovery is integral to all five forms of reparations. It is most explicitly established with the fourth form, satisfaction. Of the measures included under satisfaction, all but the first are concerned with truth recovery, as follows:

- **establishing** truth through "verification of the facts and full and public disclosure of the truth" and "the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies"
- **recognising** the truth recovered, in the forms of "an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim" and a "public apology, including acknowledgement of the facts and acceptance of responsibility"
- **responding** to inculpatory evidence using judicial measures as well as administrative sanctions against those responsible
- **remembering** the truth, through "commemorations and tributes to the victims" and "inclusion of an accurate account of the violations that occurred … in educational material at all levels" (United Nations General Assembly, 2006, Principle 22).

Reparations, example: Chile.

In response to the report of the National Commission on Truth and Reconciliation, the Chilean government led by President Patricio Aylwin delivered a variegated reparations package. The first step was a public apology, delivered by President Aylwin in his capacity as head of state acknowledging the rupture of trust between state and citizenry under Pinochet's military regime. This was followed by suite of initiatives in response to the plight of the families of los Desaparecidos – people disappeared under the Pinochet regime – include a modest pension each month for the rest of their lives, and a waiver from military service for children of *los Desaparecidos* as well as full support for university and professional studies, up to age thirty-five (Hayner, 2011, p. 167).

Application exercise

Do you know of any projects in a post-conflict setting that are termed reparations? What criteria are used for victims to receive the reparations, in other words, who receives the reparations and on what basis? What forms do the reparations take?

5

Guarantee of Non-Recurrence

The daily, commercial usage of the term guarantee holds connotations of absolute confidence. While such certainty may be misplaced in the present context, the term is used to designate measures that, if implemented with due conviction and comprehensiveness, do provide a safeguard against repetition of certain types of violation. As such, the measures are designed to uproot a systemic or historically entrenched pattern of violation. This necessarily entails "political processes and institutional reform [which are] … just as important as building trust and the capacity for dialogue, transforming conflict narratives and restoring relations," to draw on the language of Germany's Interministerial strategy to support "Dealing with the Past and Reconciliation (Transitional Justice) (Federal Government of Germany, 2019, p. 10).

In addition to the broader societal need, victims endeavouring to rebuild their lives need to know that the violation they suffered is now over and to be able to believe the promise that it will never happen again. Accordingly, guarantees of non-repetition constitutes a core aspect of reparations (its fifth form, in the UN's Basic Principles and Guidelines) as well as the fourth right in the Conceptual Framework for DwP.

What forms can the guarantee of non-recurrence assume?

The Basic Principles and Guidelines on reparations offers a useful source for giving form to this lofty concept. It contains eight measures spanning protection of human rights defenders and workers in professions such as media, law, health, mechanisms for monitoring and managing social conflicts, legislative reform as well as a series of measures for reforming state institutions, inter alia,

- entrenching of civilian control of military and security forces
- fortifying of judicial independence of the judiciary
- ongoing training of police and the armed forces in human rights and international humanitarian law
- promoting adherence to codes of conduct and international standards in all sectors of the public service, including law enforcement.

Designed to ensure state institutions "sustain peace, protect human rights, and foster a culture of respect for the rule of law" (UN Secretary-General, 2010, p. 9), these forward-looking measures are necessarily complemented by rigorous reforms that deal with past abuses. Chilean truth commissioner, José Zalaquett, emphasises the perils of attempting to avoid, block or otherwise subvert this reckoning as follows:

> *Hiding the truth allows the military or other groups or institutions responsible for past abuses to escape the judgment of history and insist on exculpatory versions of what happened; new recruits will absorb an institutional tradition which has not expunged its most objectionable aspects. All this can only weaken efforts to prevent the recurrence of human rights abuses and to reinforce the rule of law.*
>
> *Zalaquett, 1989, p. 31*

Political savvy is obviously crucial when confronting a history in which heinous violations have become systemic and therewith absorbed into an institution's culture. Internal investigations may be part of that ethos and accordingly preoccupied with preserving the prestige of the institution. Criminal investigations typically prompt a closing of the ranks and may be met with veiled menace of reprisals. By contrast, a truth commission that is at once independent and state endorsed may, through the testimony it receives from victims, establish patterns in the data that militate against denials that the violence was systemic – that is, orchestrated, condoned, incentivised and even encouraged as imperative within particular organisational arrangements. Independent testimony from numerous victims typically also exposes individuals who kept themselves in the shadows, signed no documents, and coerced underlings into perpetrating heinous acts of torture or killing.

As truth emerges, several measures become possible that pose less risk of pushback than prosecution in the proverbial public square. They are enacted to achieve specific outcomes in the process of institutional reform as well as in and for society more broadly.

- **Purges** comprise "wide-scale dismissal and disqualification based not on individual records, but rather on party affiliation, political opinion, or association with a prior State institution." (UN Secretary-General, 2004, p. 18). The hazards and escalatory outcomes of purges have been manifest in numerous contexts though rarely more vividly than in post-Saddam Iraq, in the de-Ba'athification process conducted by the Coalition Provisional Authority (Stover, Megally & Mufti, 2005, pp. 843–851).

- **Vetting,** by contrast, incorporates elements of due process and comprises screening the human rights records of individuals either holding public office or being considered for it. Requiring a lower threshold of evidence to be implemented than that required in a court of law, vetting is designed to result in "removing from office or refraining from recruiting those public employees personally responsible for gross violations of human rights" (UN Secretary-General, 2010, p. 9).

- **Lustration** refers to the policy framework that provides authorities with legal mandate to enact procedures including "soliciting information about individuals, investigating said individuals, trying, and disqualifying those individuals from public and semi-public positions of trust, or publicly disclosing information about those individuals with the ultimate goal of furthering the process of democratization and public trust in transitional societies" (Horne, 2017, p. 12).

In addition to helping reform institutions, taking such measures against notorious abusers also contributes to stabilising and transforming a society trying to emerge from conflict. For the continued presence in government employment of such abusers, enjoying the benefits of public office and asserting their power daily, represents "constant reminders" (Minow, 1998, p. 136) to victims of their suffering, its lack of resolution, and the seeming untouchability of the powerful. When these public figures are sanctioned for their acts, this can contribute significantly to providing victims with the reassurance that the state recognises the wrongfulness of the violations inflicted upon them.

Application exercise

In the context you have selected, how would you work with government officials responsible for institutional reform who resist any form of delving into past abuses? What if they say their culture is less confrontational, or that the political situation does not allow for it?

6

Reconciliation

Both the UN Secretary General's Guidance Note and the DwP Conceptual Framework leaves the term **reconciliation** largely undefined. Yet the consequences of a nebulous notion of reconciliation have been vividly evident in an array of post-conflict societies where political elites have seized on the term, using it as a euphemism for impunity: in Nepal, wives of men forcibly disappeared have described coming under pressure from government officials to enact funereal rites for their husbands, despite having received no information about their fate or the whereabouts of the remains.

Contrast this with the realisation in some historically divided settings that reconciliation needs to be actively enabled through a commitment by leadership in political, communal and other crucial sectors of the society in quest of transition. Liberation theologian and Research Director with the South African Truth and Reconciliation Commission, Charles Villa-Vicencio, for example, describes reconciliation as a "modest concept," following discernible patterns from which may be derived a series of tentative "benchmarks" (Villa-Vicencio, in Villa-Vicencio & Doxtader, 2004, p. 5): to cite but a few benchmarks here from his tentative list, reconciliation does not necessarily entail forgiveness; it does however require acknowledgement of responsibility; it interrupts entrenched patterns of violence; it advances understanding; and crucially it is about "surviving and growing together" (Villa-Vicencio, in Villa-Vicencio & Doxtader (Eds.), 2004, p. 8).

Reconciliation, understood thus, is a deliberate political programme, a consensus or commitment to change – typically crafted out of necessity or ofttimes a dearth of alternatives to re-escalation. Accordingly, a society's receptivity to the various measures that constitute DwP – its ability to undertake them in meaningful ways – depends on the extent to which a political commitment has been made to work within a reconciliatory framework and this has found resonance among the citizenry as a social consensus. Reconciliation conceived thus – as survival – is the life force that drives and forms the strategies of dealing with a history of violation.

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