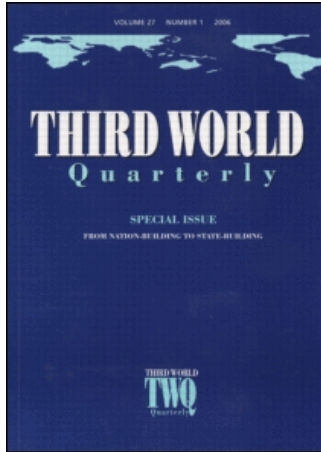


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Issues of justice and reconciliation in complex political emergencies: conceptualising reconciliation, justice and peace

DONNA PANKHURST

ABSTRACT This paper focuses on what can be done during emergency and transition periods to promote sustainable peace, in the aftermath of complex political emergencies in Africa, with particular reference to issues of reconciliation and justice. There is no common understanding of the political conditions under which efforts at reconciliation should be minimal in relation to a focus on justice in order to achieve the 'best' peace, or of those where the pursuit of justice should become paramount. There is also not even a common language of what justice and reconciliation mean in the context of post-conflict peace-building. The paper concludes that there is a much greater potential role for outsiders with regard to justice, while reconciliation is considered to be more of an internal affair in which international actors can only be present as supporters of domestic initiatives, and even then with great caution.

In the context of complex political emergencies (CPEs) 'peace' is a descriptive term commonly used to refer merely to the ending of organised violent conflict, as in Galtung's negative peace.¹ The concept of peace has a much wider range of meanings, including Galtung's positive peace at the other end of the spectrum, which describes a situation in which both these types of violence are minimal or non-existent, and the major potential causes of future conflict are also removed. Justice and reconciliation often figure in conflict settlements and the establishment of negative peace, but are of fundamental importance in minimising the chances of a return to conflict and in peace-building. They are seen as issues of increasing importance in transitions to democracy,² and there is an increasing international currency in shared experiences of promoting peace through justice and reconciliation. For instance, members of the South African Truth and Reconciliation Commission (TRC) studied and visited several countries in Latin America which had used truth commissions. Judge Goldstone, who is from South Africa and set up the War Crimes Tribunal on former Yugoslavia, is also overseeing the International Criminal Tribunal for Rwanda. Nonetheless, there is no consensus about how to assess the strength of either justice or reconciliation, and comparative research has as yet only yielded limited lessons. Moreover, no

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common understanding has yet emerged of the political conditions under which efforts at reconciliation should be restrained and justice promoted, or vice versa, in order to achieve the ‘best’ peace. Furthermore, contrasting, if not actually contradictory, understandings of justice and reconciliation, and their relationship to each other and to peace currently operate, even in the same settings.

Conceptualising reconciliation

There are a number of different meanings of the English verb ‘to reconcile’, as has also been noted by other authors.³ All of the following are to be found in different contexts of peace-making, but the norm is for the meaning to remain implicit, while in practice being an amalgam of some parts and not others.⁴

1. to become friendly with (someone) after estrangement or to re-establish friendly relations between (two or more people);
2. to settle (a quarrel);
3. to make (oneself or another) no longer opposed to something;
4. to cause to acquiesce in something unpleasant;
5. to make (two apparently conflicting things) compatible or consistent with each other.

These linguistic definitions tend to refer to relationships between individuals, but as the focus shifts to social or political reconciliation, and the word becomes a term of political currency, it takes on new significance and additional meanings.

When transposed to the political context, meanings 1 and 2 require the least activity, and are perhaps the most straightforward elements of peace settlements, such as the many attempts at Reconciliation Conferences in Somalia, aimed at bringing an end to fighting. The inclusion of ‘friendliness’ is comparable with ‘friendly relations’ between states when transposed to the political context. For instance, in Namibia since independence, very little reconciliation (in the sense of meanings 1 and 2) has taken place at a personal level between former enemies, in spite of the fact that a political strategy of reconciliation between the South West Africa People’s Organisation (SWAPO) government and its allies on the one hand, and members of the former South African regime on the other, has been robustly followed since independence.⁵

Meanings 3 and 4 are sometimes coupled together in linguistic definitions but the distinction is important for different political meanings. Meaning 3 captures the abandonment of violence and commitment to peaceful coexistence, whereas meaning 4 carries with it the implication of compromise; that such an acceptance requires sacrifice and some element of active persuasion or coercion. Again the example of Namibia is useful here: a growing complaint from the poor has been that reconciliation was forced on them and has brought few, if any, benefits. For many the meaning of reconciliation is akin to our number 4. Similar complaints are being voiced by a number of constituencies in South Africa who have argued that they are being forced into forgiveness, as part of reconciliation, against their will.⁶

When the linguistic meanings of reconciliation are transposed onto a political situation, there is thus a shift in focus from an individual to some type of

collective process, although Ignatiaff suggests that the shift is problematic;⁷ what is required psychologically for an individual to recover from trauma and be reconciled with the past (as in meaning number 1) need bear no resemblance to what might be required for a society to do so, even though it is not uncommon for people to expect that individuals and society as a whole should all be able to achieve reconciliation (of some sort) through the same set of centralised processes. It is in the shift in focus from individual to social or political that the issue of *forgiveness* emerges, even though it does not feature in the linguistic definitions. Under the influence of Archbishop Tutu and President Mandela in South Africa, much has been made of the Christian virtue of forgiveness; not only its political advantages, but also the view that forgiveness is essential for peace itself.⁸

Forgiveness is also often presented as the price people ought to pay for revelations of *truth*; a further commonality which does not feature in most of the linguistic meanings of reconciliation, but which is central to meaning 5. The political interpretation is looser than the more precise linguistic meaning, as the ambition to create a single, complete, common truth from all possible accounts is rarely hoped for, let alone achieved. South Africa's TRC comes closest to retaining this ambitious objective, with its recently published report intended as a full account of the truth, which will also contain a judgement on all the parties concerned. Certainly the absence of some process of public truth-telling is a major inhibition to reconciliation, and therefore at least to long-term or positive peace, but truth commissions or other processes of revelation and recording of the past also inevitably throw up issues of amnesty versus prosecution, which take us more squarely into the realm of justice.

Conceptualising justice

Historically justice also has a wide set of meanings in philosophical and political terms. In post conflict situations the question of 'how to see that justice is done' is itself usually a matter of political negotiation and compromise as, almost by definition, different sides have different conceptions of what would constitute a just outcome, even if they share an understanding of just principles. During conflicts it is common for both, or all, parties to conceive of themselves as fighting for justice. The challenge in a peace settlement is often to find a conception of, and structures to ensure, a minimal type of justice which is acceptable to all the key players. Central in this process is usually the establishment of some common truths about the past, and agreement about how crimes of the past should be defined and handled.

Concepts of justice in peace settlements

There are of course a number of different models of how to prosecute past crimes at the end of a war. Where relatively few individuals are cast as being responsible for war crimes, and there is a clear victor who has unchallenged power to determine the process of justice and who is also able to act as self-appointed judge, it is possible to have a narrowly focused process of

prosecution, such as the Nuremburg trials after the second world war. In conflicts in many parts of the South, and certainly in CPES, however, there is rarely such a clear victor, making the allocation of blame a complicated process. Commonly a former power holder is granted the right to be part of the new government as part of the settlement itself and therefore some compromise on the full criminalisation of human rights abuses committed during the war is almost inevitable. It is also common in CPES for many people (even the majority) to be implicated in war crimes. Under such circumstances it is difficult to avoid prosecution being seen as vengeance, even if full prosecution of all parties is attempted. Even if the logistical problems of prosecuting thousands, or even millions, of people could be overcome, there are still difficult issues of judgement to be made about the type of punishment appropriate where reconciliation is also hoped for. The stakes become high in criminal prosecutions; a process which is set up to mete out justice but which ends up being partial or incomplete, or being seen in that way (for many reasons: fear, poor information, inadequate legal support, being overruled by new political leaders), is often regarded as having made the situation worse. New cycles of resentment are likely to be triggered where there has been a history of violence followed by impunity and vengeance, as is the case in many CPES. Mass prosecutions are not only seen as costly and time-consuming, but also as counterproductive in terms of reconciliation and peace if too many old wounds are reopened on both or all sides. An ability to reconcile in the sense of meanings 1 and 2 above often seems to require some degree of forgetting, as well as forgiving, which is not compatible with long, drawn-out prosecutions which keep alive the issues which contributed to the conflict in the first place. This is especially the case where issues of identity were part of the causes of conflict.

Increasingly, war crimes, serious abuses of human rights and crimes against international humanitarian laws are thought to require some sort of punishment for justice to be seen to be done at the end of a conflict, and in order for peace to hold, whether or not reconciliation of any sort takes place. International human rights organisations tend to adopt this position on justice. Yet what punishment of precisely which acts, and which people, are political choices for which there are no clear and easily implementable guidelines, choices which themselves affect the ability of many survivors to embrace the project of peace rather than return to conflict. They are thus not made with reference to any philosophical framework for conceptualising justice. On the positive side, attempts to mete out justice for past crimes can also increase the chances for peace in the longer term; both by reassuring those 'innocent' of crimes who would seek vengeance in the absence of justice, and to exclude from positions of power, if not from society, the 'guilty', who might have their own reasons for prolonging or renewing the conflict.

On the other hand, CPES are usually settled by political compromise incorporating amnesty. Amnesty can be a useful way to recognise the moral justice of acts which are illegal, and yet if the allocation of amnesty is mishandled it can lead to a sense of injustice which can be sufficient to threaten peace. As is now widely accepted, too much amnesty can seem like impunity, which itself can be a trigger for further conflict.⁹

The promise of a truth commission (TC) is increasingly being seen as an essential part of a just settlement (as well as playing a role in reconciliation). TCs have in practice taken many different forms, from quite minimal exercises with a single judge reviewing available evidence and releasing only part of the findings, through various models allowing different intensities of investigation and openness of revelation.¹⁰ TCs can stand as a form of justice in themselves, even if they are not accorded the authority to allocate punishment or reparation, as they can still hold individuals and groups of people to account for past events. This strength is also a weakness, however, in that they usually create a single narrative of history and so work against some of its multiple strands, and some accounts and experiences are by definition marginalised or denied.¹¹ In conflicts where there are more than two sides, and particularly in CPES, a single narrative is almost bound to be contested, so the delivery of this form of justice has limited effect.

Conceptions of justice during a transition to peace

During a transition phase between outright conflict and peace, it is common to find that alternative systems of justice to those through formal, national legal proceedings are functioning. In some cases these consist of well established community systems which are rooted in local culture and politics and operate with widespread support and acceptance. More often, however, local systems of justice are relatively new and tend to reflect local power structures. In situations where light weapons are easily available during the transition, as they are in many CPES, such power relations are likely to be underpinned by the direct threat of violence. There is no way in the abstract, from a distance, of determining whether these systems of local justice are sufficiently robust that they should be built upon in the transition, or should be wholeheartedly overturned; there is likely to be a mixture of both extremes in any one country and fairly detailed knowledge about the local political and social circumstances is essential in order to make an assessment.

Individual justice in the form of personal security is increasingly seen by outside observers as being important for the successful maintenance of a ceasefire. Rights of protection from arbitrary violence, or from former enemies, and the protection of property rights, are seen by many as a touchstone of a transition to peace. Aside from any 'objective' criteria of what there should be in a good peace settlement, people's support for peace is likely to be highly coloured by their own experience of personal security. Therefore it is fundamental as a protection against a cycle of revenge attacks, as well as being fundamental for reconciliation. On the other hand, where these rights have not existed for a majority of the population for a long time, then there is likely to be a positive response to even rather limited improvements—*absolute* measures of the degree of personal security may not be necessary in the short term. Ongoing research proposes a reconceptualisation of the rule of law in which minimalist versions might be appropriate in the short term,¹² in contrast with a maximalist conception of the rule of law, including human rights, democracy and good governance, which may only be achievable in the longer term.¹³

In the longer term, competing conceptions of justice re-emerge. For protagonists the need for social justice and/or historic redress becomes a greater priority. For the international donor community conceptions of justice come to include political freedoms (particularly as expressed through structures of multiparty democracy); an effective and independent judiciary; and respect by the government for human rights and other features sometimes included under the umbrella of 'good governance'.

Justice and reconciliation: a matter of getting the balance right?

There is no established normative or deductive theory of the chances of success for post-conflict justice and reconciliation. One might therefore propose that post-conflict situations sit somewhere along a continuum between the following two extremes:

1. A minimal peace settlement with no addressing of social justice; minimal rule of law and personal security; no national reconciliation measures (other than leaders signing a peace agreement); no allocation of blame for war crimes and complete impunity; 'low intensity' democracy and fragile protection of human rights.
2. A complex peace accord with international support and local political agreement for longer-term provision of: processes of truth revelation, prosecution, amnesty and reconciliation; rule of law; ensuring absolute standards of human rights; facilitating widespread participation in associational life and democratic political structures.

It is possible to elaborate further on the conditions of the second extreme, which might constitute the basis of a positive peace, but for our purposes the concern is the ways in which countries might be able to move away from the first in the direction of the second. The remainder of this paper considers the policy options available to handle justice and reconciliation at the settlement and longer-term peace building stages, and particularly highlights potential roles for the international community.

Policies for post-conflict reconciliation

Policies on reconciliation in peace settlements

Central to policies of reconciliation is usually some sort of truth process. The multi-causal nature of CPES tends to create exceptional difficulties in reaching a peace settlement at all, but it also makes agreeing the terms of a truth process highly problematic. The pressure to put aside past antagonisms and to agree on a common, perhaps minimal, truth becomes greater under such conditions. Nonetheless, there are advantages to some sort of truth process being agreed at the settlement stage, when forces for peace are stronger, rather than having to 'reopen' debate after the past has been 'shelved'. Examples of this difficulty may be seen in Namibia and Zimbabwe. In Namibia people seeking the truth about what happened to hundreds of young people who left the country to join the

liberation movement have been thwarted by the party of government, and as a result 'the detainees issue' remains an intense source of discontent for many. The Zimbabwean government actively covered up evidence of the army's activities in the 1980s and now, as evidence is being presented by human rights activists, the whole issue is becoming a source of political destabilisation and threatens to undermine the 1987 unity agreement between the two main parties.

Policies on reconciliation in longer-term peace-building

There are many choices about the nature of a TC, not least whether the objective to be prioritised is to be reconciliation or justice. South Africa's TRC is ostensibly aimed at revealing truth and building reconciliation, rather than truth and justice, but it is too early to evaluate the effects on reconciliation in that country, as the TRC has only just produced its report. It has nonetheless received so much international attention that it is already influencing considerations of what might be possible in terms of longer-term reconciliation in highly divided societies.¹⁴

South Africa's Truth and Reconciliation Commission (TRC). South Africa's conflict is not usually considered to have been a CPE and, although the control of state power was always at the heart of resistance against apartheid, the conception of the state, and indeed much of its composition, remained intact after the Peace Accord in 1992, in stark contrast to the common outcomes of CPES. Nonetheless the TRC is regarded internationally as a remarkable attempt to reconcile former enemies in a newly constituted state through a process of revelation and recording of past events. The TRC undertook three main processes: determining the terms on which amnesty may be granted to culprits of gross violations of human rights; determining the type of compensation to be awarded to victims/survivors; and producing a 'truth report' of South Africa's history under apartheid.

Perhaps the TRC's most noted activities have been the public hearings of evidence and pleas, although behind the scenes there has been a lot more activity. The Peace Accord was founded on a recognition that many human rights abuses could be seen as political crimes for which amnesty could be granted, and that the state should bear some responsibility for reparation to victims. The TRC was thus not engaged in criminal prosecutions, although it did rely heavily on South Africa's sophisticated legal apparatus (to represent people and to implement its authority to subpoena) and the police force, which is now completely under the control of the new government,¹⁵ conditions which are rarely found in CPES. The hearings themselves have often taken on the shape of a Christian confessional, which has attracted some criticism within South Africa, although mostly because of the linked expectation that someone who makes a confession will be entitled to forgiveness—by Archbishop Tutu, if not by the victims and their loved ones.¹⁶ The right to amnesty is not automatic, but, as in Tutu's assertion that 'those who have been oppressed are duty-bound to forgive', there has been a linking of confession with forgiveness in the public consciousness.

Unsurprisingly then, perhaps the most common criticisms in South Africa of the TRC have been that victims are not given a choice about whether their former oppressors can have amnesty or not (it is the latter's right to seek it) and where for instance, a notorious torturer is granted amnesty, and retains a privileged lifestyle, this in itself limits the extent of reconciliation (in the sense of meanings 1 and 3, along with the element of forgiveness), particularly in the long term. There is no requirement for an apology, and no automatic barring of people from public office who admit to having committed crimes but have been granted amnesty, although the TRC could technically make such recommendations.

Some people argue that further preconditions are required before forgiveness (and thereby reconciliation) can occur, ranging from full apologies, direct compensation from the perpetrators to victims/survivors, through to exacting punishments. For some people justice is claimed as a prerequisite for reconciliation and some families have attempted to prosecute individuals, although this has tended to trigger an application for amnesty by the accused. For legal prosecutions to be successful, greater proof has to be provided than was acceptable at the TRC, in a context where many police records were destroyed after the Peace Accord, and other evidence is hard to come by.

Some individuals who seek a confrontation with those who committed crimes against them or their loved ones as a way of beginning reconciliation did not expect the TRC to facilitate this. Many who suffered during the terrible violence in KwaZulu-Natal, and other parts of the country, in the period leading up to the Peace Accord, for instance, did not see the TRC as being of any use in building peace or reconciliation within their communities, where former enemies are neighbours. A number of mediation and reconciliation organisations have been set up to attempt to address these but they take place outside the control of the state and largely without international assistance.¹⁷

Other strategies for reconciliation. As in South Africa, it is common elsewhere for reconciliation to be attempted in a variety of ways in the long term (particularly as in meanings 1 and 3). New organisations are established, with the aim of mediating persistent tensions within communities; even national peace organisations such as women's organisations, may appear for the first time,¹⁸ and such work is increasingly thought by the international community to be best handled by organisations in civil society. Old organisations are sometimes revived and given new meaning, although they may be referred to as 'traditional' or 'cultural', and even though it is exceptional for any such organisation or institution to have maintained robust legitimacy through a CPE, or to have acquired it in a short time, they are often identified by outsiders as ideal vehicles for delivering reconciliation. Examples are to be found in Scherrer, who puts great faith into the revived institution of *gachacha* in Rwanda,¹⁹ and in Mani²⁰ and Chicucue²¹ who refer to similar organisations in Mozambique. Such 'delegation' of the responsibility for reconciliation is in itself attractive to political leaders and international actors and also attractive because of the simultaneous association with *individual* (as well as social) reconciliation. Such organisations are normally reflections of local power structures, with no inherent

virtue or necessary commitment to egalitarian principles. Simply because they exist outside the control of the state does not guarantee that they embody any qualities of morality or concern for the greater good, an erroneous assumption which is often made by outsiders who work with a simplistic notion of civil society as merely the sum of associational life.

Such ignorance does not merely lead to misunderstandings, however, as the search for relevant organisations by international donors itself creates a pressure for them to come into being, and some are set up with that connection explicitly in mind. Moreover, the desire of outside agencies to support 'cultural' practices or local organisations, or members of civil society, who claim to be working at reconciliation can lead to clumsy and damaging interventions. In the absence of knowledge and understanding of local politics, the presence of donors and international NGOs can distort local political dynamics, as occurred in Somalia, where some clan leaders and warlords took up the opportunities for entrenching their power which they recognised in the financial and political recognition accorded them by donors.²² In Mozambique an increasing amount of international attention has been focused on local ceremonies of reconciliation in rural areas, which has certainly put some of them under strain. Elsewhere, such unwanted attention could make members of these organisations vulnerable (even to violence), while an inappropriate injection of funds can distort the political content of such activities.

There are therefore a number of potential problems with intervention from outsiders in activities of reconciliation while objectives remain vague, evaluation non-existent and timeframes short. We have seen that people work with quite different ideas about reconciliation and a lot of different activities can be captured under this banner. Evaluation tends to be rather crude and restricted to asking, 'how much fighting has there been?'. Many of the objectives of such organisations require a long timeframe, but the pressure to produce results quickly is often fierce. It ought to be a basic requirement of outsiders seeking to intervene in these contexts that they know the organisations they want to support, and although this is a lot to expect from outsiders in rural areas where local histories remain obscure to all but their participants, it is nonetheless necessary to work from this basis, rather than making assumptions about what is there. It might well be possible for outsiders to make a constructive contribution by bringing in new ideas and shaping local social and political organisation and activity, but it is important to be clear about what is being aimed for and certainly to work within a framework of justice.

Reconciliation between communities, or sides in the conflict, can also be strongly affected by the political and economic conditions of the country, once a negative peace is established. This is a wide-ranging issue, but two key aspects are worth highlighting here. The overall economic situation (which may or may not be influenced directly by any particular agreement with international organisations), and the economic conditions of aid to the new state through, for instance, a structural adjustment programme, can have a direct effect on the chances of reconciliation occurring,²³ in the sense of meanings 1–4, and therefore also on the chances of peace holding. For instance, if economic conditions severely restrict, or even reduce, the provision of health services, the

competition over scarce resources tends to increase the tension between former enemies.

A final feature of the newly emerging state which has an impact on reconciliation is the nature of its political structures. The precise form of democracy adopted in the new situation can have some impact on the type of peace; whether this be single-member constituency, first-past-the-post, leading to a single victor, or different systems of proportional representation which allow other configurations of power varying with political context. The introduction of a new electoral system quickly after a peace settlement can intensify an already volatile political environment where there has not been time for reconciliation, and the fragility of government's power can in itself also undermine reconciliation processes. Where there is a history of politicised ethnicity, and where it has played a role in the conflict, the risks of a quick election can be even greater. Moreover, an election can increase the power of people least committed to reconciliation and justice; 'voting for monsters' as Green expresses it.²⁴

Policies for post-conflict justice

Policies on justice in peace settlements

A peace settlement in which there has been international intervention is increasingly likely to include a package of arrangements including a date for the holding of elections; condemnation of war crimes but no commitment to mass prosecution; the return to rule of law; and commitment to at least the most basic human rights. There are, however, different political choices about the delivery of justice through these policies. In the tense context of the transition, certain kinds of compromises are commonly made; it is not unreasonable to suggest that 'the *justice in transition question* is one of the issues where leaders in conflict are most likely to reach a deal over the heads of ordinary people'.²⁵ Broad commitments which set limits to political choices in the longer term, covering the use of, or limitations on, the following are usually set out at the settlement stage: amnesty; prosecution for human rights abuses and other war crimes; truth processes; and mechanisms for the re-establishment of the rule of law and personal security.

Agreements on amnesty and impunity in peace settlements. Amnesty and impunity are often seen as essential by parties bargaining in peace negotiations, but amnesty without disclosure of the past often leads to revenge and/or retribution. The pressure of time and the difficulties of reaching agreement between several parties tend to militate against thorough analysis of the implications of the precise wording of amnesty agreements, or evaluation of them in terms of justice (or reconciliation). It is rare for consultation to occur widely beyond those in the negotiating process, or even for publication of the conditions, and so a potentially useful tool in bringing peace is often seen by many people to undermine their sense of justice right from the settlement stage.

Setting the terms of prosecution in peace settlements. Some prosecution under international law for gross human rights abuses, war crimes and/or genocide is increasingly expected after a CPE, whether all parties are 'equally guilty' or not. Certainly this is the position taken by many human rights organisations (international and local); the point of international law being to reflect universal values. As the principles of intervention are not applied uniformly over the globe, it is all the more imperative that internationally recognised principles and international law are followed in local or national prosecutions which take place after the conflict, unless a clear justification is publicly made. A permanent international war crimes tribunal has now come into being and the one-off for Rwanda was certainly a step in the right direction. If international law is to be applied, it is probably necessary that the international community (particularly the UN) make a commitment at the point of a settlement, along with some negotiated agreement about how this is to be done, and exactly by whom, as it is much harder to do this after the settlement.

There are many other pitfalls with prosecutions: the chances of undermining justice by prosecuting the 'wrong' people, for example, those who are easy to find evidence against, rather than those who gave orders; and disagreements about appropriate punishment, particularly whether or not to use the death penalty. Furthermore, as we have seen, the logistics of mass prosecutions are often overwhelming for the new state, as is so vividly illustrated in Rwanda. Finally, if the international community is to be involved, this can lead to different notions of justice being applied simultaneously, as is also occurring in Rwanda (between the tribunal in Arusha and courts inside the country) and to the perception at least that sovereignty and the legitimacy of the new state are being undermined. These issues are considered further in relation to policies on justice in longer-term peace building below.

Agreements on truth commissions in peace settlements. While for the majority of people a truth commission of some sort, or full prosecution, might be the only way justice can be seen to be done, and even to pave the way for reconciliation, a commitment to a TC can easily be omitted from peace agreements, especially where they are fragile, as is common in CPES. The complexities of CPES, in which disputed history and identity politics usually figure, make the objective of creating an agreed account of the past extremely problematic once the fighting has stopped. In some circumstances the attempt itself may re-inflate some of the tensions which caused the conflict in the first place. At the point of settlement it is highly unlikely that these problems could be resolved, but making a commitment to undertake a truth process at some point might be a useful undertaking.

TCs are more often seen as a way of ensuring justice than as a means of reconciliation,²⁶ in contrast to the formal aim of South Africa's TRC. They can help to avoid the problems of mass prosecution for war crimes, and so can be useful for reaching a settlement. Where the terms of a TC are such that people will not be held accountable for human rights abuses, there is a tension between the operation of a TC and universal values of justice, and some human rights

organisations have therefore argued that some form of punishment is also necessary (although this can be mitigated to suit the circumstances). A counter-argument is that the primary contribution to justice from a TC is the final report, in which a judgement is passed on the morality and legality of different parties (in contrast to South Africa's TRC, where the process itself is also seen as important).

Improving personal security and the rule of law in peace settlements. As we have seen, an important component of justice immediately after a conflict is the establishment of the rule of law and personal security, although the details of how this should be achieved are often neglected, as in the general advice given by Minear and Weiss, who do not mention the police or judicial system in their consideration of humanitarian intervention.²⁷ Yet in 'normal' conditions it is the state which is the guarantor of personal security and the rule of law. In a transition to a new state how should these rights be maintained and by whom? Common approaches are either to replace the security forces with outsiders, such as UN peacekeepers, or to have existing forces monitored by the latter. In CPES it is more likely to be the former, as there are less likely to be forces which are unambiguously part of the new state and it is highly likely that there are still armed forces which are at least ambivalent about the new situation. The processes of any demobilisation are also significant here, but many of the details of what is useful and what are the dangers depend on local circumstances.

The provision of safe zones by third parties can go some way to beginning the process of establishing personal security during the transition, although they can be fraught with the difficulties of maintaining third-party impartiality and neutrality, as seen in their use by the French in Rwanda and by the UN in Sudan. As 'community leaders' present themselves as being able to deliver aspects of personal security, it is tempting for the international community to entrust them with resources which entrench their power and authority further. The temptation is even stronger if such initiatives are presented as 'community justice', as seen in the examples of some clan leaders in Somalia,²⁸ and Local Peace Committees in South Africa.²⁹ In accepting 'local' values about justice in this way, rather than universal principles, existing power structures tend to be strengthened by violence and may even perpetuate the issues which were part of the conflict, this commonly perpetuates a high tolerance of violence against women. On the other hand, a simplistic approach which assumes that there are no surviving structures of policing which are worthy of international support may undermine what is already there. This also happened in some parts of Somalia, where a rudimentary police force was undermined by international aid efforts.³⁰ Positive examples of locally organised and informal justice do exist, and even though they may be less likely in CPES, it is important that outsiders remain open to the possibility.

A final point on the establishment of justice in the longer term is that, in order to protect and uphold basic human rights, there is a need for protection and support to be given to local and international human rights activists during the settlement and transition phases. The presence of such independent witnesses can affect the terms of peace itself. For example, observers' accounts of the

activities of South Africa's 'third force' were a significant factor affecting the peace negotiations during 1991–94.³¹

Policies on justice in longer-term peace building

In the longer term, people will expect more comprehensive justice, even where demands for the broadest social justice are foregone. Dealing with crimes of the past remains high on the agenda for justice. Recent experiences and international debates about the potential effectiveness of TCs in delivering such justice suggest they have rarely fulfilled the following criteria:

- *Ownership.* A TC must be owned by the new state, rather than merely the new government or political opposition or the international community, if impartiality is to be achieved.
- *Timing.* There must be some flexibility about the cut-off point or they can end too soon to be worthwhile, but at the same time it is important that they begin soon after the peace settlement.
- *Impartiality.* Hearings must be seen to be impartial, even if they report an overall assessment at the conclusion (as has happened in South Africa). Individual members of a commission have to have a reputation for impartiality, and should ideally be legal experts and headed by a judge. In CPES this suggests an important potential role for the international community, although not a straightforward one, as being international will not automatically guarantee impartiality (or the image of impartiality) where part of the international community has been party to the conflict itself (or where it resisted calls for help), or where the international community tries to impose international principles of justice which run contrary to popular opinion (eg rejection of the death penalty, such as in the Rwanda case).
- *Clear objectives.* Some leeway to interpret the nature of political crimes may be desirable but this could also undermine the whole process. A TC ought to specify human rights abuses very clearly before the commencement of hearings and this definition must be compatible with the terms of any peace agreement or the findings are likely to be subsequently overturned. It should also be compatible with international law.
- *Jurisdiction.* This should extend to crimes committed beyond state boundaries (especially for CPES, but also true for South Africa). This also suggests a potential role for the international community in facilitating crossborder investigations and hearings.
- *Publicity.* People have to know what is happening. In rural and largely illiterate countries this requires considerable effort and expense, with potential room for support from the international community.
- *Information.* A commission must be in a position to investigate and to prevent the destruction of police and military files; the failure to do so in South Africa has protected many people from prosecution. These rights (and that of subpoena) are important for finding out the fate of disappeared people as well as to investigate accusations. There is an important role for members of the

international community (especially NGOs) in providing evidence of human rights abuses.

- *Punishment.* If all those revealed to be guilty are not punished this could be counterproductive, but the appropriate level of authority to mete out punishment does depend on local political circumstances. Punishment could be symbolic, or include such things as banning from public service as well as amnesty. The failure of a punitive process is likely to have a worse impact on perceptions of justice than not having one at all.
- *Reparation.* The state must be able to offer some sort of compensation to victims—again there is a role for the international community in underwriting some of the cost, but this must be done in such a way as to reinforce the legitimacy of the new state. Such reparation need not be directly financial (for example, free schooling, training, setting up of monuments).

Expectations that TCs can constitute an act of judgement on the nature of the conflict itself, as well as delivering individual justice for past crimes are unlikely to be met. Nonetheless TCs can certainly go a long way in doing so if all the above criteria are taken seriously. In addition, there is probably always a need for additional forms of truth-seeking. These can include smaller-scale, local truth hearings, and the provision of open access to public records (including court records). Unless all such measures are also coupled with clear policies in relation to amnesty and punishment, however, they are unlikely to fulfil popular expectations of justice, and certainly not those expected from a more maximalist rule of law. The chances of success in the longer term are therefore closely connected to what was agreed at the settlement. The Rwanda case illustrates an alternative approach to handling crimes of the past: justice through prosecution.

Rwanda's twin trial system: justice without reconciliation. Rwanda clearly was a CPE by 1994, and criticisms of the way that justice and reconciliation have been handled in the aftermath are the reverse of those made against South Africa's TRC; the processes which have been set up are primarily driven by the new government's objective of bringing to account all those people who took part in the massacres, with far fewer attempts to establish processes which might bring about reconciliation between citizens. The separation of processes in this way is certainly problematic because the victor (the government) is not seen as even-handed, thus risking perpetuation of long cycles of impunity and vengeance between groups of Hutu and Tutsi people, even before issues of reconciliation are considered.

Thousands of suspects have been arrested and are held in jails within Rwanda, awaiting trial for a variety of crimes, including a retrospective law against genocide and crimes against humanity which had to be passed after the massacres. Very little international support has been forthcoming to assist in rebuilding or reinforcing the legal system, in spite of many pledges made in the wake of the massacres. The police, legal system and judiciary are all inadequate to process the prosecutions, let alone provide services for the accused which meet international standards, and few trials have actually taken place. Indeed Rwanda has been criticised by Amnesty International and other human rights

organisations for the way in which it has conducted prosecutions to date.³² This leaves the internal processes subject to international criticism while also not delivering on even the most partisan calls for punishment of the accused.

The main ways in which the international community is assisting the Rwandan government and people in prosecuting those responsible for the massacres of 1994 is through the funding and running of the International Criminal Tribunal for Rwanda (ICTR). It has been funded through the UN and was subject to a good deal of criticism before the trials began, with two of its three top officials resigning at the beginning of 1997, under a cloud of accusations of mismanagement. Furthermore, the inability of the ICTR to impose the death penalty, and the considerable legal support it provides for defendants, have made it a target for criticism by people in Rwanda, some of whom see it as a process whereby the international community is imposing a specific political agenda on the Rwandan people which they did not choose. This tension was certainly not helped by the fact that its purpose was not made clear in Rwanda; that its hearings are held in Tanzania; and that it has been slow to act and poorly co-ordinated with Rwanda's internal processes of prosecution.

There is growing concern about the extent to which the processes that are evolving in Kigali and Arusha are adequate for justice to prevail, even in terms of holding people accountable for gross human rights abuses. Such uncertainty adds political tension to a situation in which thousands of Hutu people have now returned to Rwanda from the Democratic Republic of the Congo, as well as from other neighbouring countries, some of whom are also suspected of having played a role in the massacres. They are also seeking justice and retribution, for lost property and alleged abuses by Rwandan forces in the former Zaire. Raids on prisons in 1997 in which hundreds of prisoners escaped have to be seen in this context. Clearly both systems (of the ICTR and Rwanda's own trials) are highly problematic in the way they have been implemented, but whether a more just outcome would have been achieved had a different approach been taken, such as a far-reaching and national TC, is hard to say.

Establishing the rule of law in the longer term

A minimalist rule of law which is acceptable at the settlement stage has somehow to be transformed to a more maximalist one for longer-term peace building. The constraints set at the settlement stage remain in place, but longer-term solutions have to be found. For instance, the challenges faced by a new state in ensuring personal security for its citizens are profoundly affected by the economic environment. Where people face poverty and insecurity it is more likely that there will be greater problems in the protection of property and prevention of violent crime. Where small armaments are easily available, these difficulties are compounded to such a degree that at least one observer has suggested that the arms and security issue ought to be more of a priority for the international community than any attempt at supporting development.³³

Similarly, the type of political system which emerges does not merely affect issues of justice in the short term, but can be a long-term problem as well. In CPES where identity politics, or some other expression of ethnicity, were an

important part of the causes of conflict, if a political system which reinforces ethnic divisions in the short term is not reformed, it will place overwhelming constraints on the reinstatement (or establishment) of the rule of law and national systems of justice in the long run.³⁴

Conclusion

Justice and reconciliation are fundamental to peace-building, but there is no adequate theorising of how these relate to each other or even a common language of what they all mean in the context of post-conflict peace-building. At present reconciliation has at least four different meanings and it is not unusual for several of them to be used in the same context. In the short term this can allow a useful political fudge to occur during peace negotiations, but this inevitably leads to problems later on, as tensions between the different meanings emerge and the policies on which they are based reveal their limitations. Similarly, there are different kinds of expectations about what constitutes justice and the feasibility of it being established at different times and under different circumstances. It has become common for the principles of international law to be applied differentially by the international community, which only serves to complicate the picture even further. Clarifying terms and developing a common understanding of how justice, reconciliation and peace are interrelated would clearly be useful immediate tasks. This paper has merely begun to indicate how what is decided in the short term, usually at the point of a settlement or peace agreement, is significant for what is possible in longer-term peace building processes.

After CPES the potential roles for outsiders are even greater than in most other post-conflict situations, even though to date the international community has not fully engaged with the issues of reconciliation or justice. From this review it seems that there is a greater potential for international intervention in measures to promote justice than reconciliation but, until the international community (whether UN, governments or INGOs) engages fully with the implications of international law on human rights abuses and war crimes, it is difficult to see how it can engage on other aspects of justice. In CPES particularly there is evidently an opportunity to insist that international law is enforced as the new state is likely to be too weak to overrule such intervention, although too great a political challenge to the new state might lead to its collapse. The view has to be considered that, where the international community, and particularly the UN, implements international laws, it is imposing inappropriate values on societies which had no say in their design, and is furthering a project of oppression, or imperialism, or some other form of global dominance. However, if such a view has any validity then the most compelling responses are surely to embark on a reform of international law and the ways in which it is implemented, so that it does reflect universal values of justice.

There are some more specific lessons which can be borne in mind in the meantime. It is important for different members of the international community to take up their potential roles in promoting and strengthening justice from the moment of a peace settlement, and these range from taking responsibility for the

prosecution of war crimes, to providing support for the new state through educational, training and material resources, as well as following through with support for implementation. Most of the mistakes made by the international community which have been highlighted here were born out of ignorance of local political conditions, and so a greater humility is also necessary, along with a commitment to further develop the weak systems for evaluating policies and progress on justice.

This paper has argued that reconciliation is generally a more domestic affair in which the roles of members of the international community should be limited to supporting what emerges from within societies. There is still nonetheless an important advisory and education role in passing on the lessons of comparative countries, and the costs of different strategies. Attempts which aim to support local initiatives must be tempered with the humble acknowledgement that reconciliation, in whichever meaning, is usually a very long process which cannot be rushed by outsiders.

Notes

- ¹ J Galtung, 'Twenty-five years of peace research: ten challenges and responses', *Journal of Peace Research*, 22, 1985.
- ² N J Kritz (ed), *Transitional Justice. How Emerging Democracies Reckon with Former Regimes*, Vol II: Case Studies, Washington, DC: US Institute for Peace Press, 1995.
- ³ K Asmal *et al*, *Reconciliation Through Truth. A Reckoning of Apartheid's Criminal Governance*, Cape Town and Johannesburg: David Phillip Publishers, 1996, p 46.
- ⁴ Adapted from the *New Collins English Dictionary*.
- ⁵ C Tapscott, 'National reconciliation, social equity and class formation in independent Namibia', *Journal of Southern African Studies*, 19(1), 1993, pp 29–39.
- ⁶ R A Wilson, *The People's Conscience? Civil Groups, Peace and Justice in the South African and Guatemalan Transitions*, London: Catholic Institute for International Relations Briefing, 1997, p 35.
- ⁷ M Ignatiuff, 'Overview: articles of faith', *Index on Censorship*, 5, 1996, pp 110–122.
- ⁸ For a fuller account of the role of forgiveness in peace, see J O'Connell, 'The essence of forgiveness', *Peace Review*, 7(3/4), 1995, pp 457–462.
- ⁹ This view has now become widely accepted; a spokesperson from the US State Department, speaking of Latin American countries which have a history of cycles of impunity and vengeance, said that there is now a 'need to acknowledge the suffering of victims and honestly reckon with the past to make a successful transition to democracy. Cited in *Catholic Institute for International Relations News*, London, May 1996.
- ¹⁰ Kritz, *Transitional Justice*; and P B Hayner, 'Commissioning the truth: further research questions', *Third World Quarterly*, 17(1), 1996, pp 19–29.
- ¹¹ On South Africa, see G Minkley, C Rassool & L Witz, 'Thresholds, gateways and spectacles: journeying through South African hidden pasts and histories in the last decade of the twentieth century', unpublished paper, Department of History, University of Western Cape, 1996.
- ¹² R Mani, 'Conflict resolution, justice and the law: rebuilding the rule of law in the aftermath of complex political emergencies', paper presented at the British International Studies Association Annual Conference, University of Leeds, 1997, p 12.
- ¹³ *Ibid*, p 14.
- ¹⁴ For example, C Scherrer, 'Central Africa: conflict impact assessment and policy options', Copenhagen Peace Research Institute, Working Paper 25, 1997, pp 37, who recommends some version of it for Rwanda.
- ¹⁵ Asmal *et al*, *Reconciliation Through Truth*, p 24.
- ¹⁶ Minkley *et al*, 'Thresholds, gateways and spectacles', p 10.
- ¹⁷ For example, the Independent Projects Trust, which trains community mediators in KwaZulu–Natal. See G Caine, 'Training for peace', *Development in Practice*, 7(4), 1997, pp 497–499.
- ¹⁸ J Prendergast, *Frontline Diplomacy. Humanitarian Aid and Conflict in Africa*, London: Lynne Rienner, 1996, pp 124–125.
- ¹⁹ Scherrer, 'Central Africa'.