

Justice Against Perpetrators,  
The Role of Prosecution in Peacemaking and Reconciliation

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## Introduction

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In today's world, issues of peace and international justice are receiving increasing attention. This working paper will examine the relationship between these two concepts—peace and justice—and the impact of prosecution on peacemaking, in the short term, and reconciliation, in the long term.

The importance of prosecuting crimes after a repressive regime or a conflict, and the impact prosecution has on peacemaking and reconciliation, cannot be discussed without making a reference to other approaches aiming reconciliation. In the last century, the international community has passed from accepting amnesty laws as the standard way to secure peace, to consider that punishment before national or international courts is a preferred solution for achieving justice and reconciliation. Meanwhile, a third alternative is emerging with characteristics of both—the truth commission, or truth and reconciliation commission.

With the internationalization of human rights and humanitarian law, the international community has shown its repulsion against human rights abuses, and its preference for prosecuting the perpetrators of crimes over granting them amnesty<sup>1</sup>. This preference for prosecution is reflected in some legal instruments, such as the Genocide Convention of 1948 or the Geneva Conventions of 1949, as well as in international institutions, such as the Inter-American Court and Commission of Human Rights, or the UN Human Rights Committee among others.

However, among scholars, there is a strong debate on the most effective ways to aim peace and reconciliation, suggesting a dichotomy between judicial and non-judicial approaches, or what some authors call retributive justice against reconciliatory justice<sup>2</sup>.

This working paper adopts an approach to this debate in the context of contemporary international law. In its first part, an overview of the different judicial and non-judicial approaches to deal with past conflict, as well as an analysis of their effective contribution to peace and reconciliation through several experiences, is presented. In the second part, the author examines the International Criminal Tribunal for the Former Yugoslavia as one of the main judicial approaches currently functioning, and its role in achieving peace and reconciliation in the Balkans.

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<sup>1</sup> See Mary Margaret Penrose, "It's Good to Be the King!: Prosecuting Heads of State and Former Heads of State under International Law", *Columbia Journal of Transnational Law*, 2000, at 193-220. In her article, Professor Penrose advocates the enactment of prosecutorial rules and urges the international community and states in particular to take the necessary steps to try the perpetrators. See also David Scheffer's (U.S. Ambassador for War Crimes Issues) Address at Dartmouth College, 23 October 1998, in which the author notes "[a]s the most powerful nation committed to the rule of law, we have a responsibility to confront these assaults on humankind. One response mechanism is accountability, namely to help bring the perpetrators of genocide, crimes against humanity, and war crimes to justice. If we allow them to act with impunity, then we will only be inviting a perpetuation of these crimes far into the next millennium. Our legacy must demonstrate an unyielding commitment to the pursuit of justice."

<sup>2</sup> See John Dugard, "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?", 12 *Leiden Journal of International Law*, at 1005. See also Tuomas Forsberg, "The Philosophy and Practice of Dealing with the Past: Some Conceptual and Normative Issues", at 62, in Nigel Biggar, *Burying the Past. Making Peace and doing Justice after Civil Conflict*. Washington, DC: Georgetown University Press, 2001.

# I. Towards Reconciliation: Different approaches and their practical application

In the decades immediately following World War II, advocates for human rights launched three important innovations: International Military Tribunal trials in Nuremberg and Tokyo, the United Nations, and intergovernmental and nongovernmental organizations. More recently, mechanisms for the promotion and protection of human rights include as well ad hoc international tribunals (ICTY and ICTR), truth commissions, and the permanent International Criminal Court among others.

As it is shown throughout this paper, each of these mechanisms has been applied in very different situations and conflicts with different characteristics, but all of them intend to deal with the past and to prevent the recurrence of conflict and serious crimes. Among these approaches, it is possible to make a distinction between non-judicial and judicial mechanisms.

## 1. Non judicial approaches: Amnesty Laws and Truth Commissions

- Amnesty laws. The traditional approach to the intersection of peace and justice was the amnesty law, by which outgoing authorities granted themselves, or negotiate the granting of, amnesty. Not surprisingly, this mechanism has been abused many times in the past by repressive military or other regimes seeking impunity for their crimes before relinquishing power to successor governments. However, it can be argued that, at certain points in history, amnesty was the only approach to smoothly reach a democratic transition after a repressive regime, and thus may have represented the best available option to victims as well as perpetrators<sup>3</sup>.

The recent trend in international law, however, has been to reject amnesty laws. For example, the U.N. Commission on Human Rights and its Sub-Commission for the Prevention of Discrimination and Protection of Minorities have concluded that amnesty is a major reason for continuing human rights violations throughout the world<sup>4</sup>. Also the Inter-American Court and Commission of Human Rights have held that amnesties granted by several Latin American countries are incompatible with the American Convention of Human Rights. However, a compromise between the international demand for prosecution of international crimes and the national appeal for a political compromise involving amnesty can in some cases be achieved by recognizing a distinction between permissible and impermissible amnesties, and by giving international acceptance to the former only<sup>5</sup>.

- Truth and Reconciliation Commissions. In the last decades, and after facing atrocities such as those committed in Chile, South Africa, Uganda and Cambodia, the enforcement of human rights has required the development of creative alternatives. Among the most remarkable is the development of truth commissions intended to inquire and document torture, murders, and other human rights violations that otherwise would be denied and covered up by repressive regimes. This approach constitutes a new form of dealing with the past that could be located between amnesty laws and international or national tribunals, and sometimes is applied together with one of these two mechanisms. As it is shown in the next section, truth commissions have come to constitute an effective way to deal with the past and achieve reconciliation in several experiences, the best known and perhaps most successful in South Africa.

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<sup>3</sup> Note for instance, the post-Franco Spain or the post-Pinochet Chile.

<sup>4</sup> See, United Nations Commission on Human Rights: Report on the Consequences of Impunity, U.N. Doc. E/CN.4/1990/13.

<sup>5</sup> See the comparison between the experiences of Chile and South Africa noted by John Dugard, *supra* note 2 "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?", at 1001-1015.

Chile may be considered an example of non-permissible amnesty, although its story is more complicated than such a simple characterization might suggest.. The way that Chileans have dealt with the atrocities committed during the regime of Augusto Pinochet (1973-90) can be divided into two phases-a "political phase" and a "judicial phase".

The first one, during the first successor civilian government under President Aylwin, was a "political phase" dominated by the executive. This phase determined how the new democracy was going to deal with the past and which limits the government wanted to (or was forced to) impose in prosecuting the perpetrators of crimes committed by the Pinochet regime.

In 1990, a Truth and Reconciliation Commission was established, due to an effort of the government to uncover the truth about past human rights violations. The Commission worked for nine months, and a report (named the Rettig Report after the Commission's President) was published by the government and announced nationwide on television. Moreover, the government established the National Reparation and Reconciliation Corporation on 8 February 1992, which established the "inalienable right" of relatives to find "disappeared" family members and which was the instrument by which compensation for the victims was provided.

Other measures taken by the government in this first phase were focused on justice and institutional reforms of the constitution, the legal system, and the military. However, these measures failed mainly due to the power that the military still retained in Chilean institutions. As Barahona de Brito points out,

*[o]f all the transitions in Latin America, Chile's was arguably the most restricted, because it was there that the military retained the highest degree of power and legitimacy. The Constitution of 1980 protected the military. The Pinochet dictatorship had succeeded uniquely in institutionalizing and legitimating itself through the Constitution, radically transforming the juridical and ideological foundations of the political system, and finally ensuring a step-by-step passage to a "protected democracy".<sup>7</sup>*

Another limit on the measures proposed by the government was the overrepresentation of the right in the legislature, which blocked important constitutional reforms necessary for the improvement of human rights policies. In addition, terrorist acts by the FPMR (Manuel Rodriguez Patriotic Front) at this stage helped to legitimize the antisubversive activities of the military.

The second phase was the so-called "judicial phase" and corresponded with the government of President Eduardo Frei, elected in 1993. During this stage, the atrocities committed in Chile acquired tremendous international attention thanks to human rights organizations, political party activists and victims' organizations. In 1997, the Supreme Court applied the Geneva Conventions for the first time since 1973, giving primacy to international law over the amnesty law and breaking the sanctity of the amnesty mechanisms for impunity.

In January 2000, Pinochet's arrest in London renewed civil-military tensions in Chile and highlighted one of the most important considerations in the Chilean case-the tension between peace and justice. The British House of Lords issued two judgments that can be considered as progressive as they refused to accord immunity to a former head of state in respect of international crimes.

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<sup>6</sup> Based on the chapter written by Alexandra Barahona de Brito, "Passion, Constraint, Law and Fortuna: The Human Rights Challenge to Chilean Democracy", in Biggar, *supra* note 3.

<sup>7</sup> See above Barahona de Brito, at 154.

However, the judges were finally influenced by the argument, strongly advanced by the government of Chile, that the extradition of Pinochet to Spain would endanger the fragile peace between army and civilian government in the country<sup>8</sup>. However, for the Chileans, the fact that the General was no longer sacred was a very positive development for democracy and justice, and contributed to reactions against the fear and immobility of the political system.

Although recent developments are encouraging, the original amnesty approach used in Chile has created many lasting problems. As Barahona de Brito concludes

*the struggle for justice in Chile does not have a clear path ahead; but it is far from over. Chileans have fought to give expression to their passion for dealing with the past since 1973. In pursuit of that aim since 1990, they have had to wrestle with a tendency to premature "reconciliation", a euphemism for the acceptance of a limited democracy with authoritarian enclaves. They have also had to confront real obstacles in the form of a powerful military and right wing, as well as legal limitations of a kind not found in any other democratized country of the region. The law has been both an obstacle and a source of new opportunities.*<sup>9</sup>

## **Guatemala<sup>10</sup>**

Contrary to the Chilean case, the shift from an authoritarian regime to an elected civilian government was not a true indicator of democratic transition in Guatemala. The elections of 1985 were controlled by the military and followed by a period of gross human rights violations, consolidation of the military power, and elimination of any opposition movements. Ten years passed before Guatemala took concrete steps toward peace and the possibility of reconciliation.

It seems important to remark that in the Guatemalan case, the peacemaking process had a great impact on future mechanisms of reconciliation. The circumstances of the peace negotiations did not favor a strong mandate for the official investigation commissions and, although the civilians had more power during the peace agreements than before, the military remained the most organized and powerful of the two sides. As a consequence, the agreement concluded in December 1996 was very weak on the issue of demilitarization and reform of the institutions.

However, due to the efforts of the Catholic Church and human rights groups, an agreement for a U.N.-sponsored Historical Clarification Commission had been signed in June 1994. Despite having a weak mandate, its recommendations included programs for compensation of victims, including psychological and economic assistance, investigations and exhumations of clandestine graves, and a commission for the search of missing children among others.

In addition, an extensive report on human rights violations during the armed conflict was published by the Human Rights Office of the Catholic Church in 1998. This document included names of those individuals responsible for violations. That transparency was likely the reason why one of its co-authors was killed a few days after the report was published.

It is important to note that the process of dealing with the past atrocities in Guatemala has been led mainly by civil society organizations independent from the revolutionary left and supported by many international NGO's and the U.N. mission in the country. These groups have frequently challenged military power and impunity while uncovering the truth and securing justice for victims.

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<sup>9</sup> See above Barahona de Brito, at 175.

<sup>10</sup> Based on the chapter written by Rachel Sieder, "War, Peace, and the Politics of Memory in Guatemala", in Biggar, *supra* note 3.

However, in order to reach genuine democracy, these activities must be accompanied by a submission of the elite to the rule of law and the abandon of their historic privileges. Although the process for reconciliation had a beginning with the truth commission and compensation mechanisms, there is a lack of judicial sanctions, creating impunity for the military and civilian elites that still remain in the country, and obstructing any real democratic transition.

## Northern Ireland

In Northern Ireland, almost eight hundred years of conflict has left a state of distrust among the parties that will take time to overcome. Particularly since Ireland's independence in 1921, discrimination and segregation towards the Catholics has led to an escalation of violence, including the terrorist campaign of the Irish Republican Army (IRA).

The cease-fires of 1994 and the involvement of the political parties associated with the paramilitaries led to the Belfast Agreement of Good Friday 1998, which contemplated the establishment of a devolved assembly and executive in Northern Ireland. Demilitarization and decommission of explosives and weapons was a prerequisite for the implementation of the agreement. As it can be observed, the creation of political mechanisms aiming at reconciliation were envisaged in the peacemaking phase. However, neither prosecution nor amnesty was addressed by the agreement. In fact, the involvement of ex-paramilitaries who were still loyal to their ideals, but who had abandoned violence, was very important to promote dialogue between local communities.

Some authors note that the agreement was possible through the approaches of justice, coexistence and reconciliation work. According to Mari Fitzduff, equality was achieved primarily through a series of legislative reforms to address existing inequalities, resulting in several commissions and other institutions dealing with unfair employment policies and social and economic inequalities. Moreover, as part of the 1998 Agreement a new Human Rights Commission for Northern Ireland was created, together with an Equality Commission<sup>11</sup>.

The reason why the case in Northern Ireland is included here is because, as noted by McCaughey, "what was achieved by the Good Friday Agreement of 10 April 1998 was not forgiveness, much less reconciliation. What was achieved was an agreement to disagree, a *modus vivendi*. In a situation such as existed in Northern Ireland, that is an enormous step forward, however modest it may sound to outsiders"<sup>12</sup>. Indeed, coexistence is a prelude to increasing peace, and peacemaking is a precondition and a necessary requirement for any form of reconciliation. In old and complicated conflicts, such as this one or the Israeli-Palestinian conflict, this may be already a considerable achievement.

## South Africa

One of the most relevant examples of permissible amnesties is the South Africa's Truth and Reconciliation Commission (TRC), created in 1995 by the first democratically elected parliament as a consequence of the peaceful transition from apartheid. It is important to point out that the TRC was a compromise (to launch a process for granting amnesty to participants in past conflicts) included during the peace negotiations. In this case therefore, there was a clear political will from

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<sup>11</sup> See Mari Fitzduff, "The Challenge to History. Justice, Coexistence and Reconciliation Work in Northern Ireland", at 257-271, in *Reconciliation, Justice and Coexistence*, Mohammad Abu-Nimer (ed.), Oxford: Lexington Books, 2001.

<sup>12</sup> See Terence McCaughey, "Northern Ireland: Burying the Hatchet, not the Past", at 266, in Biggar, *supra* note 3.

all sides of the conflict to include a mechanism for national reconciliation in the peacemaking stage. As Villa-Vicencio notes, "[i]ronically, it was the forced compromise between the forces of liberation and the forces of apartheid that provided an alternative way to dealing with the atrocities of the past."<sup>13</sup>

The TRC was a transitional mechanism designed, in the words of the Interim Constitution, to "provide a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."<sup>14</sup>

The TRC was composed itself of an amnesty, victim testimony, and reparation and rehabilitation committees. For the granting of amnesty, remorse was not a requirement; rather only political motivation for the crime and full disclosure of the facts in a public hearing under cross-examination were required. Those who have failed to obtain amnesty from the committee, or who failed to apply for it, are exposed to prosecution. This serves to demonstrate that amnesty in South Africa was conditioned on certain requirements and did not favor impunity.

Although the TRC did not aim at retributive justice, it had a positive effect on the victims and succeeded in large part at reaching a consensus among South Africans intended to achieve a pluralistic society. Montville points out that storytelling usually had a cathartic effect on the victim telling the story, which became part of the official public record of the state. He argues that storytelling also penetrated the defenses of the other side that had resisted broadside accusations<sup>15</sup>.

As for the limits of this mechanism, the Commission failed in a number of ways to meet the needs of victims, and the government failed to respond to the recommendations made by the Commission concerning reparations. Moreover, the TRC did not adjudge legal culpability for those who supported or allowed the previous oppressive government. However, still today the TRC in South Africa is seen as a successful transitional mechanism to deal with the past, and it has been taken into consideration in many debates, included by the Yugoslavia Tribunal in some cases<sup>16</sup>, when dealing with reconciliation.

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<sup>13</sup> See Charles Villa-Vicencio, "Restorative Justice in Social Context: The South African Truth and Reconciliation Commission ", at 209, in Biggar, *supra* note 3.

<sup>14</sup> Postamble to the Interim Constitution (Act No. 200 of 1993), after section 251.

<sup>15</sup> See Joseph Montville, "Justice and the Burdens of History", at 138 in , Abu-Nimer, *supra* note 11.

<sup>16</sup> For instance, note below that Alex Borain, former co-president of the TCR, appeared as a witness before the ICTY, during the proceedings to consider the guilty plea of the defendant Biljana Plavsic.

## 2. Judicial approaches for dealing with the past

Judicial approaches to deal with the past are applied in different legal scenarios and with different features, but most of them are characterized by being retributive and, in most of the cases, although not necessarily, adversarial. Among them it is possible to distinguish:

- Military tribunals, such as Nuremberg and Tokyo. These Tribunals were a reaction to the holocaust and other atrocities committed during World War II. Although their relevance from a historical point of view has been remarkable, this approach is widely seen today as victor's justice and therefore not conducive to reconciliation.
- Ad hoc tribunals such as the ones created for Yugoslavia and Rwanda. Following massive violations of human rights, including genocide, which were considered threats to international peace and security, the Security Council, acting under Chapter VII of the U.N. Charter, created the two ad hoc Tribunals as a measure contributing to the restoration and maintenance of peace in those areas.
- National courts applying the principle of universal jurisdiction, such as Belgium with its case against Sharon or Spain with its case against Pinochet. The effect of the case against General Pinochet on Chilean society was considered in the previous section.
- National courts prosecuting the perpetrators in their own jurisdictions and under their own judicial system, such as in Chile or Rwanda. In this latter case, discussed below, national prosecution is complemented by the Rwandan International Criminal Tribunal.
- Special courts created by agreement, such as in Sierra Leone, representing a mixture of national and international law.
- The International Court of Justice and the International Criminal Court in The Hague. Although different in nature and in procedures, both mechanisms constitute international fora in which countries can bring their grievances regarding human rights violations. In particular, the recently created International Criminal Court represents the future of prosecution for human rights violations.

Two of these many examples-those of Rwanda and Sierra Leone-are discussed below.

### Rwanda

The Rwandan conflict represents one of the worst atrocities ever committed, both for its intensity and for its efficiency and calculated organization. The conflict was the result of fighting between the two main ethnic groups, Hutus and Tutsis, over political power and access to resources and wealth. As Vandeginste notes "[d]ealing with the past in such a context cannot solely be a judicial issue; it is a political challenge and a challenge for society as a whole."<sup>17</sup> He also recognizes that Rwanda has not yet reached a political transition process aimed at representation, inclusiveness and better governance. Although the Arusha Accords included power sharing and numerical distribution of seats in the transitional National Assembly, this agreement has not been implemented.

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<sup>17</sup> See Stef Vandeginste, "Rwanda: Dealing with Genocide and Crimes against Humanity in the Context of Armed Conflict and Failed Political Transition", at 223, in Biggar, *supra* note 3.

In this context, two different approaches to dealing with the Rwandan conflict have arisen: an ad hoc tribunal created by the international community, and a reformed national judicial system.

On one hand, due to the reaction of the international community to the atrocities committed in Rwanda between April and June 1994, the International Criminal Tribunal for Rwanda was created by U.N Security Council Resolution 955 of 8 November 1994. The Tribunal's Statute recognizes that the role of the Tribunal is to "contribute to the process of national reconciliation and to the restoration and maintenance of peace."<sup>18</sup>

However, despite the high expectations of the Rwandan population, the Rwanda Tribunal has been criticized for various reasons. Among them, it is worth noting the delay in its procedures, its temporal limit (as the Tribunal's mandate only covers crimes committed in 1994), lack of investigation on the crimes committed by the victor (Tutsis), and lack of involvement of victims in the process.

On the other hand, the response of the national judicial system was the consequence of the new government's will to prosecute the perpetrators of mass human rights violations as a precondition for reconciliation in the country. To that aim, two objectives were essential and consecutive: the re-establishment of the justice system, and the prosecution of genocide crimes within that system.

In spite of its achievements, some problems remain with the national justice system as well, such as the delay and quality of the proceedings (which do not always follow recognized international standards), the fact that the justice system is seen by the Hutus as the victor's justice system, and the lack of victim's participation in the process. Some of the justifications given to these obstacles are the magnitude of the conflict and the limit in the capacity of the judicial system and economic situation of the country to deal with individual criminal trials.

In Rwanda, therefore, prosecution seems to have been insufficient to bring reconciliation. As Vandegiste notes, "[f]or justice to be accepted as an instrument of reconciliation, it must meet certain conditions that go even beyond criteria of the independence and impartiality of the judiciary. These conditions include its embeddedness in an overall process toward transparency, political participation, and inclusiveness."<sup>19</sup>

## Sierra Leone

In response to atrocities committed in the country as a consequence of a civil war in the 1990s, the Security Council, by its resolution 1315 (2000) of 14 August 2000, requested the Secretary General of the United Nations to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law committed within the territory of Sierra Leone<sup>20</sup>. It is important to note that, unlike the Yugoslavia Tribunal, which was created under Chapter VII of the U.N Charter, the Special Court was the result of an agreement signed between the United Nations and the Sierra

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<sup>18</sup> In this sense is important to mention *Prosecutor v. Serusago, Sentence*, Case No. ICTR-98-39-S, T. Ch I, 5 February 1999, para. 19; *Prosecutor v. Kambanda, Judgment and Sentence*, Case No. ICTR-97-23-S, T Ch. I, 4 September 1998, paras. 26-28 (see also para. 59); *Prosecutor v. Rutaganda, Judgement and Sentence*, Case No. ICTR-96-3-T, T. Ch. I, 6 December 1999, paras. 455-456.

<sup>19</sup> See above Vandeginste, *supra* note 17, at 246.

<sup>20</sup> See Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, (S/2000/915).

Leonean Government on 16 January 2002. As a consequence, the Special Court has concurrent jurisdiction with primacy only over Sierra Leonean courts.

The subject matter jurisdiction of the Court includes crimes under international law (crimes against humanity, war crimes and other serious violations of international humanitarian law not including the crime of genocide), and crimes under Sierra Leonean law.<sup>21</sup>

Although the civil war started in 1991, the temporal jurisdiction of the Court is since 30 September 1996 when the first peace agreement between the parts collapsed and the hostilities resumed with great violence. As its negotiators noted, temporal jurisdiction since the beginning of hostilities in 1991 would have been too ambitious a project, considering the economic and temporal constraints, and may have endangered the viability and success of the Court.

The Statute of the Court specifically provides that an amnesty granted to any person falling within the jurisdiction of the Special Court, in respect of the crimes referred to in the Statute, shall not be bar to prosecution. The Special Court thus recognizes the prevailing rejection of amnesty under international law and avoids any kind of impunity for the perpetrators.

The Special Court of Sierra Leone is innovative in several respects, relative to the Rwanda and Yugoslavia Tribunals. In addition to the incorporation of national law, several judges and staff members are from the country or appointed by its Government, and the seat of the Tribunal is in the country's capital, Freetown.

Since most of the Court's judges were sworn in during December 2002, is still very early to evaluate the role that this judicial mechanism will have in achieving lasting peace and reconciliation in Sierra Leone.

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<sup>21</sup> One notable innovation of the Court is its personal jurisdiction over juvenile offenders who, at the time of the alleged commission of the crime, were between 15 and 18 years of age. See Article 7 of the Statute of the Special Court, regarding "Jurisdiction over persons of 15 years of age". This point was highly controversial at the time of the negotiations and, due to the pressure from different human rights organizations, measures of rehabilitation and other judicial guarantees were contemplated.

## II. The International Criminal Tribunal for the Former Yugoslavia: a path to reconciliation?

### Introduction

The most visible of the judicial mechanisms now operating is the International Criminal Tribunal for the former Yugoslavia (ICTY), headquartered in The Hague. This section examines the various functions of justice in achieving reconciliation, and analyzes whether the Tribunal accomplishes those functions and contributes to lasting peace in the former Yugoslavia.

One author notes that justice is related to truth, fairness, rectitude and retribution. In order to apply justice, it is important to know the truth, to record and find the causes of the conflict, and to determine who is responsible for what. That exercise is better undertaken by a third party that is able to show fairness and impartiality. Impartiality in this context means that, once the facts are known by the third party, they are not misrepresented in order to maintain artificial impartiality, but rather are incorporated in the decision making process. One example of this in the Yugoslav case is the War Crimes Commission created by the United Nations in 1993 to assess the nature of the conflict and the extent of responsibility that each party to the conflict had with respect to the crimes committed. Although the findings showed atrocities committed by each part, the Commission concluded that the Serbian forces were acting as aggressors and they were responsible for the vast majority of crimes<sup>22</sup>.

Fairness also means that negotiators do not seek to find an agreement at the expenses of the victims, forcing them to accept concessions against their will or judgment. Although concessions by one party may be effective to get a peace agreement and avoid human suffering in the short term, they may not help to reach lasting peace in the area<sup>23</sup>. For example, some commentators argue that during the Dayton talks in 1995 the U.S. negotiators put too much pressure on the Bosnians to make them accept certain concessions that the Bosnian delegation saw as unacceptable for lasting peace in the area<sup>24</sup>.

In addition, as part of the peacemaking stage, retribution may be essential in terms of compensating the victims, punishing the perpetrators and imposing the rule of law. In this specific case, the method chosen was the Yugoslav Tribunal, intended to try those individuals responsible for war crimes.

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<sup>22</sup> See Paul R. Williams and Michael P. Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia*. Lanham, MD: Rowman and Littlefield Publishers, 2002, at 12 and 13.

<sup>23</sup> Estrada-Hollenbeck argues that "[t]o resolve, of course, is to do more than stop the violence. To resolve is to leave the conflicted parties with institutions and attitudes that favor peaceful interactions". See, "The Attainment of Justice through Restoration, not Litigation", at 69, in Abu-Nimer, *supra* note 11.

<sup>24</sup> Williams and Scharf differentiate among the Rambouillet/Paris and Dayton negotiations to see the extent of this theory. See also Estrada-Hollenbeck, *supra* note 23, at 80. Also Lewis Rasmussen points out that "countries such as Angola, Bosnia, Cambodia, Rwanda, Sierra Leone ... have at one point reached negotiated agreements to end their civil wars, and yet all continue to struggle toward a sustainable peace", "Negotiating a Revolution. Toward Integrating Relationship Building and Reconciliation into Official Peace Negotiations", at 103, in Abu-Nimer, *supra* note 11.

In comparison with other ways of dealing with conflict seen in the previous sections, and as an argument in favor of prosecution, Williams and Scharf argue that

*the particular circumstance of the crimes committed in the former Yugoslavia required the formation of an ad hoc criminal tribunal for both moral and practical reasons. First, the genocide, rape, and torture that occurred was of a nature and scale so horrific that nothing short of full accountability for those responsible would provide justice. Second, the domestic legal systems in some of the republics of the former Yugoslavia had been so thoroughly corrupted that they were not competent to conduct a fair trial of the war's perpetrators, many of whom are still in power.*<sup>25</sup>

The same authors, however, add that the norm of justice must be applied together with other relevant approaches, such as accommodating the interests of the parts in the conflict, economic inducements, and the use of force, during the peace-building process. As the first Prosecutor of the Tribunal, Richard Goldstone, said, "one must not expect too much from justice, for justice is merely one aspect of a many faceted approach needed to secure enduring peace in a transitional society."<sup>26</sup>

## 1. Functions of justice and their achievement by the Tribunal

### Determination of individual responsibility

One of the functions expected from prosecution is to determine individual responsibility and to avoid assigning that responsibility to the entire group—the Serbs in this case. By doing so, and following the words of the former president of the Yugoslav Tribunal, Antonio Cassese, "far from being a vehicle for revenge the Yugoslav Tribunal is an instrument for reconciliation"<sup>27</sup>.

However, the arrest of indictees has been a very complicated problem since the early days of the ICTY. During the Dayton talks, the Prosecutor of the Yugoslavia Tribunal, Richard Goldstone, formally asked the United States to make the surrender of indicted suspects a condition for any peace accord. The U.S. peace negotiators did not support that initiative, fearing to endanger the whole peace process<sup>28</sup>. Moreover, the role of president Milosevic was seen by the negotiators as essential to reach any peace agreement. As a consequence, the fact that prosecuting the perpetrators was not included in the provisions of the Dayton agreement is important in order to understand the subsequent difficulties of the Tribunal in arresting important indicted war criminals, such as Karadzic and Mladic, that still today remain at large.

In addition, the ambiguous mandate given by the negotiators<sup>29</sup> to IFOR (the NATO-led Implementation Force and later renamed SFOR) in order to arrest indictees and transfer them to the Tribunal, whether intentional or not, contributed to the above mentioned situation. The non-prosecution of some high-level perpetrators and their treatment as legitimate negotiators, as seen by the victims and other observers, will likely undermine the reconciliatory function of the Tribunal.

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<sup>25</sup> See above Williams and Scharf, *supra* note 22, at 22.

<sup>26</sup> See Richard J. Goldstone, "Justice as a Tool for Peace-Making; Truth Commissions and International Criminal Tribunals", 28 *N.Y.U. Journal of International Law and Policy* (1996), at 485 and 486.

<sup>27</sup> Antonio Cassese, *International Tribunal for the Former Yugoslavia, First Annual Report*, U.N. Doc. IT/68, 28 July 1994, para. 16.

<sup>28</sup> See above Williams and Scharf, *supra* note 22.

<sup>29</sup> As an indication that the negotiators considered more important to achieve an agreement than addressing justice issues dealing with the Tribunal, it may be interesting to quote Ambassador Holbrooke's words "the Administration remain divided over the most important question it faced: if we got an agreement in Dayton, what would the NATO-led Implementation Force, IFOR, do? Of course, if Dayton failed to produce a peace agreement, our deliberations would be meaningless." Richard Holbrooke, *To End a War*. New York: Random House, 1998, at 215.

Although dealing with issues regarding the perpetrators was not on the agenda during the Dayton talks, on 22 November 1995, the Security Council enacted Resolution 1022 encouraging the FRY to cooperate with the Tribunal and noting that compliance with orders from The Hague "constitutes an essential aspect of implementing the Peace Agreement".

Moreover, the Tribunal was established as an enforcement measure of the Security Council under Chapter VII of the UN Charter, and therefore it is a subsidiary organ with delegated enforcement powers. The Tribunal's Statute, approved by Security Council Resolution 827 in 1993, also grants the Tribunal, through Article 29, the authority to issue international arrest warrants, which shall be comply "without undue delay"<sup>30</sup>. In addition to Article 29, Rule 61 of the Rules of Procedure and Evidence contemplates a procedure in case of failure to execute an arrest warrant, with the possibility for the President of the Tribunal to notify the failure of that state to the Security Council. With these mechanisms, the Tribunal in theory should not have difficulties to arrest the perpetrators. However, reality shows that cooperation from Belgrade is still sporadic and often conditioned to foreign economic assistance, and physically bringing perpetrators to The Hague has proven to be a major obstacle to the Tribunal's success.

## Historical Record

Another function of justice is to create a detailed historical record of the events and atrocities committed in order to have a knowledge of what happened, who was responsible, why it should be condemned, and to prevent it for happening in the future<sup>31</sup>. This was an important function of the Tokyo and Nuremberg Tribunals. The Chief Prosecutor at Nuremberg, Robert Jackson, noted that the most important legacy of the trials was the documentation of Nazi atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future"<sup>32</sup>. Thus, making public the truth about what happened will help to discredit the policy applied and the regime that applied it.

The Tribunal is contributing to that end in a great manner by collecting witness testimonies and other evidence, as well as analytical studies, investigations and other information regarding the conflict. However, due to the confidentiality of most of these documents, it is still not clear whether they will be released to the public once the Tribunal's mandate ends. Moreover, the Tribunal's jurisdiction and prosecutorial practices leave uncovered many smaller (but nevertheless important from the victims' point of view) incidents during the conflict. In addition, procedural or legal technicalities may lead to information being withheld from the public, in order to protect witnesses or for other reasons<sup>33</sup>.

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<sup>30</sup> The Trial Chamber has noted in this respect that the Tribunal is empowered to issue binding orders to States pursuant to Article 29 of the Statute, which derives its binding force from Chapter VII and Article 25 of the United Nations Charter and Security Council resolutions adopted pursuant thereto. By affording judicial assistance to the Tribunal, States do not thereby subject themselves to the primary jurisdiction of the Tribunal, which is limited to natural persons. Rather, when issuing binding orders to States, the Tribunal exercises its "ancillary (or incidental) mandatory powers vis-à-vis States", as embodied in Article 29 of the Statute. See, *Prosecutor v. Kordić and Čerkez, Decision on Request of the Republic of Croatia for Review of a Binding Order*, Case No. IT-95-14/2-AR108bis, App. Ch., 9 September 1999, para. 16.

<sup>31</sup> Note Santayana's famous phrase: "Progress, far from consisting in change, depends on retentiveness ... Those who cannot remember the past are condemned to repeat it". George Santayana, *Life of Reason or the Phases of Human Progress*, 5 vols., New York: Charles Scribner's Sons, 1936.

<sup>32</sup> See "Report of Robert H. Jackson, U.S. Representative to the International Conference on Military Trials 432 (Dep. of State, Pub. 3080, 1949).

<sup>33</sup> Just to give an example, the Judges normally dismiss the case if the defendant dies before the issuance of the judgment, with the result that the court's findings of fact and law are never publicly pronounced. This was the case of Slavko Dokmanovic, who died while in detention awaiting judgment. See the ICTY Press Release, "Completion of the Internal Inquiry into the Death of Slavko Dokmanovic", U.N. Doc. CC/PIU/334-3, 23 July 1998.

## The Role of the Victims

Acknowledging the victims and their stories and grievances is also one of the main functions of justice and is essential to achieving a peaceful coexistence. Not only it is important to acknowledge the dignity of the victims, but also provide them with material and psychological support to repair the damage as far as possible.

However, unlike the recently created International Criminal Court, which contemplates a Victims' Compensation Fund, this mechanism does not exist in the Statute of the ICTY. Moreover, the complexity of the procedure inherent to any judicial body implies that many perpetrators are still at large living in the communities where the crimes took place. In 2000, the International Crisis Group reported around seventy-five individuals indictable for major war crimes who held important positions of power and influence in municipalities and political party institutions across the Republika Srpska and in the Republika Srpska central government<sup>34</sup>. This makes the relief of the victims very difficult, if not impossible, and encourages personal revenge<sup>35</sup>.

## Deterrence

For present and future conflicts all around the world, justice is intended to produce deterrence. This function is directly connected with the above-mentioned individualization of responsibility, and it needs from the Tribunal a strong will to impute crimes and arrest the perpetrators. After its establishment in 1993, the Tribunal failed to prevent the subsequent atrocities committed by the same perpetrators in Kosovo in 1999. Notably, it was only after that year that the Office of the Prosecutor indicted Milosevic and other high-level criminals from Serbia<sup>36</sup>.

However, it is early to examine the role of the Tribunal in the long term stability of the Balkans and other international conflicts (and, in particular, its effectiveness as a deterrent). Since 2001, indictees from each part of the conflict, not only Serbs, have been arrested or surrendered to the Tribunal<sup>37</sup>. Moreover, there exists abundant jurisprudence in the Tribunal's case law to illustrate that one of its aims is to prevent future violations of human rights and that deterrence is considered by the Judges when imposing a sentence. As an example, in *Prosecutor v. Tadić* it was mentioned that

*[t]he unique mandate of the International Tribunal of putting an end to widespread violations of international humanitarian law and contributing to the restoration and maintenance of peace in the former Yugoslavia warrants particular consideration in respect of the purpose of sentencing ... The Trial Chamber shares the opinion expressed in the above mentioned cases in respect of retribution and deterrence serving as the primary purposes of sentence. Accordingly, the Trial Chamber has, in its determination of the appropriate sentence, taken these purposes into account as one of the relevant factors.*<sup>38</sup>

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<sup>34</sup> See International Crises Group, "War Criminals in Bosnia's Republika Srpska" at 2, 68, 69, 78.

<sup>35</sup> The fact that the victims have very few opportunities to tell their stories and relief their suffering through a judicial process, may be an argument to have had considered any form of truth commission complementary to the action of the Tribunal for this aim. In this sense see as well Williams and Scharf, at 125 and 126.

<sup>36</sup> Milosevic's initial indictment was issued on 24 May 1999, together with Sainovic, Ojdanic, Stojilkovic, and former Serbian president Milutinovic. Krajisnic's initial indictment is from 21 March 2000.

<sup>37</sup> In this sense, recently three members of the KLA (Kosovo Liberation Army) were brought to the Tribunal last February 2003 (see *Prosecutor v. Limaj et al.*, Case No. IT-03-66). Also one Bosnian Muslim was arrested early this year (see *Prosecutor v. Orić*, Case No. IT-03-68).

<sup>38</sup> See *Prosecutor v. Tadić, Sentencing Judgment*, Case No. IT-94-1-Tbis-R117, T. Ch., 11 November 1999, paras. 7-9 (referring to the sentencing decisions in *Élebić*, Furundija, Kayishema and Ruzindana, Serushago, Akayesu and Kambanda).

## Reconciliation and Maintenance of Peace

There is extensive case law to suggest that the Tribunal has been fully aware of this function of justice and it has seen reconciliation as one of the main objectives to achieve in the former Yugoslavia<sup>39</sup>.

In *Prosecutor v. Delalić et al.*, the Trial Chamber noted that the theory of retribution, which is an inheritance of the primitive theory of revenge, urges the Trial Chamber to retaliate to appease the victim. The policy of the Security Council of the United Nations, however, is directed towards reconciliation of the parties. This is the basis of the Dayton Peace Agreement by which all the parties to the conflict in Bosnia and Herzegovina have agreed to live together. A consideration of retribution as the only factor in sentencing is likely to be counterproductive and disruptive of the entire purpose of the Security Council, which is the restoration and maintenance of peace in the territory of the former Yugoslavia. Retributive punishment by itself does not bring justice.<sup>40</sup>

The Office of the Prosecutor also appears to consider reconciliation important to the purpose and success of the Tribunal. For example, in a recent closing argument the Prosecution noted that in 1993 the Security Council passed Resolution 827 and expressed its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law, systematic detention, mass killings, rape of women, and the continued practice of ethnic cleansing. According to the Prosecution, it was recognized that there was a need to deter such conduct in order to have peace, and the council was said to have been determined to put an end to such crimes and to bring to justice the persons most responsible. The Prosecution declared that the Tribunal was created with the aim of contributing to the restoration and maintenance of peace.<sup>41</sup>

Among the case law of the Tribunal, guilty pleas by some defendants have been maybe the most valuable element aiming at reconciliation. To date, there have been only seven cases out of more than one hundred where accused have entered guilty pleas<sup>42</sup>. However, very recently, the case of Biljana Plavšić, former president of the Republika Srpska, joined the efforts of Defence and Prosecution to show to the Judges that the confession and remorse of Plavšić could be a significant and essential contribution to the process of reconciliation in Bosnia and Herzegovina and the former Yugoslavia. Several internationally renowned witnesses, such as Alex Borain (former co-president of the South African Truth Commission), Madeleine Albright (former U.S. secretary of state) and Elie Wiesel (winner of the Nobel prize for peace) testified before the court to present Plavšić's act as a contribution to reconciliation.

In a statement, Mrs. Plavšić herself noted that to achieve any reconciliation or lasting peace in Bosnia Herzegovina, serious violations of humanitarian law during the war must be acknowledged by those who bear responsibility, regardless of their ethnic group, and that acknowledgment is an essential first step.<sup>43</sup>

Furthermore, the Trial Chamber accepted that "acknowledgment and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together

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<sup>39</sup> On the contrary, Martha Minow argues that the goal of war tribunals do not include reconciling perpetrators and victims. See Martha Minow, "Innovating Responses to the Past: Human Rights Institutions", at 74-84, in Biggar, *supra* note 3.

<sup>40</sup> See *Prosecutor v. Delalić et al.*, *Judgment*, Case No. IT-96-21-T, T. Ch. IIqtr, 16 November 1998, para. 1231.

<sup>41</sup> See *Prosecutor v. Stakić*, *Prosecutor's Closing Arguments*, Case No. IT-97-24, 11 April 2003. In this sense see also *Prosecutor v. Biljana Plavšić*, *Closing Arguments*, Case No. IT-00-39&40/1.

<sup>42</sup> The accused that have entered a guilty plea so far are Erdemovic, Jelusic, Sikirica, Dosen, Kolundzija, Todorovic and Simic.

<sup>43</sup> See *Prosecutor v. Biljana Plavšić*, *Sentencing Judgement*, Case No. IT-00-39&40/1-S, 27 February 2003, para. 74.

with acceptance of responsibility for the committed wrongs, will promote reconciliation. In this respect, the Trial Chamber concludes that the guilty plea of Mrs. Plavsic and her acknowledgment of responsibility, particularly in the light of her former position as President of the Republika Srpska, should promote reconciliation in Bosnia and Herzegovina and the region as a whole."<sup>44</sup>

Interestingly, the effect achieved through guilty plea contains most of the characteristics examined in this working paper for achieving reconciliation. Although occurring in a very different procedural context, a guilty plea is in many ways very similar to some non-judicial ways to deal with human rights atrocities, such as the truth commissions.

## 2. Conclusion - ICTY

From the ICTY experience, where justice and the prosecution of perpetrators were imposed by the Security Council under Chapter VII, rather than agreed upon by the parties to the conflict, there are several lessons from which it is possible to learn for other conflicts all around the world.

First, and very important, the facts that in Dayton the negotiators dealt with war criminals and that the role of justice in the peacemaking stage was undermined, were essential to understand the atrocities that followed in Kosovo in 1999. Indeed, the role of justice in the peacemaking stage was not as relevant as may have been desirable, as the Office of the Prosecutor did not release an indictment against Milosevic until a later stage in the conflict and he was seen a legitimate negotiator in the Dayton and Rambouillet/Paris talks. As Williams and Scharf point out,

*[b]ad there been greater reliance on the norm of justice during the Dayton negotiations, and had the mechanisms proposed by the Bosnian government been incorporated into the agreement, many of these indictable war criminals would not have continued to exercise power and influence over the implementation of the accords. In all likelihood Bosnia now would be on a path toward ethnic reintegration as opposed to the path of the facto ethnic partition.<sup>45</sup>*

Second, it is important to reach the aims that the Tribunal was intended to achieve and complete the prosecution of all the perpetrators within the Tribunal's jurisdiction. While this task may be difficult to achieve due to time and economic constraints, it is indispensable for the relief of the victims and coexistence in the area that war criminals still occupying high positions in the local and national institutions be removed from influence and power.

Although the International Tribunal serves as a forum for some of the victims to tell their stories and cure their grievances before the court and the international community, it has failed to contemplate any kind of compensation system or to serve as a comprehensive mechanism in which a larger number of victims could expose the atrocities they suffered to the rest of the world. Their testimonies would serve not only for their own relief but also for the international community to have a full knowledge of what happened in the former Yugoslavia and prevent this from happening in the future.

Thus, despite the tremendous contributions of the ICTY, there is substantial room for improvement in these and others areas<sup>46</sup>.

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<sup>44</sup> See note 43 above, para. 80.

<sup>45</sup> See Williams and Scharf, *supra* note 22, at 169.

<sup>46</sup> In this sense, Barry Hart points out the still remaining obstacles to reconciliation. See Barry Hart, "Refugee Return in Bosnia and Herzegovina. Coexistence before Reconciliation", in Abu-Nimer, *supra* note 11.

### III. Conclusion

From the above presentation it is possible to say that states (individually, and together in the United Nations and other international organizations) have had different reactions and approaches to deal with human rights violations in or outside their boundaries, and that those reactions have been greatly determined by the circumstances of each case. Although some experiences have been more successful than others, in none of the afore-mentioned conflicts, has reconciliation been fully achieved. One reason for it, as most of the commentary notes, is that reconciliation among the parties is a process that starts at the peacemaking stage, by reaching an agreement on how to deal with the past, but it takes time for such an agreement to be implemented and incorporated by the new society.

From the Yugoslav and other experiences it is possible, however, to reach some conclusions that may be useful for the resolution of present and future conflicts, including Palestine.

- Justice and Reconciliation are key concepts that require the attention and study of peacemakers and peace builders before agreements are signed or negotiated political compromises reached.
- The approaches to achieve reconciliation must be agreed upon by the parties, even if monitored by an impartial third party, in a way that they include every group or ethnicity in the negotiations and that they do not force one party to accept concessions that will not contribute to lasting peace. It is important that any approach to deal with past crimes be included in the peacemaking stage, so that there is an explicit compromise by the parties to create and enhance the foundations of an inclusive social infrastructure. Effectively changing political systems after an intense conflict requires recognition and tolerance of diversity, as well as access to participation in the processes that determine the conditions of security and identity.
- States and other parties involved in the negotiating process will influence the peace building strategy following their own interests. Therefore, negotiators should acknowledge the political circumstances of the conflict, take into consideration the nature of the problems and how to deal with them, and identify the approach chosen with democratic states.
- The tension between making peace and doing justice has been evident in cases like Chile and Yugoslavia, where the negotiators had to sacrifice the full application of the rule of law in favor of a peace agreement to end the conflict or reach stability in the country. In order to end an international or internal conflict, negotiations are very often conducted with the leaders who are themselves responsible for gross human rights abuses. In these situations, insisting on criminal prosecution may prolong the conflict and intensify human suffering<sup>47</sup>, having thus a harmful effect in peacemaking. However, it is important to keep in mind that, although the achievement of an agreement may avoid more human suffering in a short term, reconciliation is necessary to prevent recurring cycles of revenge among the parties. Indeed, like the South African case shows, sometimes judicial and non-judicial approaches for dealing with the past complement each other.
- Also justice is a necessary condition for reconciliation, although it is not a sufficient condition. There is a dilemma among looking at the past to correct grievances while creating a viable present and future for every group after a conflict. Therefore, reconciliation needs

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<sup>47</sup> See Michael P. Scharf, "The Amnesty Exception to the Jurisdiction of the International Criminal Court", *Cornell International Law Journal* (1999). This author also notes U.S. Ambassador Holbrooke's statement "you can't make peace without President Slobodan Milosevic."

complementary approaches to achieving justice—more than the typical retributive, adversarial process. A major challenge for negotiators will be to find a process capable of achieving the functions of justice without creating resentment by one of the groups.

- Reconciliation only succeeds if it is linked with structural and institutional changes. Any approach that does not address a reform in corrupted institutions, as well as promoting reconstruction, dealing with returnees, redistribution of resources and other economic needs among others will have many chances to fail and not contribute to lasting peace<sup>48</sup>.
- Reconciliation must include elements of forgiveness, which does not mean forgetting and burying the past. For the parties to reach reconciliation, they have to acknowledge the past and remember their historical injuries. As Abu-Nimer notes when dealing with the Palestinian-Israeli conflict, "[t]he ability to remember the story and share with the other, with its full intensity, is an element that relieves tension and anger in conflict relationship"<sup>49</sup>.
- Unfortunately, there is no ideal model to follow in the world to achieve reconciliation. Neither ad hoc tribunals nor truth commissions by themselves are capable of handling the complexity of a post-conflict situation. For instance, judicial approaches may be politically biased, provide selective prosecution, unduly limit the admissibility of evidence, or be seen as victor's justice. Truth commissions, on the other hand, may be insufficiently punitive or ineffectual. Perhaps for this reason, some authors indicate that the key to achieving lasting peace is broadening and incorporating various approaches, in order to add restitution, acknowledgment, apology, forgiveness and equality to the retributive character of justice.

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<sup>48</sup> See Mohammed Abu-Nimer, "Education for Coexistence in Israel. Potential and Challenges", at 248, in Abu-Nimer, *supra* note 11.

<sup>49</sup> *Id.*, at 245.