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?

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.

The disagreement over whether reconciliation is a goal or a process, is just one example of what is a “murky concept with multiple meanings”. 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. 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”. 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. The discussion finds common ground with Melody Mirzaagha, and reinforces her search for an interpretation both within and beyond legal frameworks. 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. 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”.

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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 human

ting to be nice and to love each other. But, be it known that I hate them and that they hate me”. 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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11 Chapman, 2009, p. 149, see supra note 4.
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

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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. 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. 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”.

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. 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.

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. 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.

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.

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. As a result, reconciliation can become invoked as a short-hand for compromise, bargains, and perceived as “catering to apologists”. 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. 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.

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. Plavišić.

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. This nonetheless led to a sentencing concession and she was sentenced to eleven years of imprison-

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21 Chapman, 2009, p. 151, see supra note 4.
24 Teitel, 2003, pp. 77–78, see supra note 22.
26 See also Clark, 2014, p. 41, see supra note 8.
29 McGregor, 2006, p. 157, see supra note 5.
30 Leebaw, 2008, p. 102, see supra note 2.
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/f2156d/).
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accepted by local populations.40

5. Conclusion

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 ex-
pedience. However, if anything, the problems with such
agreements expose the very inadequacy of trials as a me-
dium 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 re-
conciliation”.36 This reflects the view that convictions
and the imposition of criminal responsibility which stig-
matises perpetrators, and thus alleviating “collective guilt
through the identification of discrete ‘bad guys’ [and] cool
the ardour for collective vengeance”.37 The belief in jus-
tice 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 recon-
ciliation as it can marginalise the “scourge of denial and
revisionism”.38

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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]econcilia-
tion is a process that probably takes decades and genera-
tions […]. Banal family feuds can take longer to resolve
themselves”.41 To the extent that it can be reliably identi-
fied and measured, then achieving reconciliation is argu-
ably the most difficult challenge for conflict-affected soci-
eties. 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 re-
conciliation 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 al-
egiances 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 domes-
tic populations, and in the process, improve the perceived
legitimacy of its work.

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LTD-PURL: www.legal-tools.org/doc/2fc34c/.

35 See Jelena Subotić, “The Cruelty of False Remorse: Biljana Plavšić
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.
41 William A Schabas, “Notes for remarks on ‘Reconciliation’ UN
General Assembly Thematic Debate, 10th April 2013” (on file with
the author).