

The Complexity of Reconciliation

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*Is it peace, the end of violence; is it contented individuals and families; is it communities where it is safe to walk the streets, to shop, to go to the mosque or church or synagogue, where women do not fear rape and where men and women feel no pressure to take up arms; is it economic opportunity, education for the children and dignity in old age?*¹

It would be uncontroversial to remark that reconciliation is contested, opaque and hence, attracts a spectrum of interpretation. Some tend to view reconciliation narrowly in a goal-sense, as something to be achieved or an ideal-state. In contrast there are innumerable expansive interpretations that view reconciliation as a process comprised of diverse components and contested values.²

The disagreement over whether reconciliation is a goal or a process, is just one example of what is a “murky concept with multiple meanings”.³ The range of meanings of reconciliation reflects the extensive interest it draws from fields including theology, philosophy, psychology, peace studies, political science, law and even community studies.⁴ Of course, the complexity that is generated makes the term almost impossible to tie down and thus makes attractive a response of “I know it when I see it”.⁵ However, in turn, this desire for reification, the need for a concrete and observable reconciliation phenomena, invites a further set

of questions about what reconciliation actually looks like and where and at what level it occurs.

In this light, this brief explores the conceptual complexity of reconciliation. It is not the intention here to evaluate every claim made about the achievement of reconciliation. Rather the purpose of the brief is to contribute to an increasing need for specificity in the use of the term. The aim of the brief is to encourage consistency in both the meaning ascribed to it, and the use made of it, by policy-makers and practitioners.

In furtherance of this purpose, the brief builds on previous discussions in the *FICHL Policy Brief Series*.⁶ The discussion finds common ground with Melody Mirzaagha, and reinforces her search for an interpretation both within and beyond legal frameworks.⁷ As such, the method of the brief will include placing the term within two relevant contexts, namely, transitional justice, and international criminal justice. In reference to the latter, the brief will focus on the claims, prevalent since the 1990s, that international criminal trials can contribute to reconciliation.⁸ As the Prosecutor at the ICTY has stated, prosecutions are but just one part of its mission, “which at the end of the day has to lead to reconciliation”.⁹ This debate is likely to be increas-

¹ Harvey M. Weinstein, “Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Editor-in-Chief”, in *International Journal of Transitional Justice*, 2011, vol. 5, no. 1, p. 3.

² See Bronwyn Leebaw, “The Irreconcilable Goals of Transitional Justice”, in *Human Rights Quarterly*, 2008, vol. 30, no. 1, p. 106.

³ Eric Stover and Harvey M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, CUP, Cambridge, 2004, p. 5.

⁴ Audrey Chapman, “Approaches to Studying Reconciliation”, in Hugo van der Merwe et al. (eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, USIP, Washington, DC, 2009, p. 147.

⁵ Lorna McGregor, “Reconciliation: I know it when I see it”, in *Contemporary Justice Review*, 2008, vol. 9, no. 2, pp. 155–74.

⁶ See, for example, Carsten Stahn, “International Criminal Justice and Reconciliation: Beyond the Retributive v. Restorative Divide”, *FICHL Policy Brief Series No. 36* (2015), Torkel Opsahl Academic EPublisher (‘TOAEP’), Brussels, 2015.

⁷ Melody Mirzaagha, “Striving Towards a Just and Sustainable Peace: The Role of Reconciliation”, *FICHL Policy Brief Series No. 73* (2016), TOAEP, Brussels, 2016.

⁸ The ICTR was established to contribute to “national reconciliation”: see UNSC resolution 955 (1994), UN doc. S/RES/955 (1994), 8 November 1994, preambular para. 7. In the case of the ICTY, evidence of reconciliation has been identified from speeches by prominent Tribunal figures, including ICTY President Theodor Meron: see Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia*, Routledge, 2014, pp. 38–39.

⁹ UN News Centre, “Interview with Serge Brammertz: Prosecutor at the International Criminal Tribunal for the Former Yugoslavia”, 9

ingly significant for the ICC as it expands its case load and extends the duration of prosecution interventions.

The first section of this brief includes a discussion of ‘thin’ and ‘thick’ approaches to defining the term. The second section looks at a related problem of determining the location at which reconciliation occurs and thus the components it comprises. Penultimately, the brief explores the relationship of reconciliation to the context of transitional justice. In light of that relationship, the final section provides some reflections on the expectations placed on international criminal trials to contribute to reconciliation.

1. Definition

Reconciliation emanates from the Latin word ‘reconciliare’, with ‘re’ denoting ‘back’, and the ‘conciliare’ the notion of ‘bringing together’. This accords with the Oxford English Dictionary which defines ‘reconcile’ as “to bring (a person) again into friendly relations [...] after an estrangement or to reunite into concord and harmony”.¹⁰ This is a thin conception of reconciliation based on a current absence of conflict: that, in short, people ought to accept one another and be willing to put up with the opposing positions of others.¹¹ In that sense reconciliation is focused on repairing past relations, and is about “finding a way to live alongside former enemies – not necessarily to love them, or forgive them, or forget the past in any way, but to coexist with them, to develop the degree of cooperation necessary to share our society with them”.¹²

In contrast, some argue that this focus on simply ‘getting on’ is too minimal. This risks a hollow reconciliation captured by the words of one Bosniak: “We are all pretending to be nice and to love each other. But, be it known that I hate them and that they hate me”.¹³ Consequently, Halpern and Weinstein advocate that reconciliation must be more than coexistence but that people must also see the humanity of one another and develop empathy with each other too.¹⁴ This view of reconciliation is more future-orientated, concerned with constructive relationships and the re-building of trust to enable people to move from past divisions to a shared and peaceful future.¹⁵

June 2011 (on file with the author).

¹⁰ *The Oxford English Dictionary*, Clarendon Press, 1989, pp. 352–53.

¹¹ Chapman, 2009, p. 149, see *supra* note 4.

¹² David Bloomfield, “Reconciliation: An Introduction”, in David Bloomfield, Teresa Barnes and Luc Huyse (eds.), *Reconciliation after Conflict: A Handbook*, IDEA, 2003, p. 12.

¹³ Jodi Halpern and Harvey M Weinstein, “Re-humanising the Other: Empathy and Reconciliation”, in *Human Rights Quarterly*, 2004, vol. 26, no. 3, p. 561.

¹⁴ See generally *ibid.*

¹⁵ See Ervin Staub, “Reconciliation after Genocide, Mass Killing, or Intractable Conflict: Understanding the Roots of Violence, Psychological Recovery, and Steps toward a General Theory”, in *Political Psychology*, 2006, vol. 27, no. 6, pp. 867–68. See also Clark, 2014, p. 45, see *supra* note 8 and Bloomfield, 2003, p. 12, see *supra* note

One, therefore, needs to be clear about whether *a priori*, a thin or thick definition of reconciliation is being used. This includes a more precise treatment of the relationships between ‘reconciled people’. What exactly are we looking for? How are they expected to interact with one another, both now and in the future? This is important because reconciliation can bear a close relationship with other concepts, particularly when one asks where reconciliation is occurring.

2. Location

Traditionally ‘reconciliation’ is understood as operating between individuals, but it can also be directed to a political level where the term can indicate uniting political antagonists and attempting to collapse ideological divides.¹⁶ More commonly, reconciliation is inclusively interpreted as a society-wide process, recognising that it not only extends between the once victim and the perpetrator, but that “those who were mere spectators are also part of the equation”.¹⁷ In so doing, societal reconciliation tends to unfold at all levels “beginning at the level of the individual-neighbour to neighbour, then house to house, and finally community to community”.¹⁸

This pervasiveness of reconciliation invites empirical questions about the phenomena that enables one to know whether reconciliation is, in fact, taking place. Hayner argues that this depends on the responses to questions such as how the past is dealt with in the public sphere, and whether there is one version of that past or many?¹⁹

In order to address such questions, it is said that societal reconciliation requires many components. These include *truth*, in terms of its recognition and understanding, *justice* which combines retributive and restorative forms, *respect* through offering remorse, and *security* of groups that can live free from threats to one another and within the rule of law.²⁰

The difficulty with societal reconciliation is that its elasticity and plurality makes it difficult to precisely discern the degree of reconciliation taking place, and thus it can mask a more discrete assessment of reconciliation. As such, other concepts can become conflated with reconcilia-

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¹⁶ Colleen Murphy, “Political Reconciliation and International Criminal Trials”, in Larry May and Zach Hoskins (eds.), *International Criminal Law and Philosophy*, CUP, Cambridge, 2010, p. 224.

¹⁷ Payam Akhavan, “Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda”, in *Duke Journal of Comparative and International Law*, 1997, vol. 7, p. 348.

¹⁸ Halpern and Weinstein, 2004, p. 567, see *supra* note 13.

¹⁹ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, Routledge, 2011 p. 189.

²⁰ See indicatively Louis Kriesberg, “Reconciliation: Aspects, Growth and Sequences”, in *International Journal of Peace Studies*, 2007, vol. 12, no. 1, p. 4.

tion, which has the effect of stretching its meaning beyond its natural definition. This is doubly problematic, given that some of the components of societal reconciliation sit in tension to one another such as those between justice and peace, or retribution and restoration.²¹ The provenance of these conflicts are often found in transitional justice debates where reconciliation is most frequently cited.

3. Transitional Justice and Reconciliation

Transitional justice is a conception of justice associated with periods of political change, characterised by legal responses confronting the wrong-doing of repressive predecessor regimes.²² The Nuremberg trials are often seen as the origin of transitional justice and this has forever annexed criminal prosecutions to the concept. On this narrow view, transitional justice is, as Deputy Prosecutor of the ICC, James Stewart, puts it, “not a special kind of justice, but simply an approach to achieving justice in a time of transition from state oppression or a condition of armed conflict”.²³

For many others, the concept of transitional justice is more expansive and includes the pursuits of social and restorative justice for domestic audiences, especially for victims. This encompasses goals such as societal healing, democracy, the rule of law and the embedding of peace.²⁴ On this view, transitional justice is a tool-kit of mechanisms, no longer confined to courtrooms, but includes non-punitive responses, such as truth commissions, reparations, and grass-roots and institutional reforms.²⁵

In light of this divergence, the relationship of transitional justice to reconciliation is complex, and dependent on the nature, degree and scale of the atrocities, amongst other factors.²⁶ Generally, however, reconciliation is thought of as an overarching ambition of transitional justice or, to put it another way, reconciliation as a process encompasses transitional justice efforts.²⁷ As if to support this, many transitional justice mechanisms – such as truth and reconciliation commissions – are juxtaposed to reconciliation as one of their clear and discrete goals.²⁸

²¹ Chapman, 2009, p. 151, see *supra* note 4.

²² Ruti G. Teitel, “Transitional Justice Genealogy”, in *Harvard Human Rights Journal*, 2003, vol. 6, p. 69.

²³ James Stewart, “Transitional Justice in Colombia and the Role of the International Criminal Court”, 13 May 2015 (<http://www.legal-tools.org/doc/05d0ce/>).

²⁴ Teitel, 2003, pp. 77–78, see *supra* note 22.

²⁵ The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, UN doc. S/2004/616, 23 August 2004, p. 4.

²⁶ See also Clark, 2014, p. 41, see *supra* note 8.

²⁷ See Hugo van der Merwe, “Delivering Justice during Transition: Research Challenges”, in Hugo van der Merwe *et al.* (eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, USIP, Washington, D.C., 2009, p. 117.

²⁸ Elin Skaar, “Reconciliation in a Transitional Justice Perspective”, in *Transitional Justice Review*, 2012, vol. 1, no. 1, p. 57.

However, the breadth of transitional justice practices that claim to contribute to reconciliation results in the term being imbued with perceptions. These perceptions are shaped as certain mechanisms become personified with reconciliation, and criticism of those mechanisms is conflated with reconciliation itself.²⁹ As a result, reconciliation can become invoked as a short-hand for compromise, bargains, and perceived as “catering to apologists”.³⁰ Hence, conceptually, reconciliation has a tendency to attract expectations that impunity and retribution will be traded for it. This perception also might explain the schism there is in the debate about the contribution of international criminal trials to reconciliation, which reflects a dichotomy between non-punitive and punitive impulses.

4. International Criminal Trials and Reconciliation

One body of opinion within this dichotomy is more restorative, that considers trial proceedings as contributing to reconciliation through apology and remorse.³¹ In criminal trials, however, apology and remorse are not primary objectives but only incidental to the trial process. For instance, an apology may accompany a guilty plea that is considered in mitigation at sentencing, the effect of which could be a defendant’s release after serving two-thirds of his or her sentence.³²

For some, this practice alone is highly problematic given the gravity of the alleged crimes, but there are also further reservations concerning the related practice of plea agreements. In short, the result of these ‘early guilty plea’ agreements are the dropping of (more serious) charges in favour of expeditious proceedings. However, this creates a risk of a defendant’s lack of sincerity in both the admission of guilt and the expression of remorse. There is perhaps no better example of this than the ICTY case of *Prosecutor v. Plavšić*.³³

In her case, genocide charges were dropped in exchange for a guilty plea for crimes against humanity and war crimes. Her guilty plea was accompanied by a statement of remorse which, for many commentators, appeared disingenuous.³⁴ This nonetheless led to a sentencing concession and she was sentenced to eleven years of imprison-

²⁹ McGregor, 2006, p. 157, see *supra* note 5.

³⁰ Leebaw, 2008, p. 102, see *supra* note 2.

³¹ Oliver Diggelmann, “International Criminal Tribunals and Reconciliation’ Reflections on the Role of Remorse and Apology”, in *Journal of International Criminal Justice*, 2016, vol. 14, no. 5, p. 1074.

³² See, for example, ICTY, *Prosecutor v. Momčilo Krajišnik*, Decision of the President on Early Release, IT-00-39-ES, 2 July 2013 (<http://www.legal-tools.org/doc/f12f5d/>).

³³ ICTY, *Prosecutor v. Plavšić*, Sentencing Judgment, IT-00-39&40/1-S, 27 February 2003 (<http://www.legal-tools.org/doc/f60082/>).

³⁴ See Statement of Guilt: Biljana Plavšić, available at <http://www.icty.org/en/content/statement-guilt-biljana-plav%C5%A1i%C4%87>, last accessed on 18 February 2017.

ment. Later, during her jail term, she denied responsibility, arguing that the guilty plea was for reasons of convenience, and did not (re)express any regret. As Subotić argues, this was a defendant perpetrating “a cynical fraud against the international tribunal and victims of crimes she ordered, endorsed, or failed to prevent”.³⁵

The belief that trials can be processes of reconciliation through apology and remorse is reflected in the belief that plea agreements have a moral value beyond procedural expediency. However, if anything, the problems with such agreements expose the very inadequacy of trials as a medium of this type of reconciliation.

A more retributive school of opinion is captured by the words of the current ICC Prosecutor: “the delivery of justice creates conditions which are conducive to reconciliation”.³⁶ This reflects the view that convictions and the imposition of criminal responsibility which stigmatises perpetrators, and thus alleviating “collective guilt through the identification of discrete ‘bad guys’ [and] cool the ardour for collective vengeance”.³⁷ The belief in justice is accompanied by one in the truth that is purported to be provided by trials. Not only can truth acknowledge and lessen victim suffering, but, truth is critical to reconciliation as it can marginalise the “scourge of denial and revisionism”.³⁸

Of course there are a myriad of criticisms of the quality of both the justice and truth that international criminal trials can provide. However, on the assumption that trial justice and truth contribute to reconciliation, then the most fundamental criticism is a lack of positive empirical data to support such a claim. Empirical analysis demonstrates how all sides to a conflict interpret justice and truth by one’s national identity, their self-identification as victims alongside their ethnic allegiances, and this can result in both justice and truth being distorted and refuted.³⁹ Hence, the underlying challenge is ensuring that both the justice and truth offered by trials is perceived as legitimate and ultimately accepted by local populations.⁴⁰

³⁵ See Jelena Subotić, “The Cruelty of False Remorse: Biljana Plavšić at The Hague”, in *Southeastern Europe*, 2012, vol. 36, no. 1, p. 48.

³⁶ Fatou Bensouda, “Justice, Reconciliation and the International Criminal Court”, 6 February 2008 (on file with the author).

³⁷ Skaar, 2012, p. 72, see *supra* note 28.

³⁸ See also Clark, 2014, p. 83, see *supra* note 8.

³⁹ *Ibid.*, p. 54.

⁴⁰ *Ibid.*, pp. 54, 71 and 155.

5. Conclusion

The intention of this brief has been to stimulate further debate about the conceptual clarity of reconciliation. No one should be under an illusion that there is a panacea to reconciliation. The process is multi-faceted, with an open time span, and as William Schabas states, “[r]econciliation is a process that probably takes decades and generations [...]. Banal family feuds can take longer to resolve themselves”.⁴¹ To the extent that it can be reliably identified and measured, then achieving reconciliation is arguably the most difficult challenge for conflict-affected societies. However, as a starting point, activists, practitioners and policy makers need to clear about the sense, level and context in which reconciliation is being cited, and this may counteract the risks that are attendant in how the term is often perceived.

In relation to international criminal trials, this brief also discussed how the consequences of the perception of reconciliation can lead to practices that are antithetical to the *raison d’être* of trials. Criminal trials are not equipped to provide the means for a restorative form of reconciliation, and the practice of plea agreements demonstrates how an emphasis on this can be dangerous. Rather, the *ends* the trials pursue, that of justice and truth, can contribute to societal reconciliation. The challenge for the ICC is to maximise the acceptance of its dispensing of justice and truth amongst local populations in ways that overcome allegiances to political, social or ethnic groupings. Further outreach and a more culturally-embedded presence are just two ways in which the ICC can make an impact on domestic populations, and in the process, improve the perceived legitimacy of its work.

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⁴¹ William A Schabas, “Notes for remarks on ‘Reconciliation’ UN General Assembly Thematic Debate, 10th April 2013” (on file with the author).