



Accountability and Reconciliation in Peace Processes

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11 Guilford Street
London WC1N 1DH
United Kingdom

www.democraticprogress.org
info@democraticprogress.org
+44 (0)203 206 9939

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Foreword and Acknowledgments

As conflict continues to be a recurring feature of human society, it is DPI's endeavour to provide a platform to spark discussion on different aspects of accountability and reconciliation. The complex nature of accountability and reconciliation indicates the need to constantly review the processes being utilised thus far, and to further understand the limitations and challenges presented by previously used methods. Through international case studies and analysis of different methods, this paper examines the range of measures that may help societies to achieve accountability and reconciliation, and explores the challenges faced in this field.

DPI focuses on providing expertise and practical frameworks to encourage stronger public debates and involvements in promoting peace and democracy building internationally. Within this context, DPI aims to contribute to the establishment of a structured public dialogue on peace and democratic advancement as well as to create new, and widen existing, platforms for discussions on building peace and democracy. For this purpose we seek to encourage an environment of inclusive, frank and structured discussions, whereby different parties are in a position to openly share knowledge, concerns and suggestions for democracy building and strengthening at multiple levels. DPI's objective throughout this process is to identify common priorities and develop innovative approaches to participate in and influence the process of finding

democratic solutions. DPI also aims to support and strengthen collaboration between academics, civil society and policy-makers through its projects and output. Comparative studies of relevant situations are seen as an effective tool for ensuring that the mistakes of others are not repeated or perpetuated. Therefore, we see comparative analysis of models of peace and democracy building to be central to the achievement of our aims and objectives.

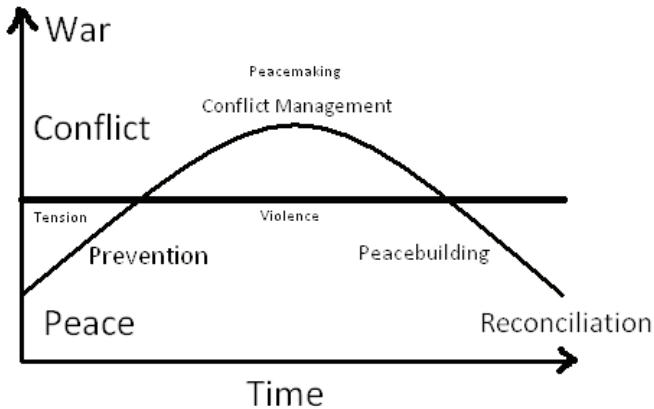
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Kerim Yildiz
Chief Executive Officer
Democratic Progress Institute
December 2015

1. INTRODUCTION

Successful peace agreements usually provide a framework outlining the ways in which parties to a conflict will work together in a new, post conflict context, and laying out a structure for the rebuilding of society. Moving on from conflict also involves dealing with the past, and one way of addressing this is through ensuring that those who committed crimes during the conflict are held accountable. Dealing with the past can allow a post conflict society to begin to move towards reconciliation.



In the field of conflict resolution, conflict is often analysed as an escalation and decline over time. The bell curve below illustrates different phases and dynamics of conflict, from conflict prevention through to conflict management and onwards to peace building. Reconciliation and accountability target important aspects of rebuilding and stabilising civil society after violence and can be noted towards the end of this curve.¹

¹ “Curve of the Conflict.” United States Institute of Peace. Accessed June 5, 2015 < <http://www.buildingpeace.org/think-global-conflict/curve-conflict> >

The need for accountability may be clear but the type of process that is suitable in any given situation will depend from context to context and country to country.

The range of measures that may help societies to achieve accountability commonly include:

- Prosecutions through national or international courts and the related issue of amnesty
- Truth-seeking, through truth commissions, for example:
- Reparations for victims, including symbolic forms, such as memorialisation.
- Reform of public institutions, particularly in the justice and security sectors
- Other, 'non-formal' initiatives, undertaken by civil society and 'traditional' approaches to accountability may also promote accountability and reconciliation.

Practice varies between countries. In Chile, for example, justice initiatives are implemented in the context of amnesty, while in the former Yugoslavia, criminal justice has been the dominant approach. Mozambique decided not to address the past but opted for traditional healing rituals as a replacement for (rather than complement to) broader accountability initiatives.

Successful accountability measures draw on a critical understanding of experience from elsewhere, carefully adapted to the social, political and cultural context and questions of feasibility. This could be down to funding, legal infrastructure, security and the willingness to participate in an accountability. In cases of ongoing conflict (like Darfur in Sudan) the only way to move towards accountability was for the United Nations Security Council to step in and take the case to the International Criminal Court.

Accountability and reconciliation are usually mentioned in the same sentence in a discussion of conflict resolution, possible because they both facilitate a post conflict society in moving forward after the conflict has ended. To a certain extent the two concepts are interlinked and complimentary. However, there is no guarantee that accountability will lead to reconciliation. Similarly, reconciliation might be achieved without first turning to accountability. The role of this paper is therefore to look at these two terms – accountability and reconciliation – in relation to peace processes and consider what they mean, what they aim to achieve and what some of the methods are through which these goals may be obtained.

2. DEFINITION OF TERMS

Concepts such as ‘accountability’ and ‘reconciliation’ are abstract and fluid; they are naturally broad and general, leaving room for interpretation. Deciding on an operational definition for these terms has proven to be problematic, largely because the context in which they are used also varies. Defining the concept is also a challenge since both terms may be used to refer to both the outcome of a process and the process itself. Broadly speaking, however, one may say that reconciliation aims to create a better, more just society, while accountability aims to hold perpetrators to account and seeks to provide redress for the victims. Accountability also helps establish a historical narrative of the conflict by identifying victims and perpetrators of human rights abuses and other crimes. Seen in this way, accountability can contribute to reconciliation, and reconciliation is more of a forward-looking process that focuses on the future of the society. Rather than referring to accountability and reconciliation as static conditions for which mandates, scopes and compositions are defined, it is better advised to approach them as processes.

Accountability is facilitated through a process of transitional justice and entails mechanisms that address past abuses and uphold the rule of law. In an operational sense, accountability can be divided into two branches: restorative and retributive justice. Retributive justice concerns the working of the formal justice system. This involves the lodging of a complaint by the victim or on the victim’s behalf; the investigation of the complaint, which will involve the gathering of evidence; and, if sufficient evidence is found, a trial where those suspected of having committed a wrong are prosecuted and either found guilty and sentenced or declared innocent and set free. The retributive justice process and its outcome concern mainly individuals: the victims, the witnesses and the perpetrators. Restorative justice, on the other hand, involves the entire

community. It seeks to build trust between perpetrators and victims by mending severed relationships in society. As such restorative justice generally has four aims: to affirm and restore the dignity of the victims of human rights violations; to hold perpetrators accountable; to create social conditions in which human rights will be respected in the future; and to commit society to reconciliation.²

Reconciliation has been described as ‘a process that allows a society to move from a divided past to a shared future. It is a means by which former enemies can find a way to live side by side, without necessarily liking or forgiving each other, and without forgetting the past’.³ It seeks to transform relationships in order to create a society in which former enemies are able to peacefully co-exist. As such it can be a process that contributes to healing past traumas.⁴ Naturally, reconciliation will come in different shapes and forms in different societies but, in general, the process involves four elements⁵:

- Truth – truth about what happened in the past.
- Mercy – the ability and willingness to forgive those who committed wrongs in order to rebuild relationships in society.
- Justice – this is enabled through accountability and social restructuring.
- Peace – the envisioned goal is a common future of well-being and security for all parties involved.

2 Kiss, Elizabeth. (2000). Moral ambitions within and beyond political constraints. In Robert I. Rotberg and Dennis Thompson, eds., *Truth v. justice: The morality of truth commissions*, (pp.79). Princeton, NJ: Princeton University Press

3 Hazan, Pierre. (2009). Reconciliation. In Vincent Chetail, ed., *Post-conflict peacebuilding: A lexicon* (pp. 256). Oxford: Oxford University Press

4 Doung, V. and Ear, S. (2009). Transitional justice dilemma: The case of Cambodia. *Peace & Conflict Review* 4(1), 1-36

5 Lederach, J. (1997). *Building peace: Sustainable reconciliation in divided societies*. Washington, D.C.: United States Institute of Peace Press

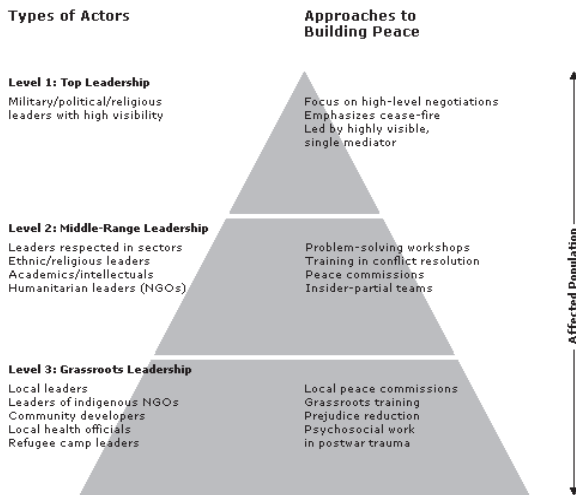
Reconciliation in particular must be actively sought after; it is not a naturally occurring progression in the process of conflict resolution. It rarely develops in a linear manner of continuous change in the direction of peaceful relations; rather, it is expressed in a series of regressions and progresses.⁶ For those reasons, often times the process of reconciliation does not have a formal beginning or ending. This makes it even more difficult to define.

6 Bar-Tal, Daniel and Bennink, Gemma H. (2004). The nature of reconciliation as an outcome and as a process. In Yaacov Bar-Siman-Tov, ed., *From conflict resolution to reconciliation* (pp.20). New York: Oxford University Press

3. ACTORS

Reconciliation and accountability efforts are all-encompassing, involving a range of actors who were involved in the conflict as well as those seeking to rebuild the society in the aftermath. Reconciliation takes place simultaneously at the level of governmental bureaucracies and civil society, spilling over from the former to the latter. It is supported by the institutions and leadership of the state and involves as many members of society as possible. The various efforts might involve elites or prominent figures in ethnic, religious, academic, economic, intellectual and humanitarian circles, as well as local leaders, businesspersons, community developers and educators at the grassroots level.

Lederach’s Peace Pyramid outlines the different actors involved in peace processes and the different approaches that will be taken by each to building peace.⁷



Derived from John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington, D.C.: United States Institute of Peace Press, 1997), 39.

⁷ Lederach J, 'Building Peace: Sustainable Reconciliation in Divided Societies.' Washington, DC: *United States Institute of Peace* 1997. page 39

The top-level leadership contains the highest echelons of military, political and religious leadership associated with status, authority and power. These leaders will address and focus upon high-level negotiation. The mid-level leadership is made up of middle ranking religious and ethnic leaders, as well as respected leaders in specific sectors, particularly academic and intellectuals as well as humanitarian leaders. They will engage in training focusing on conflict resolution and problem solving workshops. The third and largest group in the Peace Pyramid are the grassroots leadership, constituting community leaders and leaders of local indigenous NGOs, as well as community development leaders and local health officials. They will engage in local peace commissions and grass roots training programmes, directly targeting the reduction of prejudice and sectarianism, as well as developing psychosocial work in dealing with post war trauma. All these groups, and the work undertaken by them, will contribute to accountability and reconciliation.

4. MAKING PROVISIONS FOR ACCOUNTABILITY AND RECONCILIATION IN PEACE NEGOTIATIONS

A post-conflict society might face international pressure to hold those involved in the conflict accountable. This pressure stems from international human rights law that holds that states have an obligation to investigate and prosecute human rights violations that occurred within the country, and to prevent further abuse. Victims of human rights violation also have a right to a remedy and to learn the truth; aspects which are commonly achieved through prosecutions. However, no exact moment is defined in international law for when accountability mechanisms should start. When and how accountability and reconciliation take place during a peace process will therefore differ from one post conflict society to another, and will depend on factors such as: the nature of the conflict and the type of misdeeds perpetrated during it; the extent to which the various sides in the conflict were responsible for its outbreak; and the history of relations between the various groups involved in the conflict and their respective culture.⁸

The specific methods for establishing accountability and achieving reconciliation may be decided upon during peace negotiations and included in peace agreements. The methods may likewise be discussed during negotiations and set out in specific document separate to the peace accord itself. There is no right or wrong way to do this, but it is crucial that the question of accountability and reconciliation is brought up, discussed and agreed upon by all sides involved in the peace negotiations. With this in mind, certain aspects need to be kept in mind when accountability and reconciliation is discussed during peace negotiations.

8 Bar-Tal D and Bennink G H, 'The Nature of Reconciliation as an Outcome and as a Process' in Yaacov Bar-Siman-Tov, *From Conflict Resolution to Reconciliation*. New York: Oxford University Press 2004. Page 28-29.

1. Clarity of objective and definition

Settling on one definition for accountability and reconciliation is difficult as the two terms mean different things to different people. However, in a peace negotiation setting it is important that the stakeholders have a shared understanding of the concepts. The two terms should be seen as broad and inter-related processes in which the public is engaged to address the past and prevent abuses in the future.

2. Creating a process

Public consultation regarding the objective, mandate and scope of the various mechanisms is crucial to ensure the effective and successful implementation of accountability and reconciliation efforts in a post-conflict society. During peace negotiations it might therefore be more important to focus on the setting up of inclusive processes to design the mechanisms rather than seeking to set up the mechanisms on the spot.

3. Adapting international experiences to the specific context

There exists no blueprint for a successful accountability and reconciliation process. Rather, ranges of mechanisms have been used by various societies trying to move on from a conflict. These should be studied and then adopted to the specific cultural and social context of the state.

4. Bad accountability provisions may be worse than none at all

Poorly designed accountability provisions may not be able to achieve the desired aim and, as such, may do more harm than good. This might be the case if measures are agreed upon in a hurry or without proper consultation and without considering the possible effects of the specific measure.

5. Taking into account the needs of different groups

Accountability and reconciliation efforts need to also take into account the different ways in which different groups experienced the conflict and can help in post violence transformation. For example, women tend to experience war differently to men and hold different roles in reconciliation and post conflict management.⁹ Ignoring the different ways in which various groups experienced the conflict might result in the perpetuation of structural violence against those groups in the future. It is important that all the types and levels of violence suffered are acknowledged, including psychological, physical and sexual violence. In addition, there may be social taboos surrounding certain type of violence or abuse that took place during the conflict, such as male victims of sexual violence. These must be tackled to ensure that all victims receive adequate assistance and are able to play a part in the reconciliation efforts.

6. Clarity in drafting

Care must also be taken to ensure all provisions agreed upon during the negotiations are well drafted and clear to everyone. This includes, but is not limited to, provisions pertaining to the powers of any court or commission set up to establish accountability, the parameters of an agreement as well as the time frame for implementation. For example, although the Helsinki Memorandum of Understanding included provisions for the setting up of the Aceh Human Rights Court, this was only in very general term and the specifics, including the jurisdiction of the court, were left to the government to agree upon.

9 See: DPI Working Paper, *The Gendered Effect of Conflict: Turkey* (DPI, London, August 2011)

Amongst other things, it was unclear how far back in time the court's jurisdiction should extend, and it was eventually decided that it should only cover crimes committed after the signing of the Memorandum (the last five years of the conflict).¹⁰ This limits the possibility of accountability for those who committed crimes during the earlier stages of the conflict.

7. Feasibility and implementation

The feasibility of the accountability and reconciliation mechanisms proposed must also be considered. This will involve looking into matters such as how the initiatives will be implemented, by whom and with what resources. It will also involve assessing possible international assistance, including expertise and funding.

8. Holistic approach

Accountability and reconciliation initiatives are more effective when applied together in a holistic manner. This is because a holistic approach tends to lead to reform of the entire abusive *system* that was in place during the conflict rather than only removing the abusive *individuals*. This is not to say that all methods of accountability and reconciliation must be implemented together or as soon as the conflict ends; rather it means that no method should be ruled out during negotiations as it might become relevant at a future date. Similarly, all decisions pertaining to accountability and reconciliation efforts need to be carefully considered and their potential impact adequately assessed.

Processes that fail to take into account the difference experiences of girls and women and of particular population groups risk reinforcing structural violence against these and may contribute to further division or violence in the future. Women and girls' experience of abuse may be particularly hidden, or only certain types of abuse (e.g. sexual violence) acknowledged. There may

10 <https://www.ictj.org/sites/default/files/ICTJ-Indonesia-Aceh-MoU-2010-English.pdf>

be significant cultural or social taboos in discussing some forms of abuse and/or different victims groups, such as male victims of sexual violence.

International and domestic accountability mechanisms are critically needed to ensure implementation and enforcement of international law relating to gender if lasting substantive change is to be effected.

Legal and normative frameworks addressing aspects of gender based rights, such as prevention of and response to conflict related sexual violence, have been strengthened in recent times but implementation falls far short. There needs to be political consensus on gender based rights at an international level so that there is a move from codification into binding law, both domestic and international, and mainstreamed into structures, practices and procedures.

Armed conflicts can amplify pre-existing gender inequalities in society or give rise to new gender-specific disadvantages thereby escalating rights violations.

The importance of consultation and engaging the populations in the objectives, mandates and scope of accountability measures suggests that during peace negotiations, setting up inclusive processes to design accountability measures may be more appropriate than the parties attempting to create the mechanisms without broader engagement.¹¹

11 Legal Factsheet: conflict related gender based rights, DPI, October 2015, <http://www.democraticprogress.org/wp-content/uploads/2015/10/Download-Here-PDF.pdf>

5. METHODS FOR ACCOUNTABILITY AND RECONCILIATION

The end of violence does not signify the security of peace, so how is it possible to restore broken relationships and secure peace when atrocities and traumas have occurred? Different methods of reconciliation and accountability seek to take into account these deeper psychological and sociological issues that are likely to arrive between former enemies. Both the process of accountability and that of reconciliation include a myriad of means that lead to the desired end. Either one or a combination of measures may be used, depending on the context of the given case. Successful accountability and reconciliation efforts draw on critical understanding of experiences from elsewhere, carefully adapted to the relevant social, political and cultural context.

1. Prosecutions

a. Forms and aims

Arguably, the most commonly used method of accountability is through the means of prosecution. At the most basic level, prosecutions are legal instruments to hold those who have committed crimes accountable. It aims to ensure that mass atrocities and violence do not go unpunished and uses a judicial process to impose the rule of law. It indicates the importance of knowing the truth, recording it and finding those responsible for acts of violence.

Finding a named individual guilty of specific crimes may help prevent social or ethnic groups from being blamed for crimes committed 'in their name' and so may help reduce suspicion between population groups and contribute to reconciliation.

Prosecution may also establish a record and so may make denial more difficult and over time may help reduce the chance of those being relapsing into similar patterns of behaviour. However, the trials of powerful leaders may provoke instability and may further reinforce divisions in society if communities believe that only 'their' leaders are punished.

Trials of lower-ranking officials may reinforce the perception of impunity for more senior leaders. Without broader reform, prosecutions may undermine broader efforts at institutional and social transformation by blaming a limited number of individuals and drawing attention away from institutional and structural causes of repression and abuse.

Prosecutions and achieving justice through this means comes with general principles and guidelines of best practice to providing fairness, truth and retribution. As prosecutions attempt to ensure respect for the rule of law, the UN Office of the High Commissioner for Human Rights (OHCHR) has developed a set of principles relating to prosecutorial initiatives which contain five guiding considerations:¹²

1. Initiatives should be underpinned by a *clear political commitment* to accountability that understands the complex goals involved.
2. Initiatives should have a *clear strategy* that addresses the challenges of a large universe of cases, many suspects, limited resources and competing demands.
3. Initiatives should be endowed with the *necessary capacity* and *technical ability* to investigate and prosecute the crimes in question, understanding their complexity and the need for specialized approaches.

12 Office of the United Nations High Commissioner for Human Rights 'Rule of Law Tools for Post Conflict States' Page 2 (Last accessed June 2015) at <<http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>>

4. Initiatives should *pay particular attention to victims*, ensuring (as far as possible) their meaningful participation, and ensure adequate protection of witnesses.
5. Initiatives should be executed with a clear understanding of the *relevant law* and an appreciation of *trial management skills*, as well as a strong commitment to *due process*.

Prosecutions address both individual reconciliation and national reconciliation efforts. In this sense, individual reconciliation refers to the ability of each human being to conduct their lives in a similar manner as prior to the conflict without fear or hate.¹³ National reconciliation is the achievement of societal and political processes functioning and developing without reverting to previous patterns or the framework of the conflict.¹⁴ Thus, prosecution can be undertaken in different forms to promote either individual or national reconciliation; all involving a court system of some sort but varying in scale and scope.

Investigations and prosecutions may be carried out by the national authorities, the International Criminal Court or an internationalised court, chamber or tribunal, or an ad hoc tribunal. Prosecutions may also take place in another state applying universal jurisdiction.

13 Mobekk E, 'Transitional Justice in Post-Conflict Societies - Approaches to Reconciliation' in *After Intervention: Public Security Management in Post-Conflict Societies - From Intervention to Sustainable Local Ownership*, Ebnother, A and Fluri, P., Geneva Centre for the Democratic Control of Armed Forces (DCAF) Page 263 (Last Accessed June 2015) at <http://www.bundesheer.at/pdf_pool/publikationen/10_wg12_psm_100.pdf>

14 Mobekk E, Page 263.

International Criminal Court

The International Criminal Court (ICC) was set up in 2002 through the ratification of the Rome Statute. The ICC is the first permanent, treaty-based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community.

It is an independent international organisation based in The Hague. The international community had long aspired to the creation of a permanent international court, and eventually reached consensus on definitions of genocide, crimes against humanity and war crimes. The Nuremberg and Tokyo trials addressed war crimes, crimes against peace, and crimes against humanity committed during the Second World War.

In the 1990s after the end of the Cold War, tribunals such as the International Criminal Tribunal for the former Yugoslavia and for Rwanda were the result of consensus that impunity was unacceptable. However, because they were established to try crimes committed only within a specific timeframe and during a specific conflict, there was general agreement that an independent, permanent criminal court was needed.

In 1998 the international community reached a historic milestone when countries adopted the Rome Statute, which was the legal basis for establishing the permanent International Criminal Court. The Rome Statute entered into force in 2002 and has now been ratified by 123 countries.

The International Criminal Court has jurisdiction over the crimes of genocide, war crimes and crimes against humanity committed since 1st July 2002 by a state party national or on the territory of a state party. The ICC can investigate a case in a non-state party if the UN Security Council refers a situation to the court – this is what happened in the case of Sudan and Libya.

Non-state parties can cooperate with the court: Cote d'Ivoire accepted the jurisdiction of the ICC before it ratified the Rome Statute of the ICC. The ICC is a court of last resort. It only has jurisdiction when states are unwilling and/or unable to prosecute the crimes themselves. The court can only prosecute a handful of suspects and it is intended to be complementary to, not instead of domestic prosecutions. The ICC has no direct influence on peace processes, although its presence – or possible future activity – in a country usually influences discussions on amnesty, for example. Depending on the policies of a mediator's mandating institution, an ICC indictment does not usually prohibit a mediator from engaging with the indictee, which would usually be considered 'essential contact' and therefore acceptable.

The Office of the Prosecutor has opened nine official investigations and is also conducting an additional nine preliminary examinations. Thus far, 39 individuals have been indicted in the ICC, including Ugandan rebel leader Joseph Kony, Sudanese president Omar al-Bashir, Kenyan president Uhuru Kenyatta, Libyan leader Muammar Gaddafi, and Ivorian president Laurent Gbagbo.

The ICC in practice - the case of Sudan

The United Nations estimates that as many as 300,000 people have died since the conflict in Darfur began in 2003 and another two-and-a-half million have been made homeless.

The situation in Sudan's Darfur region was referred to the International Criminal Court prosecutor in 2005. Four years later warrants were issued for six people including Sudan's President Omar Al-Bashir for alleged atrocities committed in Darfur including genocide, crimes against humanity and war crimes. It was the first time a sitting head of state had become a wanted

war criminal. Five of those people were indicted, two eventually appeared in the court but three remain at large.¹⁵

After the arrest warrants were issued the ICC called on member states to arrest President Bashir if presented with the opportunity. But on the occasions that member states have had the opportunity to do so they have not – for example when President Bashir was in Chad in July 2010¹⁶ and on a more recent visit to South Africa. What happened in Sudan highlighted some of the concerns about the ICC. Initially there was a concern about what impact that issuing an indictment would have on any peace agreements in the country.

There was also concern from the African Union over the ICC's capability to handle a situation like Darfur because the ICC could not conduct a wide enough prosecution to bring justice to the region.

But in December 2014 the new chief prosecutor Fatou Bensouda put the investigation on hold. She said: "Given this council's lack of foresight on what should happen in Darfur, I am left with no choice but to hibernate investigative activities in Darfur as I shift resources to other urgent cases... What is needed is a dramatic shift in this council's approach to arresting Darfur suspects."

Bensouda said the ICC needed support from the UN Security Council and their inaction would only "embolden perpetrators to continue their brutality".¹⁷

15 <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2313&context=ilj>

16 (<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2313&context=ilj> and more recently when President Bashir visited South Africa.

17 (<http://www.theguardian.com/world/2014/dec/14/icc-darfur-war-crimes-fatou-bensouda-sudan>)

When the warrants were issued it had been hoped that the pressure being put on Sudan by the court and the international community would help to resolve the crisis in Darfur but six years later many experts believe that the Sudan case has highlighted the weaknesses of the ICC.¹⁸

Tribunals

Following mass atrocities, some countries have chosen to set up internationalised tribunals to deal with the atrocities that occurred during the conflict. In most instances these hybrid or mixed courts include both international and domestic judges. Examples are the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). Both these tribunals pre-date the ICC. In some instances the UN has also set up similar courts; examples include the Special Court for Sierra Leone, the Extraordinary Chambers of the Courts of Cambodia and the Special Tribunal for Lebanon. These were set up in the place where the crimes were committed; the rules of procedure of the courts combined both international and domestic rules, and the bench included both domestic and international judges. However, with the creation of the ICC it is foreseen that these types of localised tribunals will become less common, as they are both time consuming and expensive to run. For example, it is estimated that the ICTR cost well over USD 1.2 billion to build and run.¹⁹

18 <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2313&context=ilj>

19 Pillay S and Scanlon H, 'Peace versus Justice? Truth and Reconciliation Commissions and War Crimes Tribunals in Africa' *Center for Conflict Resolution*. Page 8. (Last accessed June 2015) at <www.ccr.org/za/images/stories/Vol_22-Peace-VsJustice.PDF>

Case study: International Criminal Tribunal for Rwanda (ICTR)

The ICTR, which was located in Arusha in Tanzania, was set up by the United Nations Security Council to prosecute “persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994”.

The tribunal has indicted 93 individuals – including ranking military and government officials, politicians, businessmen, as well as religious, militia, and media leaders - whom it considered responsible for serious violations of international humanitarian law. Those indicted include high-ranking military and government officials, politicians, businessmen, as well as religious, militia, and media leaders.

The ICTR is the first ever international tribunal to deliver verdicts in relation to genocide, and the first to interpret the definition of genocide set forth in the 1948 Geneva Conventions. It also is the first international tribunal to define rape in international criminal law and to recognise rape as a means of perpetrating genocide.²⁰

The ICTR delivered its last trial judgement in December 2102 in the Ngirabatware case.

Three people who were indicted by the ICTR remain at large. These are Félicien Kabuga, Protais Mpiranya, and Augustin Bizimana on charges of genocide and crimes against humanity.

20 <http://www.unictr.org/en/tribunal>

Tribunals like the ICTR have been criticised for being time consuming and expensive. In the *International Journal of Human Rights*, Steven Roper and Lilian Barria argue that the ICTR's remit was too narrow and point to the fact that more generally tribunals can only be truly effective when all parties recognise the legitimacy of the judicial process.²¹

National Courts

Another mechanism for establishing accountability is through prosecution through national courts. Prosecution through the national courts is largely believed to be the most effective. The reason for this is that the trials are more closely connected to the victims and society at large than when the court is internationalised. There is a better understanding of the context and the background of the situation.

There may, however, be significant challenges to domestic prosecutions: the justice system may be weak (e.g. Cote d'Ivoire) or widely held as illegitimate. There may be extensive political interference especially in higher-profile cases (e.g. Guatemala) or an ongoing conflict and/or links with organised crime (e.g. Colombia). An amnesty law may prevent prosecution (e.g. Guatemala). Military courts may have jurisdiction over international crimes (e.g. Nepal) requiring the cooperation of the military hierarchies.

Trials in national courts tends to be more closely connected to the victims and members of civil society compared to when hearings take place in an international court located in another country. National courts can also be adapted to specific needs of a country. For example, in DRC, inhabitants of remote parts of the country that lacks justice infrastructure are able to obtain legal redress through the use of mobile courts.

21 <http://stevendroper.com/ICTY.pdf>

These mobile courts have assisted victims of gender-based violence who were not able or could not afford to travel to a regular court to obtain justice.²² Similarly, in Rwanda, *Gacaca* trials sought to address the gap between the demand for justice and the limited ability of the established justice system by giving jurisdiction to lower courts of a wider variety of crimes. This enables the higher courts to focus on other serious crimes pertaining to the genocide.²³

However, in a society that has just experienced wide scaled violence there may be significant obstacles to domestic prosecutions, including lack of infrastructure and personnel. The justice system may also be weak and vulnerable to corruption, as judicial systems are susceptible to falling apart during or prior to conflict. This creates a risk for political interference, especially if those prosecuted are members of the ruling elite or party. If the trials conducted are not fair and impartial and violate rule of law norms it will have a negative effect on reconciliation efforts. In addition, domestic law might give jurisdiction to military courts for certain types of crimes committed during a conflict. This might not be advantageous from the victims' point of view, as these courts usually adhere to different rules of procedure and tend to be less transparent than civil courts.

Some of the obstacles faced by the justice system in a society just emerging from conflict may be overcome with the assistance of the international community. For instance, international judges and lawyers may participate in local courts and provide technical assistance to their domestic counterparts. It is also possible to create a hybrid transitional state law incorporating principles from international human rights laws, UN laws and treaties.

22 Beqiraj J and McNamara L, 'International Access to Justice: Barriers and Solutions' (Bingham Centre for the Rule of Law Report 02/2014), *International Bar Association*, October 2014. Page 22.

23 See the case studies at the end of this report for further information about the *gacaca* trials.

Case Study: Timor-Leste²⁴

In the 1999 referendum, Timor-Leste voted for independence from Indonesia, which had occupied the territory since 1975. This provoked large-scale violence to erupt between anti-independence militias (supported by Indonesia) and those who supported independence. A Special Panel for Serious Crimes (SPSC) consisting of international and domestic judges was created to prosecute offenders. It completed 55 trials and 84 individuals were convicted. Through such prosecutions, it allowed domestic judges coming straight from the community to be a part of the healing process, giving a sense of local ownership that can prove to be beneficial for promoting reconciliation.

The trials in Timor-Leste suffered from a clear lack of resources, which produced a number of problems for prosecutions. There was a shortage of professional legal translators and a lack of funding to have an effective witness and victim protection system set up, which resulted in victims and the accused being asked to travelling to court in the same minibuses. This in turn added to a number of cases of witness intimidations.²⁵

b. Advantages and disadvantages of prosecution

Prosecutions, especially of powerful ex-leaders who committed crimes during the conflict, help to indicate that no one is above the law. This may assist in restoring faith in the justice system. Naturally, for this to happen, the trial procedure needs to be fair and not discriminate against any side of the conflict.

²⁴ University of California Berkley War Crimes Study Centre, 'The Special Panels for Serious Crimes' (Last Accessed June 2015) at <<http://wscs.berkeley.edu/east-timor/>>

²⁵ Cohen D, 'Justice on the Cheap Revisited: The Failure of the Serious Crimes Trials in East Timor' *East-West Center* Page 5 (Last Accessed June 10 2015) at <<http://www.eastwestcenter.org/fileadmin/stored/pdfs/api080.pdf> >

In addition, prosecuting the individuals who committed specific crimes will prevent the social or ethnic group to which that person belonged from being blamed. By distinguishing the individual culprit from the group, the group's innocence will become clear which, in turn, will help reduce suspicion between parties who were previously warring and promote reconciliation. Furthermore, public trials may enable catharsis, foster a sense that grievances have been addressed and thus allow progress toward reconciliation by satisfying the basic needs of the victims.²⁶

On the other hand, trials of powerful leaders who still enjoy a large following amongst the population might lead to instability. This is particularly the case if only leaders from one side of the conflicts are being prosecuted as might happen in a situation where, for example, the leaders of the other side have managed to flee the country. The supporters of the jailed leader might then feel that they are being unduly targeted. Utmost care must therefore be taken to ensure that all parties who committed wrongs are being held accountable. In addition, prosecution needs to occur throughout the ranks. Trials of lower ranking officials without their commanders being prosecuted will simply reinforce the idea that it is possible for the powerful to escape justice.

26 Bar-Tal D and Bennink G H, 'The Nature of Reconciliation as an Outcome and as a Process' in Yaacov Bar-Siman-Tov, *From Conflict Resolution to Reconciliation*. New York: Oxford University Press 2004

9. Amnesties

a. Definition and aim

An amnesty is a legal measure that prevents prosecution of an individual or a group, for a specific offence or for acts committed during a specific time period, and nullifies any legal liability that has already been established. Amnesties can be broad in scope, covering a large group of people, such as political prisoners, or a number of crimes. Similarly, amnesties may be very specific in nature and limited to a single individual or a single offence. Furthermore, amnesties can be either unconditional or carry certain preconditions. In a post-conflict setting, most amnesties tend to include a non-recidivism clause stipulating that the beneficiary of the amnesty will lose the benefits of the amnesty if he or she commits further offences.

Amnesties may be an appropriate strategy in certain instances when used to transform relationships between parties to one that is positive and constructive. The word ‘amnesty’ itself is derived from Greek and means forgiveness. This hints at it being somewhat of a ‘forgive and forget’-method of accountability. This is not the same as advocating for public amnesia and the obliteration from memory by both the people and the judiciary of what took place; rather it is a process of forgiving which is necessary to unite a restored nation.²⁷ Its aim is to facilitate reconciliation and a sense of accountability between perpetrators and survivors/victims. Ultimately it can prove more challenging for some than other approaches, as amnesty laws can feel like a negation of crimes that actually deserve more severe punishments.

²⁷ Chetail V, *Post-Conflict Peacebuilding: A Lexicon*. Oxford: Oxford University Press, 2009. Page 257

Case Study: South Africa

In South Africa, those granted amnesty by the Truth and Reconciliation Commission after apartheid were not required to make a formal apology. The focus was instead on truth telling rather than apologising. The requirements necessary in order to be granted amnesty included 1) amnesty applicants had to submit individual applications, 2) the acts for which they applied had to have a political objective, and 3) the applicants had to give a full disclosure of the relevant facts of the incidents concerned.²⁸ Through this the South African Truth and Reconciliation Commission sought to work towards public understanding rather than vengeance, which can be argued to be either positive or problematic.

Case Study: Uganda

In 2000, the Ugandan Amnesty Act was passed in an effort to stop or limit the endemic conflict in Uganda. The Amnesty Act also formed the basis of a comprehensive DDR and SSR programme. Amnesty was granted to any and all Ugandans who had been involved in fighting since 1856, as long as they declared themselves to the proper authorities, renounced violence and surrendered any weaponry. This decision has had significant consequences in relation to the reintegration of society, as it explicitly links transitional justice measures with disarmament.²⁹

28 Abrahamsen T, 'Reconciliation through Amnesty? Amnesty Applicants Views of the South African Truth and Reconciliation Commission' *Centre for the Study of Violence and Reconciliation*. (Last accessed June 2015)

29 For more information on the Ugandan case please see: Leah Finnegan and Catherine Flew, *Disarmament, Demobilization and Reintegration in Uganda* (Bradford: University of Bradford, Safer World, 2008)

There is an emerging international consensus (UN standard) that amnesties cannot be granted for war crimes, crimes against humanity, genocide or torture.³⁰ UN mediators are expressly forbidden to witness agreements that do not exclude these crimes from amnesties, and other international and regional organisations increasingly following this lead. International actors are likely to criticise agreements that do not explicitly exclude these crimes from any amnesty. Donors may let it be known that they would not finance implementation of an agreement in Sudan that included a blanket amnesty, which was subsequently limited.

UNSC Resolution 1820 also stresses the need for crimes of sexual violence to be excluded from amnesties.³¹ As such, amnesties that have been introduced domestically might not prevent prosecution by an international court, if it has jurisdiction to hear the case, or prosecution in a second state that is relying on universal jurisdiction.

c. Alternative approach to Amnesty³²

Northern Ireland's peace process was unique in many ways. Prisoners were in many respects central to the Northern Ireland peace process initiated in the 1990s as 'neither Republicanism nor Loyalism would have been able to move away from political violence without the support of their prisoners, and the Good Friday Agreement could not have been concluded without provisions relating to the early release of such prisoners.'³³

30 United Nations Secretary General Report Establishing of a Special Court in Sierra Leone S/2000/915 (2000) Page 25 Paragraph 22 (last accessed June 2015) at <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2000/915>

31 United Nations Security Council Resolution 1820 S/Res/1820 Section 4 (Last Accessed June 2015) at < <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20S%20RES%201820.pdf>>

32 See DPI 'The Good Friday Agreement- Prisoner Release Process' (DPI London August 2013) at <<http://www.democraticprogress.org/the-good-friday-agreement-prisoner-release-processes/>>

33 McEvoy, Kieran, 'Prisoners, the Agreement, and the Political Character of

The Northern Ireland (Sentences) Act of 1998 and the Criminal Justice Act in the Republic, both stated that prisoners affiliated with paramilitary organisations that had established and maintained a complete and unequivocal cease-fire (Under Article 8(a) and (b)) were eligible for release. Moreover, all parties eventually agreed to a fixed time frame for the process to be completed.

Under the framework designed by the Agreement, eligibility for early release of qualifying prisoners includes:³⁴

- ‘The prisoner is serving a sentence of imprisonment in Northern Ireland;
- ‘The sentence is one of imprisonment for life or for a term of at least five years;
- The offence was committed before 10th April 1998
- If the sentence was passed in Northern Ireland, the offence:
 - Was a scheduled offence; and
 - Was not the subject of a certificate of the Attorney General that it was not to be treated as scheduled offence
- If the sentence was passed in Great Britain, the offence;
- Was committed in connection with terrorism and with the affairs of Northern Ireland; and
- Is certified as one that would have been scheduled, had it been committed in Northern Ireland
- The prisoner is not a support of a specified organisation’ (i.e. each individual must be a member of a party involved in the ceasefire);
- ‘If the prisoner was released immediately, he would not:
 - Be likely to become a supporter of a specified organisation, or
 - Be likely to become involved in acts of terrorism connected with the affairs of Northern Ireland; and
 - If a life sentence prisoner, be a danger to the public.’

the Northern Ireland Conflict,’ *Fordhna International Law Journal* (1998) p.1541.

34 Sentence Review Commissioners, ‘Annual Report 2001’ (July 2001) (Last Accessed August 2013) at <<http://www.sentencereview.org.uk/download/ar01.pdf>>

The Act also provided a ‘monitoring function’ to allow flexibility, ensuring organisations not currently acting under the framework of eligibility could, after reforms, be integrated into the system.³⁵ Once operational, prisoners were encouraged to make applications for release to the Commission; 446 requests were received by 1998 and were transferred to the Northern Ireland Prison Service for confirmation of accuracy³⁶. After verification, the applications were returned to the Commission and prisoners received a preliminary indication of whether they may be freed. Such a confirmation was subsequently followed by a substantive determination. Post decision mechanisms were also established whereby dissatisfied prisoners could ‘appeal to a different panel of Commissioners or could potentially request a judicial review of the decisions’.³⁷ The entire process was moderated by the Office of the Secretary of State, which retained over-arching power to suspend the scheme to prevent the release of individuals considered not to meet the criteria, or revive previously dismissed applications.³⁸

Many former combatants in Northern Ireland, notably politically motivated former prisoners have significantly contributed to reintegration and to the wider process of peace building in Northern Ireland by bringing credibility and perspective to peace building.

35 McEvoy, Kieran, ‘Prisoners, the Agreement, and the Political Character of the Northern Ireland Conflict’, *Fordham International Law Journal* (1998) p. 1560.

36 McEvoy, Kieran, ‘Prisoners, the Agreement, and the Political Character of the Northern Ireland Conflict’, *Fordham International Law Journal* (1998) p. 1560.

37 McEvoy, Kieran, ‘Prisoners, the Agreement, and the Political Character of the Northern Ireland Conflict’, *Fordham International Law Journal* (1998) p. 1560.

38 McEvoy, Kieran, ‘Prisoners, the Agreement, and the Political Character of the Northern Ireland Conflict’, *Fordham International Law Journal* (1998) p. 1560.

Many of the key participants involved in peace negotiations leading up to the adoption of the Good Friday Agreement were ex-combatants who had been convicted and imprisoned during the conflict. Their active participation in the peace building process, as well as their involvement in local level justice programmes and awareness campaigns have been largely claimed to have a positive impact on the will of communities to end the conflict, as efforts to reduce violence can carry greater weight when they are led by former combatants.³⁹

d. Advantages and disadvantages of amnesties

Amnesties are often important components of peace negotiations. Providing amnesty to political prisoners for example can be a way of correcting a wrong caused by the state to individuals. Offering amnesties for acts like treason, sedition, insurrection and rebellion may be a way of encouraging rebels to disarm and join the peace process and of engendering a sense of ownership for the process. As such, amnesties might be a precondition for peace talks, form an integral part of the discussion or be a completely separate part of the process. In Nigeria the oil rich region of the Delta has had severe instability since the 1970's. In June of 2009, President Umaru Musa Yar'Adua instated an amnesty window to all militants in the region, in exchange for the demobilization and disarmament of the militants would receive financial compensation.⁴⁰ Some consider it to be instead more incentive for criminal behaviour and a less effective attempt at providing stability.

39 Yildiz K and Breau S, (2010) *The Kurdish Conflict: International Humanitarian Law and Post-Conflict Mechanisms*, Routledge: Taylor and Francis Group, London, pp. 24-244.

40 Sango TJ, 'Amnesty: A Yard-stick Towards the Resolution of Internal Conflict' *University of Kent UK and Institute for Peace and Conflict Resolution Abuja* (Last Accessed June 2015) at <<https://kar.kent.ac.uk/23389/2/Amnesty.pdf>>

Great consideration must always be taken before amnesties are used as a leverage to encourage sides to come to the peace table. When a perpetrator of a crime is offered an amnesty there is also the risk that the victim will feel a sense of being unable to obtain justice, and can create further tensions in post-conflict situations. This may impede a victim's ability to forgive and move on, elements which are often necessary for reconciliation. Extreme care must therefore be taken when determining amnesty provisions so as to minimise possible psychological harm to victims or feelings of vengeance among society.

Because there is a risk that amnesties can be used to protect those guilty of crimes from punishment, there have been instances where amnesty laws have been later overturned. For example, in 2005 in Argentina, Congress overturned two amnesty laws that had previously protected members of the former military regime from being charged for atrocities committed during the "Dirty War".⁴¹ These laws were found to be unconstitutional, making it possible to bring to trial those previously protected by the laws, including high-ranking military officers suspected of having been involved in the "disappearance" of over 10,000 individuals during the military rule in Argentina between 1976-83.

41 'Argentina: Amnesty Laws Struck Down,' *Human Rights Watch*. (15/7/2015) (Last Accessed June 2015) at <<http://www.hrw.org/news/2005/06/14/argentina-amnesty-laws-struck-down>>

3. Truth-Seeking Commissions

a. Definition and aim

In recent years, truth commissions have increasingly become a standard component of conflict resolution. Ongoing debate surrounding the efficacy of truth commissions centres on the link between truth and reconciliation and whether truth commissions take place at the expense of criminal justice.

Criminal justice is limited in what it can achieve. Questions may remain about the role of state institutions in abuse, or the social conditions that enabled large scale human rights violations. Truth-seeking initiatives – such as truth commissions – try to address these and other issues. There are many forms of truth-seeking, which carry a variety of names, and have different mandates, powers and scopes. In general, they are official, temporary bodies that investigate patterns of abuse in the past by engaging directly with victims and/or the population more broadly, with the aim of publishing a final report, which usually includes recommendations for redress and for prevention in the future.

Truth-seeking commissions seek to achieve reconciliation through testimonies from those involved in committing acts of violence as well as the victims of such acts in the hope of having a full public disclosure.⁴² Truth and Reconciliation Commissions (TRCs) serve as a mechanism for restoring justice, both by exposing acts of violence, violations of human and civil rights, discrimination and other abuses perpetrated by the formal institutions of the state or by groups and individuals, and by addressing the changes that need to be made to prevent future atrocities. Focusing specifically on memories and trauma from the conflict provides a very human

42 Ramsbotham O and Miall H, 'Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflicts.' 3rd ed. Cambridge, UK: Polity, 2011. Page 206.

element to the conflict and resolution process as well as the opportunity to recreate social bonds. Through this TRCs aim to tackle the invisible, deep-rooted effects of the conflict that can be much harder to treat than the physical effects. As such, TRCs comprise a marriage of social and political processes in an attempt to find a balance between peace and justice.

For some, truth commissions may be seen as an alternative to criminal justice. The commissions in Morocco and the Solomon Islands were prohibited from naming perpetrators, for example. Where the justice system is dysfunctional, a truth commission may be the only feasible form of accountability, for the present at least. Early truth commissions investigated what happened and why (Argentina, El Salvador, Uganda) while some later commissions also emphasized reconciliation (South Africa and Timor-Leste). Some had a greater focus on perpetrators (Ghana, Liberia, South Africa) and others investigate deeper societal factors such as racism and economic discrimination (Peru, Guatemala). Some commissions provided support to prosecutions (Peru) and others have emphasised reparations (Morocco).

TRCs have been set up in well over 20 countries and each is tailored to the country and specific conflict in question. The set-up of these varies from country to country, but in general they tend to be temporary bodies, authorised or empowered by the state, and concentrated on abuses committed over a defined period of time, and directly engaging with the affiliated population.⁴³ Some commissions focus on finding out what happened any why, which may include looking at deeper, 'root cause' societal factors such as racism or economic discrimination; others may go further by promoting reconciliation.

43 Schmid E, 'The Diversity of Truth Commissions and Commissions of Inquiry. *United States Institute of Peace* (2012) at <<http://www.usip.org/sites/default/files/PB%20118.pdf>>

A commission might produce a report of its findings with recommendations for redress and how to prevent similar acts from being committed in the future. TRCs can be set up in conjunction with another accountability mechanism or on their own, as an alternative to criminal justice.

Truth commissions are usually established with a short timeframe, including as part of a peace agreement (e.g. Sierra Leone). Careful preparation of the commission is critical. There is no single model, but there are some common challenges and lessons. Well-functioning commissions generally have official and public support, trust and buy-in for their work, which is difficult and politically sensitive. In their composition and mandates they often reflect the make-up of the societies they serve and the context – past and present – in which they operate. Although the set-up of a commission will be different in different societies, there are a few common factors that contribute to the overall success of a truth commission:⁴⁴

- 1) The commission's mandate and goals are designed while considering the particular social fabric and historical context of the public it aims to serve, past and present. To ensure this, the mandate will usually be set up after consultation with victim groups and/or human rights organisations;
- 2) The mandate of the commission must be clear to everyone to avoid creating expectations that cannot be met. As such, the mandate should clearly stipulate the scope, powers and objectives of the commission;

⁴⁴ These are loosely based on: Schmid E, 'The Diversity of Truth Commissions and Commissions of Inquiry. *United States Institute of Peace* (2012) at <<http://www.usip.org/sites/default/files/PB%20118.pdf>>

- 3) The commission's work must be unhindered by political restrictions, so as to allow safe access to sources of information and thorough investigation of evidence, with the right to name perpetrators in its report and refer those cases to court. – Official and public support
- 4) Commissioners must be perceived as objective, credible, independent persons of integrity who are selected in a transparent process.
- 5) Truth commissions require adequate time as well as human and financial resources. It is crucial that sufficient resources are guaranteed at the start of the process, when support for the truth-seeking initiative is still robust as there is a risk that the government's interest in sustaining the commission might cease as time passes and increasingly controversial findings become revealed;
- 6) Combine truth-seeking initiatives with other mechanisms of transitional justice. Society emerging from an abusive past must confront several challenges in its period of transition, and not all of the public's needs or expectations can be met solely with a truth-seeking initiative.

e. Advantages and disadvantages to truth-seeking commissions

Truth-seeking commissions have achieved varying degrees of success in many countries, ranging from Argentina and South Africa to Haiti, Serbia, Guatemala and Uganda. In successful cases truth seeking commissions have 'opened new doors for dialogue within society, supported change and democratic reform and helped create institutional guarantees as well as a human rights culture aimed at preventing the repetition of such crimes'.⁴⁵

45 Chetail, *Post Conflict Peacebuilding: A Lexicon*. Page 264

Proponents of TRCs argue that “revealing is healing”, which indicates the importance of public inclusion in these processes. TRC utilises justice as a wider healing mechanism and such therapeutic qualities of restorative justices are needed in a raw politicised atmosphere where legitimacy is still in question.⁴⁶ In Timor-Leste, a TRC was set up with the aim of promoting national reconciliation through engaging in truth-seeking activities, promoting community reconciliation and proposing recommendations for the future.⁴⁷ Through the community reconciliation process the commission was able to facilitate the reintegration of perpetrators of lesser crimes back into their community.⁴⁸

On the other hand, TRCs have been criticised for causing victims to relive and explain painful personal accounts and do little to organise change. In Sierra Leone the truth-seeking commission was only one step in the reconciliation process, with the Special Court for Sierra Leone (SCSL) created to prosecute those suspected of more serious crimes. However, this caused people to think that the two mechanisms were working together covertly, and there was a misconception about the role of the TRC acting as an informant to the court. As a result, many ex-combatants chose to not include themselves in any of the processes.⁴⁹

46 Chetail, *Post Conflict Peacebuilding: A Lexicon*. 256

47 ‘Navigating Amnesty and Reconciliation in Nepal’s Truth and Reconciliation Commission Bill’ *International Center for Transitional Justice*. (Last accessed June 1, 2015) at < https://www.ictj.org/sites/default/files/20111208_Nepal_Amnesty_Reconciliation_bp2011.pdf>

48 ‘Navigating Amnesty and Reconciliation in Nepal’s Truth and Reconciliation Commission Bill’ *International Center for Transitional Justice*. (Last accessed June 1, 2015) at < https://www.ictj.org/sites/default/files/20111208_Nepal_Amnesty_Reconciliation_bp2011.pdf>

49 Shaw, R ‘Forgive and Forget: Rethinking Memory in Sierra Leone’s Truth and Reconciliation Commission’ *United States Institute for Peace*. (Last accessed June 9, 2015) at <<http://www.usip.org/events/forgive-and-forget-rethinking-memory-in-sierra-leones-truth-and-reconciliation-commission>>

In spite of these issues, many observers agree that truth commissions play an essential role in clarifying history, identifying structural causes of conflict and contributing to a culture of accountability.⁵⁰ Broad consultation of at least victims' groups and human rights organisations on the mandate of the commission is generally seen as important. A poorly designed and/or composed truth commission can do undermine public expectations for truth. In Mali, the Commission for Reconciliation and Dialogue created after the events of 2012 had to be replaced as its opaque selection criteria led many Malians to fear it would encourage impunity over accountability.

In DR Congo, a truth commission was created in which all the groups were represented, with no scrutiny of the personal record of the commissioners. The commission in Kenya lost valuable time and credibility over the controversy surrounding the appointment of the chair.

A truth commission's mandate will address sensitive issues such as the scope (e.g. time period, types of violations), powers (e.g. to investigate) and objectives (e.g. whether to name names or establish patterns) of the commissions. The extent to which a commission is able to consult broadly may be critical for its success as it may have to balance high expectations from victims and the public with constraints due to its mandate and resources.

An argument against truth commissions is that the link between reconciliation and truth-telling is fragile and limited. It has been argued that, in relation to the South African Truth and Reconciliation Commission, there were very few, if any, structures and processes to mediate the complexities of healing and reconciliation.

50 See: DPI Working Paper, Legacies of Silence (DPI, London, June 2015): <http://www.democraticprogress.org/wp-content/uploads/2015/06/Legacies-of-Silence-DPI-Proof1.pdf>

Observers note that truth commissions have little or no power to enforce its recommendations and the intended goal of truth commissions is often not reconciliation, but instead getting an accurate, historical account of events. It is important that the concepts of truth and reconciliation are viewed as distinct.

Case Study: Guatemala's failed truth seeking commission⁵¹

The Guatemalan civil war lasted for 36 years between the Guatemalan government and various left-wing guerrilla movements under the organisation Unidad Revolucionaria Nacional Guatemalteca. The Human Rights Accord established a truth commission named The Historical Clarification Commission (CEH) in 1996 that held serious limitations. It had no search and seizure power and no ability to subpoena witnesses. Its mandate was limited to six months with the possibility of extending its lifespan to a year and it offered a blanket amnesty for political crimes committed by both sides during the conflict. The UN did not finance it and members of the police, the Army and the security forces who were invited by the Commission to testify generally did not attend or present any apologies.⁵²

Case Study: Northern Ireland⁵³

The Northern Ireland Peace Process presents an interesting case to the concept of truth-seeking commissions as the idea of including this in the peace process was rejected. At the time of the Good Friday Agreement it was felt that such an exhaustive investigation into the past could be destabilising to the newly won and fragile peace.⁵⁴ Others have suggested that because there was no real break in power structures the British government may have been hostile to the idea of a TRC, which could have brought into question the legitimacy of existing institutions.⁵⁵

51 See: DPI Working Paper, *Legacies of Silence* (DPI, London, June 2015): <http://www.democraticprogress.org/wp-content/uploads/2015/06/Legacies-of-Silence-DPI-Proof1.pdf>

52 See Professor Christian Tomuschat Remarks presented at the conference 'Memory and Truth After Genocide: Guatemala' at the United States Holocaust Museum, Washington DC, March 21, 2000

53 See: DPI Working Paper, *Legacies of Silence* (DPI, London, June 2015)

54 Lundy and McGovern, p 31

55 Lundy and McGovern, p 31

The Northern Ireland case accurately summarises the difficulties and challenges associated with choosing to include truth commissions in a peace process as a tool of reconciliation and accountability.

Questions continue with regard to how to address the past in Northern Ireland, with the recent establishment of an Independent Information Retrieval Commission (IRRC),⁵⁶ the arresting of a British soldier in relation to the Bloody Sunday killings⁵⁷ and the breakdown of the Stormont executive⁵⁸ all creating dialogue in this area and demonstrating that the implementation of accountability and reconciliation tools can be a long and complex process with as much potential for damage as for benefits.

Case study: South Africa

South Africa's Truth and Reconciliation Commission (1995-2002) was set up after 45 years of apartheid and 30 years of armed resistance against the apartheid state by the armed wing of the African National Congress (ANC).

The South African Truth and Reconciliation Commission (TRC) hearings began in 1995. The commission was based in Cape Town and functioned like a court with hearings for anyone who felt they had been a victim of "gross violations of human rights" and perpetrators of violence related to political objectives of the past could also give testimony and request amnesty from prosecution.

56 As described in the Northern Ireland (Stormont House Agreement) Bill 2015 'Summary of measures': https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/462888/Policy_Paper_-_Summary_of_Measures_23_Sept_2015_Final.pdf

57 Tran, Mark, Bowcott, Owen and McDonald, Henry, 'Bloody Sunday investigators arrest sixty-six year old soldier', *The Guardian*, 10 November 2015 <http://www.theguardian.com/uk-news/2015/nov/10/bloody-sunday-investigators-arrest-former-soldier>

58 See DPI Briefing Note: 'Political Crisis: Northern Ireland Executive' (DPI, London, September 2015) <http://www.democraticprogress.org/news/dpi-briefing-note-political-crisis-northern-ireland-executive/>

The commission, which was chaired by Archbishop Desmond Tutu, was established to record the nature, causes and extent of gross violence, refer cases for reparation and rehabilitation and in some cases grant amnesty to the perpetrators of crimes related to human rights violations.⁵⁹

A study carried out after the TRC found that: “Nevertheless, relationships between increased distress/anger, having a TRC relevant experience to share, and negative perceptions of the TRC, support a view that bearing testimony is not necessarily helpful to survivors. However, in the population as a whole, moderately positive attitudes towards the TRC across sociodemographic variables support a view that the TRC helped provide knowledge and acknowledgment of the past.”⁶⁰

In 2012 Grace Machel said that South Africa had still not healed after the end of apartheid and participation in the TRC: “South African society is violent, intolerant, accusatory and angry because it has failed to address the emotional mutilation wrought by apartheid” and called for additional TRCs to continue dealing with these issues.⁶¹

59 Truth and Reconciliation Commission, 1995.

60 http://scholar.harvard.edu/files/davidrwilliams/files/2008-the_impact_of-williams.pdf?m=1355167405

61 <http://www.tutu.org.za/graca-machel-addresses-the-2nd-annual-desmond-tutu-international-peace-lecture-2-october-2012>

11. Reparations

a. Definition and aim

After a crime has occurred, reparation seeks to restore a victim's situation to what it would have been had the crime not occurred. In the simplest terms, it can be understood as, 'I'll undo the harm done by undoing the damage and restoring the status quo'.⁶² According to the UN General Assembly, when serious violations of fundamental human rights and international humanitarian law occur, states must provide effective remedies to victims, including reparation.⁶³ The term 'victim' can include individuals or a collective group as well as immediate family or a dependent of a direct victim/persons who have suffered from intervening to assist victims in distress.⁶⁴

Reparation comes in the form of restitution, compensation and satisfaction.⁶⁵ Restitution includes 'restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.'⁶⁶ Monetary compensation as a tool for accountability includes damages of physical or psychological harm, lost opportunities (job and education), costs incurred for legal assistance, expert reports, drugs, health services, psychological care or social support.⁶⁷

62 Nimer, Mohammed, ed. *Reconciliation, Justice, and Coexistence: Theory and Practice*. Lanham, MD: Lexington Books, 2001. Page 6.

63 United Nations Office of the High Commissioner for Human Rights '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' Section II paragraph D (16 December 2005) (Last Accessed June 2015) at < <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>>

64 Basic Principles Paragraph 8.

65 Chetail, *Post Conflict Peacebuilding: A Lexicon*. Page 281

66 Basic Principles Paragraph 19

67 Chetail, *Post Conflict Peacebuilding: A Lexicon*. Page 282.

Restoring things to their original state indicates the need for compensation to be proportionally dispersed, which may not always be possible. Reparation for moral damages can simply be acknowledgment of violation and apologies.

The aim of reparations is to acknowledge the rights of victims and the laws that have been violated and overcome the distress caused by the violation. The aim should therefore be to restore the material damage *and* moral damage incurred. Reparations as a method of accountability and reconciliation post-conflict can involve both transitional justice measures, in which a court orders the perpetrator or the state to pay damages to the victim, and mass compensation programmes in favour of a group of victims.⁶⁸

Reparations may also be future-oriented by, for example, providing services for victims, guarantees of non-repetition or a public apology (or all of these). Reparations can be symbolic rather than monetary. This can include the holding of commemorative ceremonies in which victims to the conflict are remembered, or the raising of a statue or the creation of a memorial containing their names or in their memory.

Examples of reparations include the Interim Relief Program in Nepal that compensated victims; pensions for certain victims of the Pinochet regime in Chile, accompanied by an apology by the President, and an apology by the Sierra Leonean President to women victims and society more broadly. In Morocco, for example, women are entitled to compensations through the reparations programme, which supplements compensation to take into account the particular abuse women have suffered.

68 Marco Sassoli. (2009). Reparation. In Vincent Chetail, ed., *Post-conflict peacebuilding: A lexicon* (pp. 279). Oxford: Oxford University Press.

Case Study: Nepal ⁶⁹

Nepal suffered a decade of armed conflict that formally ended with the signing of a peace agreement in 2006. The agreement included provisions for an Interim Relief and Rehabilitation Programme (IRRP), which provides financial compensation to relatives of persons who were killed or forcibly disappeared during the conflict, including scholarships for children of the victims. Through the programme, expenses can also be claimed for medical treatment of certain injuries caused during the conflict, and monetary compensation is also available for property damage that was a result of the conflict.

The financial compensation element of the IRRP is not connected with any public apology or acceptance of guilt on the part of the state. Similarly, the programme is very limited to strictly defined 'conflict-related harms', and does not cover violations such as torture or sexual violence occurring in prisons or similar, as there is no perceived nexus to the conflict. The lack of state accountability and the fact that not all victims of human rights violations are covered by the scheme has resulted in the IRRP being criticised for not fulfilling all victims' right to reparation.⁷⁰

69 See: 'Report on Mapping Exercise and Preliminary Gap Analysis of the Interim Relief and Rehabilitation Programme', *IOM and UNOHCHR* (2010) at <<https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Mapping-Exercise-of-Interim-Relief-and-Rehabilitation-to-the-Victims-of-Nepals-Armed-Conflict.pdf>>

70 Carranza R, 'Relief, Reparations, and the Root Causes of Conflict in Nepal', *International Center for Transitional Justice* (October 2012) at <<https://www.ictj.org/sites/default/files/ICTJ-Nepal-Reparations-2012-English.pdf>>

f. Advantages and disadvantages of reparations

Reparation as a whole supports and benefits those searching for accountability at the most individual level. The flexibility of mass reparations programmes enables a state to acknowledge the special suffering endured by a specific group in society, such as women, and create special or additional compensation especially catered to the needs of this group.

However, discussing reparations can also open up old wounds of the past, which may make the fragile situation vulnerable to a relapse in violence. Compensation programmes aim to answer difficult questions of who receives compensation and how to quantify damages that may not normally be quantifiable. Deciding who is, and who is not, a 'victim' might cause tension between communities or groups who feel they are not receiving sufficient reparations. Broad consultation in the early design stage of such programmes can help alleviate these issues. Nonetheless, successful reparations often depend on the victims stepping forward to claim reparations. There are a multitude of reasons for which someone might be unwilling to do this, including preventing the re-opening of old wounds.

Reparation programmes may not always be realistic on large scales as states emerging from conflict, may not have the financial ability to cope with the full compensation of the material harm resulting from the conflict. Another challenge includes garnering of political will when it comes to setting up reparations programmes, which can prove challenging to achieve. Such programmes can also result in escalating tensions between victims seeking reparation and the rest of the population who might be suffering under the same economic and social problems but not have recourse to assistance.⁷¹

71 Chetail, *Post Conflict Peacebuilding: A Lexicon*. Page 282.

5. Institutional Reform

This concerns the reform of public institutions, for example within the justice and security sectors. Institutional reform is a crucial aspect of accountability and reconciliation for a number of reasons. If the justice system is not perceived as just and fair, the public will not take any form of accountability and reconciliation efforts attempted under its auspice seriously. Similarly, the security sector, or members of it, may have played a part in the conflict and is therefore no longer seen as a trusted institution. Other institutions that existed pre-conflict might have contributed to the conflict erupting in the first place and will therefore need to be reformed in order to prevent repetition of old dynamics and practices in the new state. For example, this might be the case if the conflict started off as a reaction to widespread institutional corruption. Institutional reform will also facilitate changes in the longer term, including adequate law enforcement and ensuring the protection of the rights of all citizens.

As part of institutional reform, vetting procedures might be implemented. This seeks to identify public officials responsible for past abuse or misconduct and removes them from office. It is important to note the difference between vetting and purging, which is the removal from office of public officials based solely on their membership of a certain group or political party. For example, the de-Baathification process in Iraq dismissed people from office based on rank and not behaviour.⁷² In El Salvador the armed forces and newly created police service were vetted and some limited mechanisms to increase judicial accountability were created.

72 Sissons, M and Al-Saiedi A, 'A Bitter Legacy: Lessons of De-Baathification' *International Center for Transitional Justice*. (Last Accessed June 2015) at <<https://www.ictj.org/sites/default/files/ICTJ-Report-Iraq-De-Baathification-2013-ENG.pdf>>

In Bosnia-Herzegovina vetting focused on the police and judiciary. Vetting may also be closely connected to symbolic reparation, such as public apologies issued on behalf of institutions for previous abuse or changing the names and insignia of security services (Northern Ireland and the former Yugoslavia). For a programme to work, vetting procedures need to meet basic due process standards.⁷³

Vetting is different from lustration, which is when members of certain groups are prevented from running for and holding public office after a change in government. For example, in Poland, there were as many as 70,000 officers in the Secret Police in Poland who were connected to the oppressive, authoritarian communist party.⁷⁴ The lustration laws required high-level officials to submit an affidavit declaring whether or not they had collaborated with the Secret Police. Those found lying would be sentenced and those who truthfully claimed these relationships faced public condemnation preventing them from running for office.⁷⁵ It can be argued that these legal provisions may further divide a society and increase polarisation in some cases.

73 Sissons, M and Al-Saiedi A, 'A Bitter Legacy: Lessons of De-Baathification' *International Center for Transitional Justice*. (Last Accessed June 2015) at <<https://www.ictj.org/sites/default/files/ICTJ-Report-Iraq-De-Baathification-2013-ENG.pdf>>

74 Kaj M and Metzger M. 'Justice or Revenge? The Human Rights Implications of Lustration in Poland.' *Humanity in Action* (Last Accessed June 9 2001) at <<http://www.humanityinaction.org/knowledgebase/165-justice-or-revenge-the-human-rights-implications-of-lustration-in-poland>>

75 Kaj M and Metzger M. 'Justice or Revenge? The Human Rights Implications of Lustration in Poland.' *Humanity in Action* (Last Accessed June 9 2001) at <<http://www.humanityinaction.org/knowledgebase/165-justice-or-revenge-the-human-rights-implications-of-lustration-in-poland>>

Institutional reform is no easy task. It may be especially difficult to implement where a power-sharing agreement is in place between a belligerent group and the government, as this may lead to those who have committed serious human rights abuses retaining power. Integrating rebel forces into the military without proper vetting procedures and reform of the armed forces might similarly enable those who committed crimes during the conflict to go unpunished. This, in turn, can cause the recurrence of violations. Institutional reform can also be costly. In Rwanda, rebuilding the internal criminal justice system cost over USD 100 million as it continued to work on 120,000 cases in reference to the genocide.⁷⁶

In situations where truth commissions are weak, constrained or non-existent, civil society organisations can play a pivotal role in either supplementing the official process or providing an alternative to the official process. Observers note that civil society can bring a more flexible approach to truth-telling and memory retrieval and is not subject to the same constraints that truth commissions can be subject to.

Civil Society Organisations and human rights groups can also play an important role in the design and implementation accountability measures. They may have other specific roles, as human rights monitors (e.g. Afghan Independent Human Rights Commission), in unofficial truth-seeking initiatives, and in collecting and documenting evidence of abuse for future endeavours (e.g. Brazil, Northern Ireland, Uruguay and the former Yugoslavia). In sub-Saharan Africa, there is increasing use of so-called 'traditional' approaches to accountability (e.g. gacaca courts in Rwanda and mato oput rites in Uganda).

76 Pillay S and Scanlon H, 'Peace versus Justice? Truth and Reconciliation Commissions and War Crimes Tribunals in Africa' *Center for Conflict Resolution*. Page 8 (Last accessed June 2015) at <www.ccr.org/za/images/stories/Vol_22-Peace-VsJustice.PDF>

Case Study: Northern Ireland⁷⁷

Policing has been one of the most controversial issues arising out of the Good Friday Agreement in Northern Ireland, specifically because of a failure to find ‘an acceptable democratic basis for governance’⁷⁸ and the Catholic community’s ‘perception of unequal treatment by the police force’⁷⁹ in the past. The Good Friday Agreement promised a new policing service that aimed to be ‘more representative of the community it polices, democratically accountable, free from political control, infused with human rights and culturally neutral.’⁸⁰ Consequently, the Independent Commission on Policing for Northern Ireland – also known as the Patten Commission⁸¹ – was established to reform the police force. On 9 September 1999, the Commission produced the Patten

77 See ‘DPI The Good Friday Agreement – An Overview’ (DPI London August 2013) at <www.democraticprogress.org/wp-content/uploads/2013/07/The-Good-Friday-Agreement-An-Overview.pdf>

78 Independent Commission on Policing for Northern Ireland (1999) ‘A New Beginning: Policing in Northern Ireland - The Report of the Independent Commission on Policing for Northern Ireland’, September 1999

Accessible at: <http://cain.ulst.ac.uk/issues/police/patten/patten99.pdf>

79 Democratic Progress Institute (2011) ‘Turkey: Comparative Studies Visit to The Republic of Ireland - Conflict Resolution’, p. 101

Accessible at: <http://www.democraticprogress.org/turkey-comparative-studies-visit-to-the-rep-of-ireland-conflict-resolution/>

80 Sinn Féin (2001) ‘Response to the Revised Implementation Plan on Policing: A new beginning to policing’

Accessible at <http://cain.ulst.ac.uk/issues/police/docs/sf250801a.htm>

81 The Commission was named after Chris Patten, who served as Member of Parliament in the United Kingdom from 1979 to 1992, and was Minister for Overseas Development for the Foreign and Commonwealth Office from 1986 to 1989. He was also the last Governor of Hong-Kong, from 1992 to 1997. Chris Patten served as Chairman of the Independent Commission on Policing for Northern Ireland from 1998 to 1999.

The Independent Commission on Policing for Northern Ireland was set up by the Good Friday Agreement to inquire into policing issues in Northern Ireland and make recommendations for the adequate reform of the police force in Northern Ireland.

Report, comprising 175 recommendations with the objective of 'depoliticising the police', which were partly integrated into law by the British Government in 2000 and 2003. Controversial symbols previously used were thus changed to be free from any association with either the British or Irish States. The Royal Ulster Constabulary was renamed the Police Service of Northern Ireland. A new oath of allegiance was devised, which upheld human rights and equal respect to all communities. Uniforms, badges and the logo of the police force were changed to be politically neutral. The Union flag was removed from police buildings, and a new flag was designed for the Police Service of Northern Ireland, used for the new badge of the police force. Furthermore, entry requirements were made flexible with regard to prior criminal offences, so that there was no systematic disqualification from entry into the police force. This was a particularly controversial provision as it inherently enabled former political activists with criminal records to apply and potentially enter the police force. These numerous provisions were condemned by the Ulster Unionist Party as a 'gratuitous insult' to the Royal Ulster Constabulary.⁸²

On the other hand, whilst most Republican/Nationalist parties criticised the fact that the Royal Ulster Constabulary had not been disbanded, these measures were widely acclaimed as a crucial step towards intercommunal peace. Additionally, the Patten Report provided for recruitment of the police force to be conducted by an independent agency. Until March 2011, positive discrimination measures were implemented to ensure the even religious composition of the police force. These measures were deemed crucial as in 2001, the police force comprised 92 per cent Protestants. However, this provision was removed in March 2011 following protests from Unionist politicians claiming that it constituted unfair sectarianism.

82 BBC News (1999) 'Gratuitous insult, says UUP', 9 September 1999.

Accessible at: http://news.bbc.co.uk/1/hi/northern_ireland/442815.stm

Most notably, Secretary of State Owen Paterson claimed that this practice was no longer justified as 30 per cent of officers had a Catholic background. As the table below testifies, the composition of the police workforce has not changed since the removal of this provision.

Figure 1: Police Workforce Composition Figures⁸³

	% Perceived Protestant	% Perceived Roman Catholic	% Not determined
Police Officers	67.36	30.41	2.23
Police Staff	77.88	18.95	3.17

Furthermore, in accordance with the Good Friday Agreement's provisions related to the reform of the judicial system in Northern Ireland, the Criminal Justice Inspection Northern Ireland (CJI) was established in 2003.⁸⁴ An ad-hoc Committee on Criminal Justice Reform was also set up by the Northern Ireland Assembly between December 2001 and January 2002 to reform the judiciary. It produced the Report on the Draft Justice (NI) Bill and the Criminal Justice Review on 14 January 2002.

83 Police Service of Northern Ireland (2012) Workforce Composition Figures. Accessible at: http://www.psn.police.uk/index/updates/updates_statistics/updates_workforce_composition_figures.htm - Figures accurate as at 01.11.12

84 The Criminal Justice Inspection Northern Ireland (CJI) is an independent, statutory inspectorate established under section 45 of the Justice (Northern Ireland) Act 2002. Its mandate is to inspect all aspects of the criminal justice system in Northern Ireland apart from the judiciary.

6. Non-Formal or Traditional Methods

Civil society and human rights groups often come to play an important role in accountability and reconciliation efforts. They may act as human rights monitors, assist in the collection of evidence for prosecutions or assist the truth and reconciliation commission. By undertaking ‘non-formal’ or ‘traditional’ initiatives, civil society or community groups often assist in promoting accountability and reconciliation. Such initiatives are often undertaken alongside more formal methods, and might include:

- Writing a common history: This involves creating a historical account of the conflict that can be agreed on by all groups involved in the conflict, so that what happened is reported in a truthful manner. This provides a basis for the eventual evolvment of new collective memory.⁸⁵
- Education: civil society can be involved in helping set educational objectives, preparing curriculums, specifying school textbook contents, developing instructional material, training teachers and constructing a climate in schools that is conducive to peace education.⁸⁶
- Mass media may be used as a channel to communicate leaders’ messages about peace and reconciliation, and constructs public reality by framing the news and commentaries.
- Civil society may organise publicised meetings between leaders of all groups involved in the conflict to humanise them. Seeing that the leaders and “the other side” are humans too helps develop a relationship and trust which is necessary if they are to be treated as partners to agreements.⁸⁷

85 Bar-Tal & Bennink, p.24

86 Bar-Tal & Bennink, p.26

87 Bar-Tal & Bennink, p.26

6. INTERNATIONAL CASE STUDIES

1. South Africa

An example of a reconciliation programme that has been applied in a post conflict state is the South African Truth and Reconciliation Commission. The Truth and Reconciliation Commission was a restorative justice body created in order to help South Africans psychologically overcome the trauma of apartheid, through a number of public hearings which attempted to give individuals a platform to express the nature of atrocities committed, in order for the courts to record human rights violations.

The Truth and Reconciliation Commission was divided into three committees in order to tackle the wide range of different problems faced by South Africans following the end of apartheid: the Amnesty Committee, the Reparation and Rehabilitation Committee and the Human Rights Violation Committee.

The Amnesty Committee was developed as an accountability tool, and was provided with the legal ability to grant amnesty to offenders if crimes were fully disclosed, deemed as politically motivated, and responsibility was accepted. Although this amnesty process did not take place across the board, and the majority of amnesty requests were rejected, this can to an extent be seen as a successful model for formal accountability, as it allowed perpetrators to be held publicly accountable for their crimes and led to some individuals admitting to and taking responsibility for crimes that they may have otherwise denied.⁸⁸

88 Justice and Constitutional Development, 'Amnesty Hearing and Decisions, The Truth and Reconciliation Commission website', (last accessed June 2015) at: <<http://www.justice.gov.za/trc/amntrans/index.htm>>

The Reparation and Rehabilitation Committee (R&R) was given the task of providing the victims of apartheid with rehabilitation programmes, proposing legislation that aimed to aid victims' recovery and reintegration. This process can be considered of vital importance as a counterbalance to the policy of amnesty (which allowed some self-confessed persecutors to walk free following their admission of responsibility), as it provided victims with the essential support they needed. The main areas of support covered by the Reparation and Rehabilitation Committee included general health care, mental health care, education and housing. For example, in terms of mental health care, the R&R offered 'Community based interventions' which acted as local support groups to assist victims and survivors as well as new training programmes to encourage the development of an extensive system of community based counsellors to assist those who have suffered gross human rights violations and trauma.⁸⁹ Education is also an important aspect of the rehabilitation process in South Africa, which was addressed through the Assistance for the Continuation of Studies Programme.

This focused on the establishment of Community Colleges and Youth Centres, which encouraged young South Africans to become active members of their communities. Alongside this was the Adult Basic Education Programmes, which was established to address the problems related to the loss of education due to apartheid and human rights violations. There were also reparation payments and

89 Justice and Constitutional Development 'A Summary of Reparation and Rehabilitation Policy, Including Proposals to be Considered by the President', (last accessed June 2015) at: <<http://www.justice.gov.za/trc/reparations/summary.htm#community>>

grants made by local authorities which aimed at reducing financial inequality, a direct product of the apartheid state.⁹⁰

The Human Rights Violation Committee investigated human rights violations, on both the side of the apartheid regime and the side of the A.N.C and the Umkhonto we Sizwe that took place between 1960 and 1994.⁹¹ This process took place through the format of local hearings, which often happened in areas intensely affected by violence. Victims came forward with testimonies of human rights violations they had experienced. These hearings took place between 16th of April 1996 to June the 26th 1997, and are extensively recorded online providing specific, individual examples of regional hearings.⁹²

Another important feature of the Human Rights Violation Committee in South Africa was the open nature of the hearings, which were organised centrally by the Truth and Reconciliation Commission, but took place on a local, community basis. South Africans could attend hearings as a form of therapeutic rehabilitation, and the hearings were also broadcast on television, which gave the general population easy, non-invasive access to the processes of reconciliation and accountability. The broadcasting of these trials has been viewed as one of the most successful elements of the Truth and Reconciliation Commission's process.⁹³

90 O'Malley P, 'Chapter 5: Reparation and Rehabilitation Policy', *Post-Transition (1994 – 1999) - Truth and Reconciliation Commission - TRC Reports - The Report Of The Truth And Reconciliation Commission - Volume 5.* The Nelson Mandela Foundation of Memory (Last Accessed June 2015) at: <<https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02264/05lv02335/06lv02357/07lv02398/08lv02403.htm>>

91 'Umkhonto weSizwe – The ANC and the Turn to Armed Struggle' South African History online website (Last accessed June 2015) at: <<http://www.sahistory.org.za/topic/umkhonto-wesizwe-mk>>

92 The South African Broadcasting Corporation, Human Rights Violation Hearings, Truth Commission Special Report (Last Accessed June 2015) at: <<http://sabctrc.saha.org.za/documents/hrvtrans.htm>>

93 Smith D, 'Special Report: Truth, Justice and Reconciliation' *The Guard-*

14. Northern Ireland

Further examples of reconciliation efforts used in a post-conflict state have developed in Northern Ireland. Following decades of armed sectarian violence, Northern Ireland has progressed slowly towards peace, and reconciliation and accountability have proved important factors in this process.

High profile peace talks with neutral international intermediaries resulted in the signing of both the Good Friday Agreement and the St. Andrews agreement.⁹⁴ These can be considered as symbolic, high level political manifestations of the concepts of reconciliation. The main areas which the talk focused on included:

- Weapons decommissioning/amnesties, a key process that was seen as one of the most important early factors in beginning a reconciliation dialogue.
- Power sharing in government.
- Release of political prisoners, often people who have been tried and convicted of violent acts of terrorism. This is considered a particularly controversial aspect of the peace process, but it is seen as vital in the process of reconciliation as it involves dealing with the past and correcting the wrongs that were committed by the old regime.

ian (24/06/2014), (Last Accessed June 2015) at: <<http://www.theguardian.com/world/2014/jun/24/truth-justice-reconciliation-civil-war-conflict>>

⁹⁴ 'Agreement at St. Andrews' 'The St. Andrews Agreement' (2007), (Last Accessed June 2015) at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136651/st_andrews_agreement-2.pdf>

15. Cambodia

Reconciliation and accountability attempts in both Northern Ireland and South Africa have been relatively successful when compared to reconciliation efforts in Cambodia, which have largely failed in their attempts to rebuild society and re-establish harmony.

The post-Khmer Cambodian governments did not fully attribute blame and accountability for the atrocities that took place in Cambodia between 1975 and 1979, and as such failed to distribute responsibility to ex-Khmer Rouge Guerrilla leaders for past violence, and hindered reconciliation. In part, this can be considered a direct product of the chaotic nature of post-Khmer Cambodia, which was plagued by civil war following the 1979 ousting of the Khmer Rouge, who were initially replaced by a pro-Vietnamese government. In more recent years, following a series of coup d'états during the 1980s and 1990s, Cambodia has slowly begun to reach some form of political stability and reconstruction under a multi-party system of constitutional monarchy.

As well as a shift towards political stability, there has, in more recent times, been a shift towards some form of accountability, particularly following a 2003 agreement between the UN and the government of Cambodia which led to the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC),⁹⁵ a court created with the direct purpose of trying the senior figures within the Khmer Rouge leadership. However this has been viewed as “justice delayed” by international observers and Cambodians alike.⁹⁶

95 The Extraordinary Chambers in the Courts of Cambodia Organisation, *The Extraordinary Chambers in the Courts of Cambodia* (Last Accessed June 2015) at: <<http://www.eccc.gov.kh/en/about-eccc/introduction>>

96 ‘Cambodia: Khmer Rouge Trial is Justice Delayed,’ *Human Rights Watch* (24/06/11) (Last Accessed June 2015): <<http://www.hrw.org/news/2011/06/24/cambodia-khmer-rouge-trial-justice-delayed>>

The slow progress of this tribunal, which only began in 2003, well over 20 years after the Khmer Rouge fled Cambodia, has left a negative effect on reconciliation in Cambodia as well as proving extremely challenging from a legal point of view, due to such a long delay in prosecution.⁹⁷ Many key Khmer Rouge members and reliable witnesses have died as time passes. Despite this, the Extraordinary Chambers in the Courts of Cambodia has received some praise in more recent times, particularly following the high profile trials of high-ranking Khmer officials. For example, in February 2012 an ex-commander of the infamous Tuol Sleng prison know as S-21, Kaing Guek Eav (also known as Duch), was sentenced to life in prison following the tribunal.⁹⁸ There have been a number of cases similar to that of Duch, which shows that Cambodia is in some ways progressing towards some form of accountability, 30 years after the acts of genocide themselves took place.⁹⁹

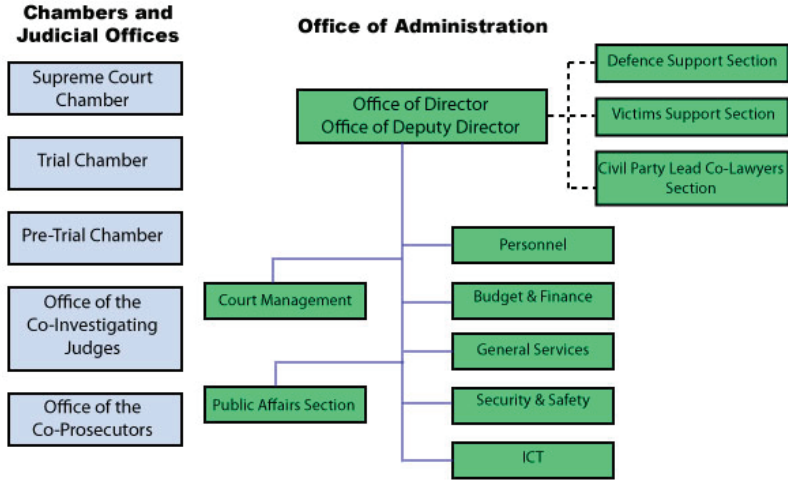
The Extraordinary Chambers in the Courts of Cambodia's reconciliation structure are divided as follows:¹⁰⁰

97 Darcy S, *Dilemmas of Delayed Justice for the Crimes of the Khmer Rouge*, 'Oxford Transitional Justice Research Working Paper Series' (04/11/08) (Last Accessed June 2015): <http://otjr.crim.ox.ac.uk/materials/papers/41/Darcy_E.pdf>

98 'Khmer Rouge jailer Duch's sentence increased by Cambodia court', *The Guardian* (03/02/12) (Last Accessed June 2015): <<http://www.theguardian.com/world/2012/feb/03/khmer-rouge-duch-sentence-cambodian>>

99 'Reconciliation and justice in the context of the Khmer Rouge Tribunal', *Deutsche Gesellschaft für Internationale Zusammenarbeit* (Last Accessed June 2015): <<https://www.giz.de/en/worldwide/17322.html>>

100 'An Introduction to the Extraordinary Chambers in the Courts of Cambodia', *The Extraordinary Chambers in the Courts of Cambodia* (Last Accessed June 2015) at: <<http://www.eccc.gov.kh/en/about-eccc/introduction>>



Despite the more recent high-profile trials in Colombia, the initial impunity of ex-Khmer officials, particularly of the highest-level officials, including the Khmer leader Pol Pot, angered many in Cambodia and has been highly detrimental in terms of accountability and reconciliation efforts. Amnesties that were granted in the 1990's did not occur alongside a process of accountability. It is important to take into account that the concept of an amnesty has little value when it is not used alongside systems of accountability, as this results in guilty parties being granted with impunity without having to accept responsibility for their actions or showing remorse for the atrocities committed.

Furthermore, it has been argued that the Cambodian amnesties of the 1990s were in fact designed primarily as means of motivating army defections, weakening the remaining insurgent Khmer army in order to regain control of Cambodia.¹⁰¹ Not surprisingly, the Cambodian amnesties have not generally been seen as a successful.

16. Rwanda

Following the Hutu-led genocide of the Tutsi population in 1994, the state of Rwanda has made considerable steps in both reconciliation and accountability, in order to achieve peace and justice, whilst attempting to heal the psychological impact the violence has had on the Rwandan people.

In terms of accountability, in the years following the Rwandan genocide over 120,000 people were detained and considered to bear criminal responsibility for the violence that had taken place.¹⁰² In order to deal with such a high volume of cases, the Rwandan judicial system worked on three levels:

101 Slye R.C, '*THE CAMBODIAN AMNESTIES: BENEFICIARIES AND THE TEMPORAL REACH OF AMNESTIES FOR GROSS VIOLATION OF HUMAN RIGHTS*', *The Cambodian Amnesties*, Wisconsin International Law Journal, Vol. 22, No. 1 (Last Accessed June 2015): <<http://hosted.law.wisc.edu/wordpress/wilj/files/2012/02/slye.pdf>>

102 'Background Information on the Justice and Reconciliation Process in Rwanda', *Outreach programme on the Rwanda Genocide and the United Nations* (Last Accessed June 2015): <<http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml>>

a. The International Criminal Tribunal for Rwanda (ICTR)

The International Criminal Tribunal for Rwanda was established by the UN Security Council on the 8th of November 1994, with the mandate of prosecuting individuals who held responsibility for genocide and violations of international humanitarian law during the Rwandan genocide of 1994. The trial phase of the tribunal lasted from January 1997 to December 2012, and during this time the tribunal indicted 92 individuals for genocide, crimes against humanity and war crimes. Of these 92 individuals, 49 were found guilty and convicted, 10 cases were referred to national jurisdictions (two to France, eight to Rwanda), 2 died during trial, 14 were acquitted and nine remain at large.¹⁰³ According to information published on the UN website, as of March 2014, the cases against 12 individuals are undergoing appeal.

The International Criminal Tribunal for Rwanda (ICTR) has led to several landmark judgments and international legal precedents, including the first prosecution of a head of government for genocide, against Jean Kambanda, who was sentenced to life in prison in 1998.¹⁰⁴

Following the end of the ICTR in 2015, the Mechanism for International Criminal Tribunals (MICT) will take over the remaining tasks including enforcement of sentences by the Tribunal, the tracking, arrest and prosecution of the three fugitives left for trial at the Mechanism and the care and protection of witness, alongside the transfer of cases to the National Court System.¹⁰⁵

103 Background Information on the Justice and Reconciliation Process in Rwanda', *Outreach programme on the Rwanda Genocide and the United Nations* (Last Accessed June 2015): <<http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml>>

104 The Prosecutor Versus Jean Kambanda, Case no.: ICTR 97-23-S, The Judgement and Sentence, (Last Accessed June 2015): <https://www1.umn.edu/humanrts/instree/ICTR/KAMBANDA_ICTR-97-23/KAMBANDA_ICTR-97-23-S.html>

105 'ICTR Expected to close down in 2015', *United Nations International*

g. The National Court System

The Rwandan national court system has also tried and prosecuted individuals accused of genocide and other serious offences, such as rape, committed during the genocide. As of 2006, the national court system had tried 10,000 persons suspected of having been involved in the genocide.

Another significant development was the abolition of the death penalty in Rwanda in 2007, which had been in place and in use in the years following the genocide, most notably 22 individuals were convicted of genocide related crimes and executed in 1998.¹⁰⁶ The abolition of the death penalty was significant as it allowed the International Criminal Tribunal in Rwanda (ICTR) to pass on genocide and war crimes related cases to the national courts system. This had been previously prevented due to the Statute of the ICTR stating clearly that the most severe punishment to be provided would be imprisonment, preventing the imposition of the death penalty for any ICTR related cases.¹⁰⁷

Criminal Tribunal for Rwanda, Press release (Arusha) 02/02/15, (Last Accessed June 2015): <<http://www.unictr.org/en/news/ictr-expected-close-down-2015>>

106 'Rwanda Executes Genocide Convicts', *B.B.C News, World News: Africa* 24/04/1998 (Last Accessed June 2015): <<http://news.bbc.co.uk/1/hi/world/africa/82960.stm>>

107 Morris, M.H, 'Justice in the Wake of Genocide', *The Trials of Concurrent Jurisdiction: The Case of Rwanda* (Last Accessed June 2015): <http://www.unc.edu/depts/diplomat/AD_Issues/amdipl_6/morris2.html>

h. The Gacaca courts

The Gacaca Courts can be described as a system of traditional, grass-roots community justice. Based mostly on a local level, the Gacaca Courts were re-established primarily as a system designed to help ease the strain on the national court system, which was dealing with a huge volume of serious and complicated genocide related cases. To date, more than 12,000 community-based courts have been established, dealing with over 1.2 million cases nationally. These cases concern all sorts of crimes related to the genocide apart from the high level planning of the genocide itself, which was left to international and national courts to deal with. Accountability was a fundamental concept of the Gacaca Court process, with lower sentences handed out to those individuals who confessed their crimes and took responsibility for their actions. This has been a key factor in achieving some form of reconciliation within Rwandan society.

Despite these positive steps towards reconciliation and accountability, due to its perceived human rights failures and accusations of authoritarian rule, some have condemned the post-genocide Rwandan government. Following the 1994 genocide, the Rwandan Patriotic Front (a majority Tutsi party) led government established a great deal of power within the Rwandan state. This has led some to liken the RPF's grip on power to that of a dictatorship, which openly continues to practice racial discrimination against the Hutu population, concentrates power in the hands of the few and eliminates any form of dissent or opposition within society.¹⁰⁸

108 Grant R, 'Paul Kagame: Rwanda's Redeemer or Ruthless Dictator?' *The Independent* 22/07/10 (Last Accessed June 2015): <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/rwanda/7900680/Paul-Kagame-Rwandas-redeemer-or-ruthless-dictator.html>>

It has been argued that this has been allowed to take place in Rwanda as a direct result of perceived international “guilt syndrome” in relation to a lack of international intervention during the genocide of 1994.¹⁰⁹ The Rwandan case demonstrates the many complexities and challenges faced even in relatively successful accountability and reconciliation processes.

109 Reyntjen F, ‘*Rwanda, Ten Years On: From Genocide to Dictatorship*’, *African Affairs* (2004), 103, 177–210 (Last Accessed June 2015); <<http://afraf.oxford-journals.org/content/103/411/177.full.pdf>>

7. CONCLUSION

The concepts of both ‘accountability’ and ‘reconciliation’ are difficult to define specifically; both aim to promote a secure, long lasting peace through uncovering the root of the conflict so that violence does not recur. In essence, the ending of violence via military engagement and cease-fire does not suffice on its own. Instead, reconciliation and accountability aim for the restoration of collaborative and supportive relationships that were initially disrupted.

Every example of conflict is unique, given that the factors that have created it are different in every circumstance. Therefore reconciliation and accountability efforts must also, to an extent, be unique, in order to deal with the specific problems that have developed. There is no one, single model through which to assess the progress of reconciliation in a conflict or one specific process to hold someone accountable because there is no one single method that can fit the need and complexity of each country’s/region’s situation.¹¹⁰ However, outlined in this paper, past conflicts have presented processes that have gone some way in healing past traumas and in moving society towards peaceful coexistence in the form of prosecutions, amnesties, truth seeking commissions, reparation and restitution.

Amnesty can often form an important part of a reconciliation process, which can be applied in many different shapes and forms, to groups such as political prisoners or to a specific individual, from a legal system to the grassroots level. It has been seen as a prerequisite to the success of many peace processes as well as a practical tool, and aims to work towards understanding rather than vengeance, but which must be considered holistically along with other tools and components as discussed in this paper.

110 Ramsbotham, *Contemporary Conflict Resolution*. Page 206.

Prosecutions utilise a judicial process to transform communities but certain conflicts require a transformation of such state institutions, which can themselves be a source of conflict. That said, prosecutions can still establish accountability through the search for justice and rule of law dependent on what caused the conflict to occur. Truth seeking commissions have been seen in over 20 countries. Specific to the country to which a TRC is tailored, they can be more or less effective, depending on the approach taken. While providing room for dialogue for the victims, TRC can go only as far as those who establish it want it to, a problem the Guatemala peace process struggled with. Certain regions may aim at reconciling parties through reparations but quantifying pain and suffering is sometimes not possible and is seen as inappropriate to reconciliation efforts or as a risk to peace in fragile situations. Many questions need to be addressed in this regard, ranging from what constitutes a 'victim' to differentiating moral and material damage.

The effectiveness of all accountability and reconciliation methods is dependent on numerous, complex factors. This paper has outlined different case studies and methods that have been applied and basic principles that have emerged alongside areas of difficulty that can be faced. This is a topic which requires continued focus at every level of international peace efforts and which merits ongoing discussion and debate.

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DPI Board Members



Kerim Yildiz (Chief Executive Officer)

Kerim Yildiz is Chief Executive Officer of DPI. He is an expert in international human rights law and minority rights, and has written extensively on international human rights mechanisms and international humanitarian law. Kerim is the recipient of a number of awards, including from the Lawyers Committee for Human Rights for his services to protect human rights and promote the rule of law in 1996, the Sigrid Rausing Trust's Human Rights Award for Leadership in Indigenous and Minority Rights in 2005, and the Gruber Prize for Justice in 2011.



Nick Stewart QC (Chair)

Nicholas Stewart, QC, is a barrister and Deputy High Court Judge (Chancery and Queen's Bench Divisions) in the United Kingdom. He is the former Chair of the Bar Human Rights Committee of England and Wales and Former President of Union Internationale des Avocats.



Prof. Penny Green (Secretary)

Professor Penny Green is the Deputy Head (Research) at Dickson Poon School of Law, King's College London and Director of the International State Crime Initiative (ICSI), United Kingdom. She joined King's College in September 2007 following eight years as Professor of Law and Criminology at the University of Westminster. Prior to that she held posts at the University of Southampton and the London School of Economics and Political Science (LSE).



Priscilla Hayner:

Priscilla Hayner is co-founder of the International Center for Transitional Justice. She is a global expert on truth commissions and transitional justice initiatives, and has authored several books on these topics. She is former consultant to the Ford Foundation, the UN High Commissioner for Human Rights, and numerous other organisations.



Arild Humlen,

Arild Humlen is a lawyer and Director of the Norwegian Bar Association's Legal Committee, Norway. He is widely published within a number of jurisdictions, with emphasis on international civil law and human rights, and he has lectured at law faculties of several universities in Norway. He is the recipient of the Honor Prize of the Bar Association of Oslo for his work on the rule of law.



Jacki Muirhead

Jacki Muirhead was formerly the Practice Director at Cleveland Law Firm. She has also worked as Barristers' Clerk at Counsels' Chambers Limited and Marketing Manager at the Faculty of Advocates. She has also undertaken an International Secondment at New South Wales Bar Association.



Prof. David Petrsek

Professor David Petrsek is Associate Professor at Graduate School of Public and International Affairs University of Ottawa, Canada. He is former Special Adviser to the Secretary-General of Amnesty International. He has worked extensively on human rights, humanitarian and conflict resolution issues, including for Amnesty International (1990-96), for the Office of the UN High Commissioner for Human Rights (1997-98), for the International Council on Human Rights Policy (1998-02) and as Director of Policy at the Centre for Humanitarian Dialogue (2003-07).



Antonia Potter

Antonia Potter Prentice has 17 years' experience across a diverse range of humanitarian, development, peacemaking and peacebuilding issues in the not-for-profit sector, most recently specialising in women's empowerment and gender. This includes extensive management and leadership at a strategic level. Educated at Oxford and the London School of Economics, she has worked in Afghanistan, Cambodia, East Timor, Switzerland, India, USA and Indonesia for NGOs including Save the Children, Concern Worldwide, Centre for Humanitarian Dialogue, Oxfam GB and Médecins du Monde.

DPI Council of Experts



Dermot Ahern

Dermot Ahern is a former Irish Member of Parliament and Government Minister and was a key figure for more than 20 years in the Irish peace process, including in negotiations for the Good Friday Agreement and the St Andrews Agreement. He also has extensive experience at EU Council level, including as a key negotiator and signatory to the Constitutional and Lisbon Treaties. In 2005, he was appointed by the then UN Secretary General Kofi Annan to be a Special Envoy on the issue of UN Reform.



Dr Mehmet Asutay

Dr Mehmet Asutay is a Reader in Middle Eastern and Islamic Political Economy and Finance at the School of Government and International Affairs (SGIA), Durham University, UK. He researches, teaches and supervises research on Middle Eastern economic development, the political economy of Middle East, including Turkish and Kurdish political economies, and Islamic political economy.



Ali Bayramoğlu

Ali Bayramoğlu is a writer and political commentator. He is a columnist for the Turkish daily newspaper Yeni Safak. He is a member of the former Turkey's Wise Persons Commission, established by Prime Minister Erdoğan.



Prof. Christine Bell

Professor Christine Bell is a legal expert based in Northern Ireland. She is an expert on transitional justice, peace negotiations, constitutional law and human rights law. She regularly conducts training on these topics for diplomats, mediators and lawyers.



Cengiz Çandar

Cengiz Çandar is a senior journalist and columnist for Turkish newspaper Radikal Daily News. He is an expert on the Middle East and former war correspondent. He served as special adviser to former Turkish president Turgut Ozal.



Yılmaz Ensaroğlu

Yılmaz Ensaroğlu is the former Director of Law and Human Rights Studies at SETA Foundation for Political, Economic and Social Research in Ankara, Turkey. He is a member of the Executive Board of the Joint Platform for Human Rights, the Human Rights Agenda Association (İHGD) and Human Rights Research Association (İHAD). He is also Chief Editor of the Journal of the Human Rights Dialogue and member of the former Wise Persons Commission, established by Prime Minister Erdoğan.



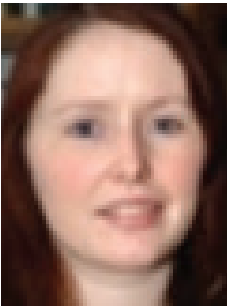
Prof. Mervyn Frost

Professor Mervyn Frost is Head of the Department of War Studies at King's College London. He previously served as Chair of Politics and Head of Department at the University of Natal, Durban, South Africa. He is former President of the South African Political Studies Association. He is an expert on human rights in international relations, humanitarian intervention, justice in world politics, democratising global governance, just war tradition in an era of New Wars and ethics in a globalising world.



Martin Griffiths

Martin Griffith is a founding member and first Executive Director of the Centre for Humanitarian Dialogue as well as founding member of Inter-Mediate. He has served in the British Diplomatic Service and in British NGOs, most recently as Chief Executive of Action Aid. He has held posts as the UN Director of the Department of Humanitarian Affairs, Geneva, and Deputy to the UN Emergency Relief Coordinator, New York. He has also served as UN Regional Humanitarian Coordinator for the Great Lakes, UN Regional Coordinator in the Balkans and UN Assistant Secretary-General. He was formerly Senior Advisor to Kofi Annan during his time as joint UN-Arab League special envoy to Syria.



Dr. Edel Hughes

Dr Edel Hughes is Senior Lecturer at University of East London. Prior to joining the University of East London, Edel was awarded an LL.M. and a PhD in International Human Rights Law from the National University of Ireland, Galway, in 2003 and 2009, respectively. Between 2006 and 2011 she was a Lecturer in Law at the School of Law, University of Limerick, Ireland.



Professor Dr Ahmet Insel

Professor Dr Ahment Insel is Managing Editor of Turkey editing house Iletisim and Head of the Department of Economics in Galatasaray University, Istanbul. He is a Professor at Paris 1 Panthéon-Sorbonne University, an author and columnist.



Avila Kilmurray

Avila Kilmurray is a founding member of the Northern Ireland Women's Coalition. She was part of the Coalition's negotiating team for the Good Friday Agreement and has written extensively on community action, the women's movement and conflict transformation. She serves on the Board of Conciliation Resources (UK), the Global Fund for Community Foundations, Conflict Resolution Services Ireland and the Institute for British Irish Studies. She was the first Women's Officer for the Transport & General Workers Union for Ireland (1990-1994) and became Director of the Community Foundation for Northern Ireland in 1994. She is a recipient of the Raymond Georis Prize for Innovative Philanthropy through the European Foundation Centre.



Joost Lagendijk

Joost Lagendijk is a columnist for the Turkish dailies Zaman and Today's Zaman and a lecturer on EU Institutions and Policies at the Suleyman Shah University, Istanbul. He has also authored and edited a number of books on European border issues, US and EU foreign policy strategies and modern Turkey. From 1998 to 2009 he was a Dutch Green-Left Party Member of European Parliament where he focused on foreign policy and EU enlargement. He has also served as Chair of the Dutch Parliament's Turkey Delegation and as Rapporteur for the Parliament on the Balkans and Kosovo. From 2009 to 2012 he worked as a senior adviser at the Istanbul Policy Center in Istanbul.



Dr Salomón Lerner Febres

Professor Salomón Lerner Febres is former President of the Truth and Reconciliation Commission of Peru. He is Executive President of the Center for Democracy and Human Rights of the Pontifical Catholic University of Peru.



Prof. Ram Manikkalingam

Professor Ram Manikkalingam is Visiting Professor at the Department of Political Science, University of Amsterdam. He served as Senior Advisor to the President of Sri Lanka. He is an expert on issues pertaining to conflict, multiculturalism and democracy, and has authored multiple works on these topics. He is founding board member of the Laksham Kadirgamar Institute for Strategic Studies and International Relations.



Bejan Matur

Bejan Matur is a renowned Turkey-based author and poet. She is a columnist for Zaman newspaper where she focuses mainly on Kurdish politics, the Armenian issue, minority issues, prison literature, and women's rights. She has won several literary prizes and her work has been translated into over 17 languages. She was formerly Director of the Diyarbakır Cultural Art Foundation (DKSV).



Monica McWilliams

Professor Monica McWilliams is Professor of Women's Studies, based in the Transitional Justice Institute at the University of Ulster, UK. She was the Chief Commissioner of the Northern Ireland Human Rights Commission from 2005 to 2011 and responsible for delivering advice on a Bill of Rights for Northern Ireland. She is co-founder of the Northern Ireland Women's Coalition and was elected to a seat at the Multi-Party Peace Negotiations, which led to the Belfast (Good Friday) Peace Agreement in 1998.



Mark Muller QC

Mark Muller QC is a senior advocate at Doughty Street Chambers (London) and the Scottish Faculty of Advocates (Edinburgh). He specialises in public international law and human rights. He has many years' experience of advising on conflict resolution, mediation, ceasefire and power-sharing and first-hand experience of a number of conflict zones, including Afghanistan, Libya, Iraq and Syria. Since 2005 he is Senior Advisor to the Centre for Humanitarian Dialogue, Beyond Conflict and Inter-Mediate. He is also a Harvard Law School Fellow and former Chair of the Bar Human Rights Committee and Head of Rule of Law for the Bar Council. He is the founder of Beyond Borders – a Scottish initiative dedicated to fostering peace and international understanding through cultural dialogue. He currently acts as Senior Mediation Expert for the Standby Team of Mediators of the UN Department of Political Affairs.



Giles Portman

Giles Portman is an experienced British and EU diplomat, having worked for the UK Foreign Office in Brussels, New York, Prague and as Deputy Head of Mission in Ankara; and for the EU's External Action Service as an Adviser to the High Representative, Head of Division for Turkey and Eastern Neighbourhood strategic communications adviser.



Jonathan Powell

Jonathan Powell is founder and CEO of Inter-Mediate, an NGO devoted to conflict resolution working in the Middle East, Latin America, Africa and Asia. He was appointed as the UK Official Envoy to Libya by Prime Minister David Cameron in 2014. Jonathan was Chief of Staff to Tony Blair from 1995 to 2007, and from 1997 he was also Chief British Negotiator on Northern Ireland. From 1978 to 79 he was a broadcast journalist with the BBC and Granada TV, and from 1979 to 1994 a British Diplomat.



Sir Kieran Prendergast

Sir Kieran Prendergast served in the British Foreign Office, including in Cyprus, Turkey, Israel, the Netherlands, Kenya and New York. He was later head of the Foreign and Commonwealth Office dealing with Apartheid and Namibia. He is former UN Under-Secretary-General for Political Affairs. He was also Convenor of the Secretary General's Executive Committee on Peace and Security and engaged in peacemaking efforts in Afghanistan, Burundi, Cyprus, the DRC, East Timor, Guatemala, Iraq, the Middle East, Somalia and Sudan.



Rajesh Rai

Rajesh Rai was called to the Bar in 1993. His areas of expertise include Human Rights Law, Immigration and Asylum Law and Public Law. He is Founding Director of HIC, a community centred NGO based in Cameroon, and of Human Energy (Uganda) Ltd. He was previously Director of The Joint Council for the Welfare of Immigrants (JCWI). He lectures on a wide variety of legal issues, both for the Bar Human Rights Council and internationally in India, Africa, Asia, and the USA.



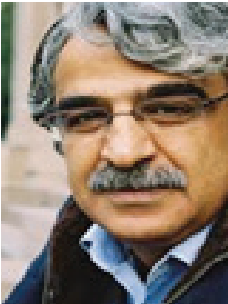
David Reddaway

Sir David Reddaway now works as an adviser, board member and consultant in the private and university sectors. He previously served as British Ambassador to Turkey and to Ireland; High Commissioner to Canada; UK Special Representative for Afghanistan; and Charge d’Affaires in Iran, where he had first worked during the Iranian Revolution. He has also worked in Argentina, India and Spain. He was a Fellow at Harvard University and a volunteer teacher in Ethiopia. He read History at Cambridge and Persian at the School of Oriental and African Studies in London.



Prof. Naomi Roht-Arriaza

Professor Naomi Roht-Arriaza is Professor at University of Berkeley, USA. She is an expert on transitional justice, human rights violations, international criminal law and global environmental issues, and has authored several works on these issues.



Prof. Dr. Mithat Sancar

Professor Dr Mithat Sancar is Professor of Law at the University of Ankara. He is an expert on constitutional citizenship and transitional justice. He is a regular columnist for Taraf newspaper and has written extensively on international human rights law and constitutional issues. He is a member of the former Wise Persons Commission in Turkey, established by Prime Minister Erdoğan.



Catherine Woollard

Catherine Woollard is an independent consultant based in Brussels. Previously she served as the Director of the Brussels Office of Independent Diplomat, and from 2008 to 2014 she was the Executive Director of the European Peacebuilding Liaison Office (EPLO) – a Brussels-based network of not-for-profit organisations working on conflict prevention and peacebuilding. She previously held the positions of Director of Policy, Communications and Comparative Learning at Conciliation Resources, Senior Programme Coordinator (South East Europe/CIS/Turkey) at Transparency International and Europe/Central Asia Programme Coordinator at Minority Rights Group International. She has also worked as a consultant advising governments on anti-corruption and governance reform, as a lecturer in political science, teaching and researching on the EU and international politics, and for the UK civil service.



Prof. Dr. Sevtap Yokuş

Professor Dr Sevtap Yokuş is a Professor of Law at the University of Kocaeli, Turkey. She is a widely published expert in the areas of constitutional law and human rights law, and is a practitioner in the European Court of Human Rights.



11 Guilford Street
London WC1N 1DH
United Kingdom
+44 (0)203 206 9939

info@democraticprogress.org

www.democraticprogress.org

Twitter: @DPL_UK