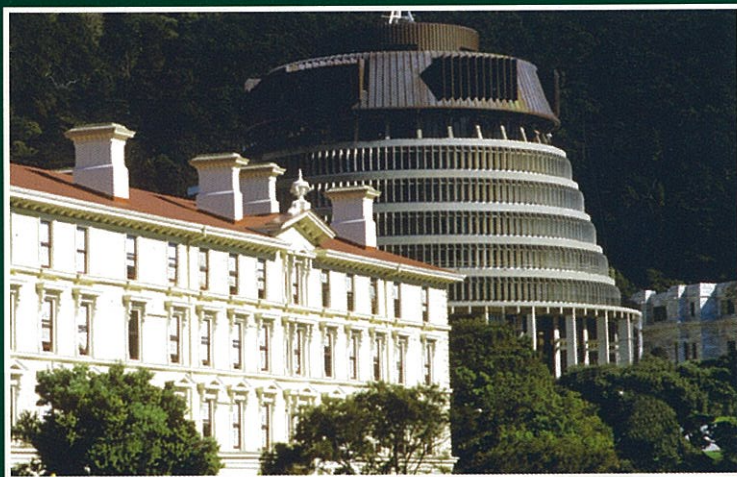


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SPECIAL CONFERENCE ISSUE
17TH ANNUAL ANZSIL CONFERENCE: THE FUTURE OF
MULTILATERALISM IN A PLURAL WORLD

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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Christopher C Joyner	

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UNIVERSITY OF WELLINGTON

*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



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RECONCILIATION AS CONFLICT RESOLUTION

*Christopher C Joyner**

Since the end of the Cold War, alternative legal techniques for dispute settlement have become increasingly prevalent as national governments work to rebuild their civil societies. Among the most popular of these techniques is reconciliation, which represents a new focus in conflict resolution that strives to promote "transitional justice" by moving a society from internal war to lasting peace or from a repressive authoritarian regime to a more democratic government. This paper considers the concept of reconciliation, its promotion by the United Nations, and its relationship to foreign policy.

I Introduction

On 20 November 2006, the United Nations General Assembly voted to proclaim 2009 as the International Year of Reconciliation.¹ In so doing, the General Assembly expressed its determination to pursue reconciliation processes in societies affected or separated by conflicts, believing that such processes are crucial for establishing a renewed commitment to lasting peace in the aftermath of civil strife. On 23 January 2007, the General Assembly officially carried that mandate out by adopting General Assembly Resolution 61/17.² This resolution asserts that "reconciliation processes are particularly necessary and urgent in countries and regions of the world which have suffered, or are suffering, situations of conflict that have affected and divided societies in their various internal, national and international facets",³ and affirms an awareness that "dialogue

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1 Done at the United Nations General Assembly, 56th plenary meeting, 20 November 2006.

2 International Year of Reconciliation, 2009 GA Res 61/17, A/RES/61/17 (2007).

3 Ibid, at [2]. The resolution goes on to invite "international and non-governmental organisations as well as governments to support reconciliation processes among divided societies" and requests that they "plan and

among opponents from positions of respect and tolerance is an essential element of peace and reconciliation ... [and] that truth and justice are indispensable elements for the attainment of reconciliation and lasting peace".⁴

Given this spotlight of international attention, it is not surprising that the notion of reconciliation has become a prominent topic for consideration in the contemporary field of conflict resolution. It refers to activities that strive to transform the temporary peace of a ceasefire agreement that ends fighting into a durable end to the conflict itself. Through reconciliation and the related processes associated with restorative justice, parties to a dispute examine their particular situation. In so doing, these transitional strategies seek to overcome the anguish and sorrow caused by the conflict, with the express aim of discovering ways and means to build trust so that the parties might be able to live cooperatively with one another.

Appreciating these points, this study addresses three principal themes. First, the analysis examines the concept of reconciliation and explains how it works legally and personally to resolve conflicts. A second theme explores the role of the United Nations in promoting reconciliation as an international technique to be employed by national governments to resolve domestic conflicts. Finally, in the third theme the study analyses how reconciliation relates to personal levels of foreign policy in general, with a focus on the personal philosophy of United States President Obama. From exploring these themes a better understanding might be gained of the complex concept of reconciliation and greater insight obtained as to why and how this legal technique is used to resolve conflict in domestic and diplomatic agendas.

II The Nature of Reconciliation

Reconciliation operates as a process, although there is no universally accepted definition. In that sense, the concept remains vague. In the emotional wake of massive violence in a society, it is extremely difficult to negotiate a multifaceted reconciliation process, and even more so to implement it successfully. During reconciliation, legal prosecutorial tools are available, acceptable political compromises might be accomplished, and gross harms against victims might be acknowledged. Even so, reconciliation amounts to an untidy process. It is hamstrung by severe emotional anxieties of anger, fear, bitterness, hatred, dread and revenge. It is not easy to mobilise or to convince a society that it is in its best interest to forgive grave sins of the past in order to make progress into the future. Still, attempts to foster reconciliation seem far better than doing nothing. In a real sense, to remain silent is to render people in that traumatised society complicit witnesses of those who perpetrated the atrocities. Further, failure to take action should be considered unbearable

implement adequate cultural, educational and social programmes to promote the concept of reconciliation, including the organization of seminars and conferences in order to disseminate information on this issue." Ibid, at [7(3)].

4 Ibid, at paras [4]-[5].

because it allows grievances, fear of reprisals and cultures of impunity to intensify, thus making greater the possibility that violence will reoccur in the future.⁵

Though a standard definition for reconciliation is elusive, commentators and practitioners generally agree that certain critical elements seem necessary for it to succeed. Philosophically, it is thought that reconciliation springs from religious origins that contain elements of truth, justice, mercy, tolerance, fairness, reason and peace. In this sense, reconciliation acquires increased significance as a contemporary instrument for conflict resolution.⁶ Yet, while conceptually rooted in religion, reconciliation must be applied as a pragmatic political tool. No less important, reconciliation also involves for individuals the personal traumas of healing, mourning, safety, remembrance and reconnection between the perpetrator and the survivor.⁷

Why does reconciliation seem desirable today as a legally sanctioned conflict resolution process? Much of the answer paradoxically appears to lie in the nature of contemporary national violence. Over the past 30 years, civil wars and internal fighting have replaced interstate wars as the paramount form of worldwide conflict. Traditional conflict management strategies such as mediation, conciliation, arbitration and adjudication have proven less than adequate for dealing with the contemporary localised nature of global conflict. International violence today has become much more internal than transnational. The problem here becomes apparent. In civil war situations, the relationships between the two warring parties are considerably more intimate and complex. Parties share the same geographic area and community space. Members of that warring society are strongly linked together by economic interdependence, as well as often by various social bonds, including intermarriage. Boundaries in that society become blurred, which makes long-term conflict solutions especially difficult. The critical factor thus becomes the ability to move toward a conflict resolution such that issues sparking a conflict become resolved and antagonisms, hatreds and biases between adversaries must be transformed from negative, destructive forces into positive, constructive attitudes. If done purposefully and effectively, the experience of recent history suggests that resort to reconciliation can remedy the situation and achieve these ends over a protected period of time. Consequently, the strategy of reconciliation emerges as a composite of both philosophical views and psychological goal values.⁸

5 Brandon Hamber and Grainne Kelly "Beyond Coexistence: Towards a Working Definition of Reconciliation" in Joanna Quinn (ed) *Reconciliation(s): Transitional Justice in Postconflict Societies* (McGill-Queen's University Press, Montreal, 2009) at 286-310.

6 Erin Daly and Jeremy Sarkin *Reconciliation in Divided Societies* (University of Pennsylvania Press, Philadelphia, 2007) at 3-37.

7 Ibid, at 41-67.

8 Andrew Schaap *Political Reconciliation* (Routledge, Milton Park, 2005).

Reconciliation as a conflict resolution process contains certain core ingredients. In a sense, these ingredients consist of part confession and part apology, as well as part commitment and part absolution. Parties must acknowledge several factors, chief of which are the following: they must sincerely admit to inflicting the harm or injury on the other party; they must genuinely regret and offer repentance for all grievances committed; they must be willing to apologise for their role in inflicting the injuries; they must willingly release the anger and hostility caused by the conflict and any resultant injuries; the offender must genuinely be obliged not to repeat the injury; sincere efforts must be made to redress past grievances that precipitated the conflict and victims must be compensated for harm or damage done to them; and both sides must honestly commit to enter into and foster a new, mutually beneficial relationship.⁹ Reconciliation therefore is the new relationship that emerges between the parties from these processes. In a sociological sense, when the term "healing" is used to describe reconciliation, it refers to curing the severe emotional suffering in a society created by the conflict.¹⁰ Critical to keep in mind, however, is that reconciliation is a two-way street. Both perpetrators and victims must be sincerely committed to confess, forgive and move on to a better future for all.

The essence of reconciliation is the unforced willingness of the conflicted parties to admit their responsibility and guilt to one other. Interrelations between the parties are intended not only to convey the grievances that one holds against certain actions of its adversary, but also to permit introspection about one's own role and conduct throughout the hostilities of the dispute. As much as one party attributes guilt and responsibility to an adversary for the harms inflicted, that party must also be self-critical and earnestly acknowledge his or her own role in causing or perpetrating the dispute and its harmful consequences. For this reason, the ways and means used to arrive at justice through the reconciliation process is unlike those used to reach justice in the conventional (ie judicial) approach. In the judicial approach, the chief aims are to identify the guilt of an offender and administer the appropriate punishment assigned by law that fits the crime. Little if any effort is made to heal the animosity and anger that exist between parties to the conflict. Reconciliation, on the other hand, seeks ways in which offenders can redress the physical and emotional damage caused to victims of their offences. This is accomplished by critical self-reflection, admission of responsibility, genuine remorse and compensation, if possible. This approach, often referred to as "restorative justice" (in contrast to "retributive justice"), strives to heal the psychological breach

9 Lawrence "Thomas, Forgiveness as Righteousness" in Quinn, above n 5, at 17-26; Nicholas Frayling "Toward the Healing of History: An Exploration of the Relationship between Pardon and Peace" in Quinn, above n 5, at 26-35.

10 Hizkias Assefa "The Meaning of Reconciliation" in *People Building Peace* (European Platform for Conflict Prevention and Transformation, 1999) at 42 <www.gppac.net>.

between the disputants and in that way, draw that society closer together toward a closer whole again.¹¹

III Legal Significance of Reconciliation

Reconciliation within a society matters simply because the political, economic, social and emotional costs of not doing so can be huge. All too often a violent conflict is ended by a legal agreement that terminates the fighting but fails to resolve the dispute satisfactorily between the parties. While it is necessary that fighting and killing between the disputants be halted, that is not sufficient for creating a stable, durable peace. A peace agreement that is bereft of genuine opportunities for peace is likely to be of little lasting value. Absent genuine reconciliation, a society is left with the same hatreds, fears, and anxieties that gave rise to the conflict in the first place,¹² exacerbating the possibility that conflict will again break out.

Although at base reconciliation is a personal process, in recent years it has taken on salient state-level dimensions. With respect to formal structures, reconciliation over the last two decades was often operationalised nationally through a commission process, which was usually created by domestic legislation or executive decree. These commissions are well-known for striving to expose the perpetrators and identify victims. They also serve as a mirror in which all members of that society must examine their own roles in a conflict by answering key questions that come out of the commission's soul-searching effort. Why did this conflict happen in my country? What went wrong? What must change? How can we effect those changes? The commission compels a national society to confront its past. The reconciliation commission reinforces the belief that the past cannot be forgotten; members of that conflicted society must learn the lessons of the past, lest they be condemned to repeat its tragedies. The ultimate goal of reconciliation is attainment of durable peace, with respect for the human rights of everyone in that society. The interactive keys for success of reconciliation through the commission process are the willingness of all parties to speak the truth, the willingness of the survivors to forgive and the willingness of the commission members to balance reconciliation with justice.¹³

Best known among these national commissions is the Truth and Reconciliation Commission (TRC) that was formally created in South Africa in 1995 after the abolition of apartheid.¹⁴ The

¹¹ Daly and Sarkin, above n 6, at 123-139.

¹² See generally Sean Byrne and Cynthia Irvin (eds) *Reconcilable Differences: Turning Points in Ethnopolitical Conflict* (Kumarian Press, West Hartford, Connecticut, 2000); Louis Kriesberg *Constructive Conflicts: From Escalation to Resolution* (Rowman and Littlefield, Lanham, Maryland, 2003).

¹³ Daly and Sarkin, above n 6, at 140-177.

¹⁴ See generally Jeremy Sarkin *Carrots and Sticks: The TRC and the South African Amnesty Process* (Intersentia, Antwerp, 2004); Desmond Tutu *No Future Without Forgiveness* (Doubleday, New York, 1999); Desmond Tutu *Truth and Reconciliation Commission of South Africa Report* (Macmillan Reference, New York, 1998).

mandate of the commission was to bear witness to testimony, record and grant amnesty to perpetrators of crimes relating to human rights violations, and to facilitate reparation for victims and rehabilitation for offenders. The TRC heard testimony from more than 22,000 persons and considered applications for amnesty from another 7,000 individuals.¹⁵ Its great success at creating the conditions necessary for reconciliation and the extensive international publicity that surrounded its accomplishments subsequently inspired other governments to set up various forms of truth commissions. Since the early 1980s, at least seventeen such national commissions have been established to foster national reconciliation processes.

In Argentina, The National Commission on the Disappearance of Persons¹⁶ was created by President Raúl Alfonsín on 15 December 1983, shortly after his inauguration, to investigate what happened to the *desaparecidos*¹⁷ and other human rights violations that occurred between 1976 and 1983 during the military dictatorship known as the National Reorganisation Process.¹⁸

In Canada, the Indian Residential Schools Truth and Reconciliation Commission was established on 2 June 2008 by the parties to the Indian Residential Schools Settlement Agreement. The commission is part of a holistic and comprehensive response to allegations of physical, psychological, and sexual abuse and neglect in the Indian residential schools throughout Canada.¹⁹

In Chile, the National Commission for Truth and Reconciliation was designated by President Patricio Aylwin to investigate human rights abuses resulting in the death or disappearances of nearly 2,300 persons between 11 September 1973 and 11 March 1990 in Chile, which were the years of military rule under Augusto Pinochet.²⁰

15 The Promotion of National Unity and Reconciliation Act 1995 (SA). For discussion, see Stephanus F du Toit "Tensions between Human Rights and the Politics of Reconciliation: A South African Case Study" in Quinn, above n 5, at 232; Andre Du Toit "The Moral Foundations of the South African TRC: Truth as Acknowledgement and Justice as Recognition" in Robert Rotberg and Dennis Thompson (eds) *Truth v. Justice: The Morality of Truth Commissions* (Princeton University Press, Princeton, 2000) at 122-41; and Richard Wilson *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge University Press, Cambridge, 2001). See also South Africa Truth and Reconciliation Commission *TRC Final Report* (1998) <www.doj.gov.za>.

16 Comisión Nacional sobre la Desaparición de Personas (CONADEP).

17 Victims of forced disappearance.

18 See Conadep, National Commission on the Disappearance of Persons *Nunca Mas (Never Again)* (1984) <www.nuncamas.org>.

19 See Indian Residential Schools Settlement Agreement (2006), sch N "Mandate for the Truth and Reconciliation Commission" <www.residentialschoolsettlement.ca>.

20 See United States Institute of Peace *Report of the Chilean National Commission on Truth and Reconciliation* (2002) <origin.usip.org>.

In El Salvador, the Truth Commission for El Salvador²¹ was established by the United Nations to investigate and report on human rights abuses during the civil war in El Salvador (1980-1992). The Commission was established by the 1992 Chapultepec Peace Accords that brought the civil war to an end, Article 2 of which stated, "The Commission shall have the task of investigating serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth".²²

In Fiji a Reconciliation and Unity Commission was proposed in 2005 as a government body to be established there. The Commission would be empowered to grant amnesty to persons involved in the Fiji coup of 2000, and to authorise compensation to victims of the coup between 19 May 2000 and 15 March 2001.

In Ghana, a National Reconciliation Commission was established in 2002 to recommend appropriate redress for persons who suffered from torture, killings, abductions, disappearances, detentions, and seizure of property by public officials during the periods of "unconstitutional governments": 24 February 1966 to 21 August 1969; 13 January 1972 to 23 September 1979; and 31 December 1981 to 6 January 1993. As stipulated, "The mandate of the Commission was to help reconcile the people of Ghana by finding out the truth about past human rights violations and abuses and helping the victims of those violations and abuses to deal with their pain, and to move on with their lives."²³

In Guatemala, the Historical Clarification Commission²⁴ was created by the 1994 Oslo Accords that ended Guatemala's three-decades-long civil war, during which an estimated 200,000 people were killed. The Commission's mandate was to investigate the pervasive human rights violations committed by both sides in that internal conflict.²⁵

In Liberia, the Truth and Reconciliation Commission was created by Liberia's Parliament in May 2005 to investigate and report on gross human rights violations that occurred during the civil

21 Comisión de la Verdad para El Salvador.

22 See United Nations Commission on the Truth for El Salvador From Madness to Hope: The 12 Year War in El Salvador, S/25500 (1993). See also Paul F Seils "The Limits of Truth Commissions in the Search for Justice: An Analysis of the Truth Commissions of El Salvador and Guatemala and Their Effect in Achieving Post-Conflict Justice" in M Cherif Bassiouni (ed) *Post-Conflict Justice* (Transnational Publishers, Ardsley, New York, 2002) at 775-795.

23 See The National Reconciliation Commission of Ghana Final Report (April 2005).

24 Comisión para el Esclarecimiento Histórico.

25 See Guatemala Commission for Historical Clarification Memory of Silence: Report of the Commission for Historical Clarification (February 1999); Anne-Marie O'Connor "The Emerging Secrets of Guatemala's Disappeared" Washington Post (Washington, 12 April 2009) at A7.

conflict in that country between January 1979 and 14 October 2003. The Commission operated from 20 February 2006 to 22 June 2009. Its final report was issued in June 2009.²⁶

In Morocco, the Equity and Reconciliation Commission is the Moroccan Truth Commission created on 7 January 2004 by King Mohammed V to investigate forced disappearances and arbitrary detentions carried out between 1956 and 1999. It also prepared a report containing specific as well as general information concerning these violations, and recommended types of compensation and reparation for victims.²⁷

Created in 2001, the Panama Truth Commission²⁸ investigated human rights abuses of torture, assassination and disappearance that occurred during the military regimes headed by General Omar Torrijos (1960-1981) and General Manuel Antonio Noriega (1981-1988).²⁹

In Peru, the Peruvian Truth and Reconciliation Commission³⁰ was established in June 2001 to examine mass atrocities committed by the Shining Path, the Túpac Amaru Revolutionary Movement and the military during the 1980s and 1990s.³¹

In Rwanda, the National Unity and Reconciliation Commission was created in March 1999, mandated with the purpose of promoting unity and reconciliation of the Rwandan people in the aftermath of the 800,000 person genocide that ravaged that country for one hundred days during the spring and summer of 1994. Its final report, *The Causes of Violence after the 1994 Genocide in Rwanda*, was issued in January 2008.³²

26 See Truth and Reconciliation Commission of Liberia *Final Report of the Truth and Reconciliation Commission* (19 December 2008) <www.trcofliberia.org>.

27 See Morocco's Truth Commission *Honoring Past Victims during an Uncertain Present* (2005) <www.hrw.org/reports>; see also Christopher J Le Mon "Morocco Releases Truth Commission Report" (Transitional Justice Forum, 15 December 2005) <tj-forum.org>; Veerle Ogenhaffen and Mark Freeman "Transitional Justice in Morocco: Lifting the Veil on a Hidden Face" in Quinn, above n 5, at 53-85.

28 Comisión de la Verdad.

29 See "Panama: Truth Commission Delivers Its Final Report on Victims Of The 1968-1988 Military Regime" *NotiCen: Central American & Caribbean Affairs* (New Mexico, 2 May 2002).

30 Comisión de la Verdad y Reconciliación.

31 See Peruvian Truth and Reconciliation Commission Final Report of the Truth and Reconciliation Commission (28 August 2003) <www.cverdad.org.pe>. The commission estimated that "the most probable figure" for victims killed was 69,280 individuals.

32 See Republic of Rwanda, National Unity and Reconciliation Commission *The Causes of Violence After the 1994 Genocide in Rwanda* (2008) <www.cverdad.org.pe>; Eugenia Zorbas "Reconciliation in Post-Genocide Rwanda" (2004) 1 *African Journal of Legal Studies* 29; Rosemary Nagy "Traditional Justice and Legal Pluralism in Transnational Context: The Case of Rwanda's Gacaca Courts" in Quinn, above n 5, at 86-115.

The Sierra Leone Truth and Reconciliation Commission was established on 7 July 1999 as a condition of the Lomé Peace Accord that ended the civil war in that country. Chaired by Rev Dr Joseph Christian Humper, the Commission operated from November 2002 to October 2004 and made its final report to both the Sierra Leone Government and the United Nations Security Council in 2004.³³

For Solomon Islands, the Solomon Islands Truth and Reconciliation Commission was established by the Government of Solomon Islands on 29 April 2009. Formed to investigate causes of the ethnic violence in Solomon Islands between 1997 and 2003, this Truth and Reconciliation Commission was the first of its kind in the Pacific islands region.³⁴

South Africa's Truth and Reconciliation Commission, which operated from 1994 through 1998, was a court-like body established after the abolition of apartheid in that country. Led by Desmond Tutu and authorised by Nelson Mandela, any person who felt that he or she was a victim of its violence during 1960-1993 was invited to appear before the commission and be heard. Perpetrators of violence could also give testimony and request amnesty from prosecution.³⁵

In South Korea, a national Truth and Reconciliation Commission was established on 1 December 2005, charged with investigating certain periods in Korean history, such as the Japanese rule of Korea from 1910-1945. The Commission also investigated the mass atrocities committed by Syngman Rhee's Government during the Korean War and estimated that as many as 200,000 people were executed during the summer of 1950.³⁶

The Commission for Reception, Truth and Reconciliation in East Timor was an independent truth commission established in 2001 under the UN Transitional Administration in East Timor. It was mandated to "inquire into human rights violations committed on all sides, between April 1974 and October 1999, and facilitate community reconciliation with justice for those who committed

33 See Truth and Reconciliation Commission of Sierra Leone *The Final Report of the Truth & Reconciliation Commission of Sierra Leone* (2004) <www.trcsierraleone.org>. See also Justice in Perspective "Truth and Reconciliation Commission" <www.justiceinperspective.org.za>; William Schabas "The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone" (2003) 25 Hum Rts Q 1035; Beth Dougherty "Searching for Answers: Sierra Leone's Truth and Reconciliation Commission" (2004) 8 African Studies Quarterly <www.africa.ufl.edu>; Human Rights Watch *World Report Chapter: Sierra Leone* (2009) <www.hrw.org>.

34 See "Solomons Truth and Reconciliation Commission launched" (2009) Radio New Zealand International <www.rnzi.com>.

35 South Africa Truth and Reconciliation Commission, above n 15; Alex Boraine *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford University Press, Oxford, 2001).

36 For the commission's official website, see Truth and Reconciliation Commission, Republic of Korea <<http://jinsil.go.kr>>. See also Choe Sang-Hun "Unearthing War's Horrors Years Later in South Korea" New York Times (New York, 3 December 2007) <www.nytimes.com>.

less serious offences." Its final 2,500 page report, chaired by Aniceto Longuinhos Guterres Lopes, was delivered to the Timorese President on 31 October 2005.³⁷

Finally, in the United States, local residents established a truth and reconciliation commission in 2005 in Greensboro, NC, to help heal racial animosities left over in that community from a massacre on 3 November 1979 during which five anti-Klan protest demonstrators were shot and killed by members of the Ku Klux Klan and the American Nazi Party. Sixteen people were arrested but only six were brought to trial. Two criminal trials resulted in acquittal of the defendants by all-white juries.³⁸

This resort to reconciliation by so many national societies over the last two decades created an unanticipated problem. Reconciliation was so facilely instigated, so frequently endorsed, and seemed so instantaneously attractive as a policy panacea for post-conflict societal evils that few policy-makers took time to consider the spate of perplexing problems that reconciliation programmes can engender. Little scrutiny was given to how reconciliation can actually be achieved or promoted or to the complex ways in which reconciliation relates to other notable problems which are the hallmark of transitional politics. Among these are the prospects for securing justice after violent social upheaval, fostering the reallocation of national wealth, attaining the re-establishment of civil society, and making relevant the depredations of the past to people in the present, with improved prospects for the future.³⁹

In sum, reconciliation implies a coming together within society, ie, the re-establishment of friendship and civility between people in that society. Reconciliation carries a normative quality as well. It is the conjoining of peoples that should be able to coexist. Reconciliation implies the reunion of peoples that once were united but were ripped apart by civil strife and social upheaval. Within the past two decades, the widespread resort to national reconciliation provoked a primal question: How can a society devastated by conflict return to a sense of normalcy when friends, relatives and neighbours living next to each other have survived and inflicted upon one another criminal atrocities of unspeakable revulsion? In this regard, implementing reconciliation as national policy invites attendant philosophical and psychological questions that have no simple answers. To what degree should the focus of reconciliation policy be directed at the past? Can reconciliation really be made congruent with justice and respect for human rights? Is truth a necessary ingredient for reconciliation and how can victims be certain that an accused perpetrator is telling the truth and not fabricating a story merely to be absolved of his alleged crimes? To be successful, does the

37 See _____, *Verdade, e Reconciliac* _____ *Chega!:* Final Report of the *Commission for Reception, Truth and Reconciliation in East Timor* (International Center for Transitional Justice, New York, 2005) <www.ictj.org>.

38 See Greensboro Truth and Reconciliation Commission *Greensboro Truth and Reconciliation Commission Final Report* (2006) <www.greensborotrc.org>.

39 Daly and Sarkin, above n 6, at 123-139.

process of reconciliation require that the former antagonists forgive and absolve each other? What if the perpetrator is not seeking forgiveness or if victims are unwilling to grant it? How can either be certain that forgiveness is actually given and that vengeful violence will not later be inflicted upon the confessed criminal? How might all of these considerations be impacted upon by the multifaceted attitudes toward religion in various societies?⁴⁰

It is also true that efforts to comprehend reconciliation during periods of political transition point up deep-seated, unanswerable questions about human nature. Discussion of the merits of reconciliation nearly always occurs after gross violations of human rights and the abrogation of societal norms, especially widespread killings, torture, rape, mutilations and other awful depredations. Of necessity, the consideration of reconciliation compels people to ponder how it can happen that human beings can inflict such gross atrocities upon one another.⁴¹ When one stares at the personification of evil, do we see ourselves? Or can it be that some people are capable of committing horrors in ways that others would never contemplate? These posers highlight the profound complexity of reconciliation on both the personal and national societal levels.

As a societal process, reconciliation is not static; it is dynamic and constantly evolving. This, too, poses genuine conundrums for societies bound up in reconciliation efforts. For example, how can decision-makers gauge the extent to which reconciliation is being achieved in a society and relatedly, at what point is reconciliation eventually attained? While these questions are real and personal, they are also loaded with physiological and subjective qualities that no doubt will differ in each and every effort at societal reconciliation by national governments.

IV Reconciliation and Intergovernmental Institutions

Throughout the 20th century, reconciliation emerged as a popular conflict resolution strategy of international choice. The rise of human rights and humanitarian considerations as facets of international law added credibility to the principle of humanity and international institutions. People have rights merely by being born a human being, and these rights should be respected under international law. By the end of the Second World War, largely because of tremendous personal devastation and the incredible human costs associated with the Holocaust, statesmen asserted that people must be treated fairly and equally, regardless of gender, race, colour, ethnicity, age, religion or personal beliefs. The basic principle emerged that people are actors in international law and they should be protected under that legal system. Such developments also highlighted the need for special, new techniques to settle disputes before they explode into regional or world wars.

40 See Daan Bronkhorst *Truth and Reconciliation: Obstacles and Opportunities for Human Rights* (Amnesty International Dutch Section, Amsterdam, 1995).

41 See generally Elin Skaar, Siri Gloppen and Astri Sukrke (eds) *Roads to Reconciliation* (Lexington, Lanham, Maryland, 2005).

The international institutions that most inculcate the values associated with national reconciliation are the League of Nations and its successor, the United Nations. Both organisations came as reactions to world wars and both were efforts at reconciliation on a global scale. The League failed largely after the First World War because the Great Powers – especially Great Britain and France, with an absent United States – refused to work cooperatively through the institution to check aggression by Japan in Manchuria, Italy in Abyssinia, and Germany in Czechoslovakia.⁴² Founded on the ruins of the League, the United Nations embodied reconciliation even to a degree greater than its predecessor. The governments of the world, including the vanquished Germany, Italy and Japan, had to be rehabilitated through reconciliation as viable international polities. It fell to the United Nations to envision and promote that reconciliation process, a goal that is boldly expressed in the Charter of the organisation.⁴³

It is intriguing to note that the Preamble of the United Nations Charter underscores essential qualities inherent in a process of global reconciliation. The Preamble provides that:

We the Peoples of the United Nations Determined

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom,

And for these Ends

to practice tolerance and live together in peace with one another as neighbours, and to unite our strength to maintain international peace and security, and

to ensure by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples, ...

The Preamble reads like a recipe for global reconciliation. Governments are called upon to prevent war and promote peace; to respect the legitimacy of fundamental human rights; to accept that people have intrinsic dignity and equality under law by virtue of being human; to foster justice

⁴² See generally FP Walters *A History of the League of Nations* (Oxford University Press, London, 1952).

⁴³ Charter of United Nations.

and respect for law; to encourage opportunities for social progress and freedoms; to practice tolerance, good neighbourliness and civility in society; to promote international peace and condemn the use of armed force; and to advance the social and economic betterment of all people.

The United Nations Charter itself reinforces and elaborates on the ways and means the institution can contribute to post-conflict national efforts at reconciliation, which goes to the very essence of the purposes of the organisation. Article 1 affirms that one of the purposes of the United Nations is:⁴⁴

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

At the root of reconciliation efforts are these very objectives as well. Reconciliation clearly strives to promote peace and restore personal security to individuals in a society. The process likewise aims to minimise factors through non-violent means that might jeopardise the peace, as well as to promote justice through conflict resolution and international and national dispute settlement.

Similarly it is important to point out that since 1945, the United Nations has undertaken manifold activities aimed at fostering national reconciliation within war-torn societies. Among these are peacekeeping, peace-building, economic reconstruction, establishment of the rule of law, creation of institutions to protect human rights and addressing issues of impunity. These diverse activities are carried out respectively by the various UN organs, committees and special programmes. The Security Council is largely responsible for settling disputes⁴⁵ and maintaining international peace and security concerns.⁴⁶ The General Assembly provides the global forum for discussing international problems and seeking viable solutions for them among the United Nations membership. To facilitate these challenges, six main committees were created under the General Assembly to study significant issues of concern and report back to the main body. The First Committee (Disarmament and International Security Committee) is concerned with disarmament and related international security questions;⁴⁷ the Second Committee (Economic and Financial Committee) deals with economic questions;⁴⁸ the Third Committee (Social, Humanitarian and

44 Ibid, art 1(1).

45 Ibid, chap VI.

46 Ibid, chap VII.

47 Disarmament and Security (First Committee) <www.un.org/ga/first>.

48 Economic and Financial (Second Committee) <www.un.org/ga/second>.

Cultural Committee) examines social and humanitarian issues;⁴⁹ the Fourth Committee (Special Political and Decolonisation Committee) addresses various political issues not addressed by the First Committee, including decolonisation;⁵⁰ the Fifth Committee (Administrative and Budgetary Committee) deals with the administration and budget of the United Nations;⁵¹ and the Sixth Committee (Legal Committee) is concerned with international legal matters, including the drafting of multilateral agreements.⁵² All of these United Nations activities usually directly or indirectly affect the progress of reconciliation in a state.

The Economic and Social Council (ECOSOC) is the primary organ for coordinating economic, social and related activities of twenty specialised United Nations agencies,⁵³ nine functional commissions⁵⁴ and five regional commissions.⁵⁵ ECOSOC serves as the central United Nations forum for discussing international economic and social issues, and for formulating policy recommendations for member states. The general aim of these bodies is to facilitate reconciliation within societies by achieving higher standards of living, full employment, and economic and social progress; finding solutions to international economic, social and health problems; promoting international cultural and educational cooperation; and fostering universal respect for human rights and fundamental freedoms within member states.

The International Court of Justice (ICJ) strives to reconcile, in accordance with international law, disputes voluntarily submitted to it by states. The court also gives advisory opinions on legal

49 Social, Humanitarian and Cultural (Third Committee) <www.un.org/ga/third>.

50 Special Political and Decolonization (Fourth Committee) <www.un.org/ga/fourth>.

51 Administrative and Budgetary Committee (Fifth Committee) <www.un.org/ga/fifth>.

52 Legal Committee (Sixth Committee) <www.un.org/ga/sixth>.

53 The functional UN agencies include the International Labour Organisation, Food and Agriculture Organisation, United Nations Educational, Scientific and Cultural Organisation, World Health Organisation, International Bank for Reconstruction and Development, International Development Association, International Finance Cooperation, Multilateral Investment Guarantee Agency, International Centre for Settlements of Investment Disputes, International Monetary Fund, International Civil Aviation Organisation, International Maritime Organisation, International Telecommunication Union, Universal Postal Union, World Meteorological Organisation, World Intellectual Property Organisation, International Fund for Agricultural Development, United Nations Industrial Development Organisation, and the World Tourism Organisation. See UN Specialised Agencies <www.un.org>.

54 The functional commissions include the Statistical Commission, Commission on Population and Development, Commission on Social Development, Commission on the Status of Women, Commission on Narcotic Drugs, Commission on Crime Prevention and Criminal Justice, Commission on Science and Technology for Development, Commission on Sustainable Development and United Nations Forum on Forests. See United Nations Economic and Social Council (Subsidiary Bodies) <www.un.org>.

55 Economic Commission for Africa, Economic and Social Commission for Asia and the Pacific, Economic Commission for Europe, Economic Commission for Latin America and the Caribbean, and Economic and Social Commission for Western Asia. See Subsidiary Bodies, above n 54.

questions referred to it by authorised United Nations organs and specialised agencies. Since 1946 the court has entered 146 cases into its General List, many of which concerned disputes over contentious issues, such as land frontiers and maritime boundaries, territorial sovereignty, the non-use of force, non-interference in the internal affairs of states, diplomatic relations, hostage-taking, the right of asylum, nationality, guardianship, rights of passage and economic rights. Importantly, nearly all these decisions were accepted and implemented by the participating states. In fact, more states are submitting more cases to the court than ever before, with 15 pending on its docket in 2010.⁵⁶

A final United Nations organ dealing with national reconciliation issues is the Trusteeship Council. Created by the United Nations Charter, its charge was to supervise the administration of Trust Territories left over from the defunct League's mandate system and territories seized from Japan and placed under the Trusteeship System after the Second World War. The principal goals of the system were to promote the advancement of the inhabitants of Trust Territories and their progressive development towards self-government or independence – in effect to reconcile their local populations with national self-determination and sovereignty.⁵⁷ By 1994, all territories in the Trusteeship System had attained self-government or independence, either as separate states or by joining neighbouring independent countries. Hence the Council thereafter became non-functional.

In the aftermath of conflict, United Nations officials in a state targeted for civil reunion apply certain principles to achieve conditions for reconciliation. Among these United Nations principles are the following:

- (1) all groups in the population, especially women, should be included in the reconciliation process;
- (2) all people, especially minorities, must be given transparent equal treatment under the law;
- (3) former enemies must be socially and economically integrated into the society with an equitable sharing of resources;
- (4) national institutions must be reformed to ensure that past social, economic and political inequalities are not repeated;
- (5) the national constitution must be rewritten or replaced to reflect the post-conflict reconciliation process;
- (6) a national effort must be undertaken to heal the psychological wounds inflicted during the conflict;
- (7) human rights and fundamental freedoms must be promoted and protected to encourage education and heightened public awareness;

56 See "Pending Cases" International Court of Justice <www.icj-cij.org>.

57 "Trusteeship Council" United Nations <www.un.org>.

- (8) measures must be adopted to ensure that differences in ethnicity, culture and religious traditions are respected;
- (9) reconciliation programmes must be created to acknowledge and address the suffering of the victims of violence; and
- (10) an assessment of the effects of the conflict on the national environment must be made to facilitate opportunities for economic development.⁵⁸

Importantly, no two national situations will be identical, and hence how these principles are implemented will depend on the prevailing political conditions and societal circumstances in each state.

It is also important to realise that genuine national reconciliation may not be possible in some cases unless persons who committed the most egregious atrocities are held legally accountable.⁵⁹ To accomplish this aim, the United Nations Security Council has facilitated creation of special tribunals in certain states. In May 1993, the Security Council by resolution 827 created the International Criminal Tribunal for the former Yugoslavia⁶⁰, and in November 1994, it created by resolution 955 the International Criminal Tribunal for Rwanda.⁶¹ In 2000 the Security Council adopted resolution 1315 authorising negotiations to create the Special Court for Sierra Leone.⁶² In 2003, the General Assembly facilitated adoption of the initiative to prosecute former members of the Khmer Rouge in Cambodia through the creation of a special criminal court.⁶³ In October 1999, the Security Council by resolution 1244 created a United Nations Transitional Administration of East Timor, which became responsible for overseeing the administration of justice and the creation of a judicial system in post-conflict East Timor in 2000.⁶⁴ Finally, the Security Council by resolution 1244 in 1999 established the United Nations Mission to Kosovo, which subsequently in February 2000 adopted a programme for international judges and prosecutors to conduct trials on a wide variety of crimes in Kosovo.⁶⁵ These acts clearly attest to the United Nations' firm conviction and commitment to the vital need to prosecute persons for the most awful crimes committed during an internal conflict in order to more effectively foster national reconciliation.

58 HE Ambassador Richard Ryan, Permanent Representative of Ireland to the UN on behalf of the European Union "Post-Conflict National Reconciliation – The Role of the United Nations" (EU Presidency Statement to the UN Security Council, 26 January 2004) <www.europa-eu-un.org>.

59 See the discussion generally in the text below at notes 95-106.

60 See ICTY "About the ICTY" <www.icty.org>.

61 See ICTR "International Criminal Tribunal for Rwanda" <www.ictr.org>.

62 See SCSL "The Special Court for Sierra Leone" <www.sc-sl.org>.

63 See Trial "Criminal Court for Cambodia" <www.trial-ch.org>.

64 See Trial "Special Panel for Serious Crimes – Timor Leste" <www.trial-ch.org>.

65 See Trial "Programme of International Judges in Kosovo" <www.trial-ch.org>.

There is little question that since its creation in 1945, the United Nations, more than any other international institution before or since, has worked boldly and ambitiously to achieve the goals and values of national reconciliation through peace and development. While this does not mean that the organisation has succeeded in accomplishing all its aims for reconciliation, it must be appreciated that the institution itself does not fail in these ambitions. Rather, it is the member states which fail, as their governments falter – usually for reasons of narrowly perceived national interests – in their efforts to respect or carry out decisions and directives of the various UN organs and agencies.

In sum, the United Nations as a world body imbues the ideals of equality, peace, security and non-violence – the very values that underpin the concept of reconciliation. It underscores the notion that the dignity and worth of the individual are inherent as are universal human rights. In this way, the United Nations Charter sets out the multifaceted mission for the member states in that global institution to bring about the reconciliation of peoples and governments to forge a genuine and viable international community.

V Reconciliation and Individual Leaders

As already discussed, it is important to realise that efforts over the past 60 years to operationalise the process of reconciliation have occurred both on national and international levels, with varying degrees of success. More recently, however, reconciliation has emerged as a societal conflict resolution strategy employed by individual national leaders to bring about healing in their societies ravaged by various forms of internal violence and conflict. Nelson Mandela and Desmond Tutu were towering figures in applying reconciliation in South Africa, as were Raúl Alfonsín in Argentina, Patricio Aylwin in Chile and Aniceto Longuinhos Guterres Lopes in East Timor. Surprisingly, though not involved in creating or chairing a national reconciliation commission, the most frequent modern day practitioner of reconciliation as a dispute settlement technique is United States President Barak Obama. This attribute was implicitly recognised by the international community when President Obama was awarded the Nobel Peace Prize on 9 October 2009 "for his extraordinary efforts to strengthen international diplomacy and cooperation between peoples".⁶⁶ In this regard, President Obama's resort to reconciliation has been often, multifaceted and multidimensional.

Since the Obama Administration came into office in January 2009, reconciliation as a legal notion has generated considerable attention in the United States. On 9 February 2009, Senator Patrick Leahy (D-Vt), Chairman of the United States Senate Judiciary Committee, called for the establishment of a non-partisan "commission of inquiry" to investigate allegations of wrongdoing by former Bush administration officials in their prosecution of the war on terrorism. Leahy called for

⁶⁶ Norwegian Nobel Committee "Nobel Peace Prize 2009" (press release, 9 October 2009) <<http://nobelprize.org>>. See also Steven Erlanger and Sheryl Gay Stolberg "Surprise Nobel for Obama Stirs Praise and Doubts" *New York Times* (New York, 9 October 2009) <www.nytimes.com>.

this "truth commission" to have a "targeted mandate" that focused on issues of national security and executive power. Specifically, he asserted that it should look at allegations of "questionable interrogation techniques," "extraordinary rendition" and the "executive override of laws," particularly with regard to the policies and practices against detainees being held at the Guantanamo Bay and Abu Ghraib detention facilities.⁶⁷

The Obama administration largely remained silent on Senator Leahy's proposal to investigate alleged abuses of the Bush administration, and this provoked criticism from both progressives and Bush critics on the left. President Obama may have realised what appeared obvious to many observers, namely that formal establishment of an investigatory or truth and reconciliation commission entails a serious matter that serves an important role in healing wounds caused by injustice. Such a commission can promote trust and goodwill among Americans. Even so, such an investigatory commission can produce negative effects as well, and President Obama was wary of that possibility. For one, this might be viewed as a political exercise aimed at retribution, as implied by such an investigatory truth commission. President Obama seems geared more to opportunities for reconciliation; ie, to admit that wrongs were done in the past, to try to right those wrongs by moving on to change and to adopt new policies that correct the past wrongs. This was pointedly demonstrated on 20 January 2009 when as his first official act after taking the oath of office, President Obama issued a proclamation that called on Americans to serve one another with a common purpose and declared that day to be a National Day of Renewal and Reconciliation.⁶⁸ The proclamation asserted that as heir to two centuries of American democracy, Americans have the "glorious burden" to carry it forward once again.⁶⁹ Several other early efforts aimed at promoting reconciliation among Americans can be seen in President Obama's decisions to close the detainee facility at Guantanamo,⁷⁰ to ban "extreme interrogation techniques" that amounted to torture,⁷¹ to

67 "Leahy Calls for 'Truth Commission' on Torture" *CNN* (Washington, 4 March 2009): <www.cnn.com>. Officials likely to be targeted include Vice President Richard Cheney, CIA. Director George J Tenet, Secretary of Defence Donald H Rumsfeld, and Alberto R Gonzales, then White House counsel. But see Charlie Savage "Any Indictment of Interrogation Policy Makers Would Face Several Hurdles" *New York Times* (New York, 22 April 2009) <www.nytimes.com>.

68 The White House "A National Day of Renewal and Reconciliation" (Office of the Press Secretary, 20 Jan. 2009) <www.whitehouse.gov>.

69 Ibid.

70 Matt Apuzzo and Lara Jakes Jordan "Obama Plans Guantanamo Close, US Trials" *Huffington Post* (United States, 10 November 2008 <www.huffingtonpost.com>.

71 The White House "Ensuring Lawful Interrogations" (Executive Order, 22 January 2009) <www.whitehouse.gov>.

release the classified "torture memos,"⁷² and to reject the use of presidential signing statements as instruments for undercutting the force of legislation passed by Congress.⁷³

On another foreign policy issue, President Obama initiated a policy of reconciliation in Latin America, when he ordered some restrictions in the 50 year old embargo against Cuba to be lifted.⁷⁴ On 12 April 2009, the Obama administration announced that it would ease certain limitations on the dealings of Americans with Cuba, a measure that signals a gradual revision of United States policy toward the communist island state. Cuban-Americans can now visit Cuba as frequently as they like and send gifts and unrestricted amounts of money, provided that the recipients are not senior government or Communist Party officials. In addition, other changes include an expanded list of items that families can send to relatives in Cuba, such as humanitarian goods like clothes, fishing equipment, and personal hygiene products. Moreover, some United States telecommunications companies will now be permitted to apply for licences to do business in Cuba. If the Cuban government permits it, this could lead to improved radio, satellite television, cell-phone, and internet service to the country – part of the Obama Administration's effort to link Cuba with the outside world. These changes signify the most significant shift in United States policy toward Cuba since 1960, and although not a full lifting of the embargo, they represent a shift in the hard line taken by the Bush Administration.⁷⁵

Perhaps the most instructive insights into President Obama's attitude about the need to promote reconciliation among people are revealed in his speeches on social and religious issues. His March 2008 speech on race, prompted by the intent to defuse a controversy caused by the inflammatory rhetoric by his own minister, Jeremiah Wright, was delivered in Philadelphia in the middle of the United States presidential campaign.⁷⁶ Perusal of that speech opens the window to Obama's views on an issue very sensitive to most Americans – race relations in the United States. It is an issue that still begs for reconciliation in American society, or as Obama put it nine times in his speech, to "perfect our union." In this address, President Obama observed that:⁷⁷

72 Bob Keeler "President Obama Releases Torture Memos" *Newsday* (United States, 16 April 2009) <www.newsday.com>.

73 The White House "Presidential Signing Statements" (Memorandum for the Heads of Executive Departments and Agencies, Office of the Press Secretary, 9 March 2009) <www.whitehouse.gov>.

74 Howard LaFranchi "Obama Eases Cuba Travel, But Embargo Remains" *Christian Science Monitor* (Washington, 13 April 2009) <www.csmonitor.com>.

75 Sheryl Gay Stolberg and Damien Cave "Obama Opens Door to Cuba, but Only a Crack" *New York Times* (New York, 14 April 2009) <www.nytimes.com>.

76 "Transcript: Barak Obama's Speech on Race" *New York Times* (New York, 18 March 2008) <www.nytimes.com>.

77 Ibid.

The fact is that the comments that have been made and the issues that have surfaced over the last few weeks reflect the complexities of race in this country that we've never really worked through – a part of our union that we have yet to perfect. And if we walk away now, if we simply retreat into our respective corners, we will never be able to come together and solve challenges like health care, or education, or the need to find good jobs for every American.

He went on to declare that Americans are stuck in a "racial stalemate." Nonetheless, he averred, "I have asserted a firm conviction – a conviction rooted in my faith in God and my faith in the American people – that working together we can move beyond some of our old racial wounds, and that in fact we have no choice if we are to continue on the path of a more perfect union."⁷⁸

So, for President Obama, reconciliation in terms of race relations takes on the process of striving for perfection, which is an ongoing process, not an outcome. Loyalty to the American community requires reconciliation of its racial divide. As he declared in his speech, "This union may never be perfect, but generation after generation has shown that it can always be perfected." For President Obama, the issue of race remains a challenge in a complex society. If Americans are to heal the racial divide, they must commit themselves to a process aimed at perfecting their social relations. They must admit their biases and prejudices and strive to become perfect in an imperfect society.

President Obama delivered a second noteworthy address in June 2009 in the Great Hall of the Cairo University, in Egypt, on the need to reconcile American and Islamic values.⁷⁹ It became clear during President Obama's remarks that he was troubled about the failings of the Bush Administration, especially in ordering the invasion of Afghanistan after 11 September to destroy al-Qaeda and the invasion of Iraq in 2003 on the misguided presumption that there were weapons of mass destruction there. He admitted that the trauma inflicted by the 11 September 2001 attacks led the United States Government to act contrary to its democratic traditions and political ideals, but he aimed to reverse these policies by taking decisions to prohibit the use of torture techniques by United States military personnel and to close the Guantanamo Bay prison facility by early 2010. In an appeal to all Muslims, he also lamented the violence between Sunnis and Shias in Iraq. As regards Afghanistan, President Obama asserted that he did not want United States troops fighting there. Even so, the fact that the perpetrators of the 11 September attacks are unrepentant and are secreted along the Afghanistan-Pakistan border region planning more attacks on a massive scale against Americans compels the United States to pursue them. These United States military actions were being taken in defence of the American people, not to engage the United States in a war with Islam.⁸⁰

78 Ibid.

79 The White House "Remarks by the President on a New Beginning" (Office of the Press Secretary, Cairo University, Cairo, Egypt, 4 June 2009) <www.whitehouse.gov>.

80 Ibid.

In a third speech in May 2009 at commencement exercises at Notre Dame University President Obama addressed the divisive United States domestic issue of abortion. By way of background, President Obama favours a "woman's right to choose", loosely translated as being supportive of a woman's decision to abort a foetus. Notre Dame is well-known for its strict Catholic views and traditions on social issues, especially the Church's vehement opposition to abortion. Consequently, it came as little surprise that his visit to Notre Dame generated considerable controversy and attracted hundreds of anti-abortion protestors. Even so, in his commencement address, President Obama directly took on the issue of abortion and stressed the needs for mutual understanding and reconciliation of views. He urged everyone to use "open hearts, open minds, fair-minded words" in the attempt to find "common ground" on the issue. He stressed the need for cooperation and goodwill between both sides of the debate over abortion and for people to come together.

The leitmotif of these three speeches seems clear. When an intellectual dispute or spiritual conflict arises between people, the reconciliation of ideas and attitudes can promote tolerance and rational discussion, which then can engender greater trust and enhanced prospects for its resolution. That philosophy for individuals is no less true than it is for the healing of a society, and provides the foundation for the reconciliation process.

Although important strides were made by President Obama toward social, cultural, religious and political reconciliation in both the United States and the international community, it must be noted that during the second half of 2009 he suffered some backsliding in these efforts. For one, as already mentioned, he decided not to support the creation or convening of a truth commission to investigate the role of former Bush Administration officials who authorised "extreme interrogation techniques" (ie torture) of detainees. Included among these targeted officials would likely be former Vice President Richard Cheney and his White House counsel David Addington,⁸¹ former Secretary of Defence Donald Rumsfeld and Department of Defence officials Paul Wolfowitz and Douglas Feith, former Attorneys-General John Ashcroft and Alberto Gonzales, the three principal Department of Justice legal counsel who authored the so-called "torture memos", Jay Bybee who is currently a judge of the United States Court of Appeals for the Ninth Circuit,⁸² John Yoo who is a faculty member at the University of California School of Law at Berkeley,⁸³ and Steven G Bradbury who signed three memos and returned to private legal practice toward the end of the Bush

81 Jack Goldsmith *The Terror Presidency: Law and Judgment Inside the Bush Administration* (W W Norton, New York, 2007); and David Cole "The Man Behind the Torture" (2007) 54 *New York Review of Books* 19 <www.nybooks.com>.

82 Karl Vick "Amid Outcry on Memo, Signer's Private Regret" *Washington Post* (Washington, 25 April 2009) at A1 <www.washingtonpost.com>.

83 John Yoo *War by Other Means: An Insider's Account of the War on Terror* (Atlantic Monthly Press, New York, 2006).

Administration, and George Tenet, former Director of the Central Intelligence Agency (CIA).⁸⁴ This decision, which flew in the face of Senator Leahy's investigatory commission proposal, generated considerable political blowback and media criticism. President Obama justified his opposition to such a commission on the grounds that it would reopen old wounds without solving any real issues.⁸⁵ More problematically, he contended that such a national investigatory commission would likely be perceived by many people at home and abroad not as an effort toward reconciliation, but more so as a political act of retribution and revenge by the new administration against former Bush officials.⁸⁶

President Obama decided not to prosecute any of these former officials. Critics contended that not to do so created a blatant double standard in that the United States expects other governments to prosecute officials who commit wrongdoings, but in this case, the United States refused to uphold its own values. In short, the critics' argument comes down to this: If the United States is to hold true to its values of human rights and respect for human dignity, the government should hold senior Bush Administration officials accountable for unlawful things they ordered to be done in the "war against terror." For President Obama, the potential political price of doing so outweighed the need for such prosecutions.⁸⁷

The controversial role played by CIA agents in the terror suspects' interrogation process was again taken up by President Obama. On 23 August 2009, the Obama Administration announced the creation of a select team of interrogators to question high value detainees as part of a wider programme to repair United States policy on the detention and interrogation of terrorist suspects. President Obama approved this new body, the High-Value Detainee Interrogation Group (HIG), which will be housed in the Federal Bureau of Investigation and will operate "consistent with the

84 George Tenet *At the Center of the Storm* (Harper Collins, New York, 2007).

85 Shailagh Murray and Paul Kane "Obama Rejects Truth Panel, Commission Would Have Investigated Abuses in Terrorism Fight" *Washington Post* (Washington, 24 April 2009) <www.washingtonpost.com>.

86 R Jeffrey Smith, Michael D Shear and Walter Pincus "In Obama's Inner Circle, Debate Over Release of Memos Was Intense, Some Feared Partisan Outcry Could Obstruct Larger Agenda" *Washington Post* (Washington, 24 April 2009) <www.washingtonpost.com>.

87 See Mark J McKeon "Why We Must Prosecute" *Washington Post* (Washington, 28 April 2009) at A23 <www.washingtonpost.com>. McKeon goes on to posit that "we cannot expect to regain our position of leadership in the world unless we hold ourselves to the same standards that we expect of others. That means punishing the most senior government officials responsible for these crimes." Moreover, to say that we should hold ourselves to the same standards of justice that we applied to Slobodan Milosevic and Saddam Hussein is not to say that the level of our leaders' crimes approached theirs. Thankfully, there is no evidence of that. And yet, torture and cruel treatment are as much violations of international humanitarian law as are murder and genocide. They demand a judicial response. We cannot expect the rest of humanity to live in a world that we ourselves are not willing to inhabit. For a contrary opinion, see Jeffery H Smith "CIA Accountability: 6 Reasons Not to Prosecute Interrogators" *Washington Post* (Washington, 24 August 2009) at A15 <www.washingtonpost.com>.

US Army Field Manual" that provides guidelines for interrogators. This development clearly signalled President Obama's intention to remove the CIA from its previous controversial role in conducting interrogations of terror suspects using harsh interrogation techniques.⁸⁸

A related development concerned the detailed revelation by the CIA of what interrogation methods its agents employed against high-value terror detainees. On 24 August 2009, the Obama Administration released a partially declassified CIA report that describes implementation of the Agency's interrogation programme in 2002 and 2003 as sporadic and poorly supervised, thus permitting the use of "unauthorised, improvised, inhumane and undocumented" techniques. By releasing this 2004 report, as well as other documents, President Obama continued to reduce the impact of the Bush Administration's counterterrorism policies while striving to move United States foreign policy beyond them. That same day, Attorney-General Eric H Holder Jr appointed a special prosecutor, John H Durham, to investigate allegations that CIA agents abused detainees.⁸⁹ This decision to launch a probe into allegations that Bush-era interrogators abused detainees provoked former Vice President Cheney to accuse the Obama Administration of setting a "terrible precedent" by allowing an "intensely partisan, politicised look back at the prior administration."⁹⁰

The release of this CIA report complemented the release earlier by the Obama Administration of Department of Justice memos that approved the use of "harsh interrogation techniques" and decisions to terminate the CIA's role in the interrogation programme and close the military prison at Guantanamo Bay, Cuba, where high-value detainees are incarcerated. The 2004 report by then Inspector General John L Helgeson noted, presciently, that "the agency faces potentially serious long-term political and legal challenges as a result of the ... program, particularly its use of [enhanced interrogation techniques] and the inability of the U.S. Government to decide what it will ultimately do with terrorists detained by the agency."⁹¹

A second controversial issue stemmed from President Obama's declaration to close by January 2010 the detainee facility at Guantanamo Bay. While this decision in the main was politically popular, a critical problem soon became apparent to conservative critics, as well as current United States policy-makers: If the Guantanamo facility were closed, what should be done with the detainees being held there? Most of these detainees were nationals of states whose governments did not want to accept their return, and few other non-detainee governments voiced any willingness to

88 Anne E Kornblut "New Unit to Question Key Terror Suspects" *Washington Post* (Washington, 24 August 2009) at A1 <www.washingtonpost.com>.

89 Mark Mazzetti and Scott Shane "CIA Abuse Cases Detailed in Report on Detainees" *New York Times* (New York, 24 August 2009) <www.nytimes.com>.

90 Alexi Mostrous "Cheney: Interrogations Probe is a 'Political Act'" *Washington Post* (Washington, 31 August 2009) <www.washingtonpost.com>.

91 Peter Finn, Joby Warrick and Julie Tate "CIA Report Calls Oversight of Early Interrogations Poor" *Washington Post* (Washington, 25 August 2009) <www.washingtonpost.com>.

take them either. In August 2009, the relocation conundrum appeared to improve following an intense public relations campaign by the Obama Administration to convince European and other Western governments to admit some detainees.⁹² Nonetheless, problems persist. There are some 80 detainees whose past violent acts were deemed unlawful and warrant prosecution by the United States Government; given that, what judicial means for trial should be used? Should it be by military commission? Are federal courts more suitable? Where should the trials be conducted? Should they be in the United States,⁹³ or in Iraq or in Afghanistan or somewhere else? The Obama Administration announced in May 2009 that it supported creation of military commissions – the same option proposed by the Bush Administration – to try accused detainees in the Guantanamo Bay facility, rather than in federal courts in the United States.⁹⁴ The main difference between the Obama plan and that of his predecessor is that the President will ask Congress to expand the rights of defendants to contest the charges against them.⁹⁵ While this option admittedly would be less taxing on the United States judicial and prison systems, critics suggest it demonstrates little progress on the issue since the Bush Administration left office in January.⁹⁶ In addition, President Obama announced that, like the Bush Administration, he supported indefinite detention for some terror suspects. This policy provoked serious criticism from several human rights and civil liberties organisations, among them Human Rights Watch, Amnesty International and the American Civil

92 Six European states – Britain, France, Ireland, Italy, Portugal and Spain – have publicly announced their willingness to accept some detainees. Four other European governments have privately informed the Obama administration that they will take some as well, and five other European Union states are reportedly considering doing so. See Peter Finn "Progress on Resettling Detainees" *Washington Post* (Washington, 2 February 2010) at A1 <www.washingtonpost.com>.

93 For example, the suggestion that detainees might be transferred to a prison in Standish, Michigan sparked loud protests and objections from the local population. While the argument that holding the detainees there would provide an "economic lifeline" for the town and the prison by creating 300 jobs, the fear of having terrorists in their community was deemed unacceptable by most residents. See Kari Lydersen "Detainee Plan Draws Fear and Opposition" *Washington Post* (Washington, 2 February 2010) at A3 <www.washingtonpost.com>. Interestingly enough, in May 2009 the Republicans in the United States House of Representatives introduced a special piece of legislation, the Keep Terrorists Out of America Act, aimed at preventing the transfer or release of terror suspects held at Guantanamo Bay into the United States. See John Boehner, House Republican Leader "House GOP Introduces Keep Terrorists Out of American Act" (press release, 7 May 2009) <<http://republicanleader.house.gov>>.

94 "Obama Resurrects Military Trials for Terror Suspects" *CNN* (Washington, 15 May 2009) <www.cnn.com>.

95 Peter Baker and David M Herszenhorn "Obama Planning to Keep Tribunals for Detainees" *Washington Post* (Washington, 14 May 2009) <www.nytimes.com>.

96 A number of groups, including the American Civil Liberties Union and Human Rights Watch, decried this decision on grounds that the constitutional rights of these detainees are unclear or are not being upheld. See Jake Tapper and Huma Khan "Obama Wants to Reinstate Military Commissions for Some Guantanamo Bay Detainees" *ABC News Politics* (United States, 15 May 2009) <abcnews.go.com>.

Liberties Union.⁹⁷ Their overriding complaint was manifestly clear: not only does such an indefinite detention policy undermine the prospects for reconciling the schism over treatment of detainees, it also violates the fundamental constitutional rights of due process and a fair and speedy trial for all persons in American custody as enshrined in the United States Bill of Rights.

A third issue involving reconciliation that provoked criticism was President Obama's decision not to release additional, still-classified photographs depicting gross mistreatment in 2003 of detainees held at the Abu Ghraib prison in Iraq. These photographs, taken by United States military forces in the prison, depicted United States troops and civilian "advisors" compelling Arab prisoners to engage in religiously, morally and sexually degrading and offensive acts with each other and United States military guards. Civil rights advocates argued that the American public has a right to know what kind of human rights abuses were committed by American military forces at Abu Ghraib. President Obama disagreed. In May 2009, he concluded that release of these explicit photographs would do little to foster justice since trials of military personnel had already been held in late 2005, leading to the conviction of nine accused Army Reserve military policemen and the demotion of the commanding officer of the prison, Brigadier General Janis Karpinski.⁹⁸ More significantly, he stated, declassification and release of these offensive photographs might incite furious anti-American resentment among conservative Islamic elements and the general public in Iraq and Afghanistan, thus further endangering United States troops stationed there.⁹⁹ Release of these classified photographs was not worth that risk to the safety of American forces.

A related criticism erupted over President Obama's decision to continue the policy adopted by President Bush that persons incarcerated by United States troops in foreign prisons have no United States legal rights.¹⁰⁰ The principal concern turns on the possibility that detainees being given access to United States courts might compel the military to reveal details about "the place of capture," and "the identity of United States or foreign forces or entities" that carried out the operation that resulted in their capture. Critics contend that this policy amounts to capturing suspects and holding them indefinitely overseas without allowing them due process and access to a speedy and fair trial.

97 Peter Finn "Obama Endorses Indefinite Detention Without Trial for Some" *Washington Post* (Washington, 22 May 2009) at A4 <www.washingtonpost.com>.

98 Marcy Strauss "The Lessons of Abu Ghraib" (2005) 66 Ohio St L J 1269.

99 Wayne Drash "Abu Ghraib Photos were 'Big Shock,' Undermining U.S. Ideals" *CNN* (United States, 20 May 2009) <www.cnn.com>; Duncan Gardham and Paul Cruickshank "Abu Ghraib abuse photos show 'rape'" *Telegraph* (United Kingdom, 27 May 2009) <www.telegraph.co.uk>; Andrew Gray and Ross Colvin "U.S. slams British press over report of abuse photos" *Reuters* (Washington, 28 May 2009) <www.reuters.com>.

100 R Jeffrey Smith "Obama Follows Bush Policy on Detainee Access to Courts" *Washington Post* (Washington, 11 April 2009) at A2 <www.washingtonpost.com>.

Finally, President Obama came under heavy criticism in the United States for his decision to substantially increase United States military forces deployed to Afghanistan, without having any time-frame, exit strategy or viable plan for their eventual withdrawal. The United States presently has 70,000 troops (out of a total 113,000 coalition forces) deployed in Afghanistan, with another 30,000 due over 2010 as part of a renewed strategy that emphasises development and the "reconciliation" of Taliban fighters.¹⁰¹ Serious concern has arisen among the American people that this insurgency is not winnable. The greatest tragedy for Americans appears to be that, like the war in Vietnam during the 1960s and the war in Iraq since 2003, this escalated American military involvement in Afghanistan can only be fought at exorbitant human, emotional and financial costs, with little likelihood that any outright victory will be won by the United States.¹⁰²

Since assuming office, President Obama has adopted policies that he feels will promote reconciliation within American society to help repair both domestic and international divisiveness created by the previous administration. On the domestic front, he has attempted to confront the spectre of racism, address the debate over abortion and social inequities in America, and to avoid reopening political wounds left from the Bush administration. In foreign policy, reconciliation efforts mainly focused on reversing or revising certain decisions taken during the first Bush administration on the treatment and detention of terror suspects, softening strained relations with foreign adversaries and reigning in executive power. On an "intermestic" level, he made concerted efforts to bridge gaps in understanding involving matters of racial and religious tolerance between peoples. All these actions make it plain that President Obama's personal, philosophical, legal, political, social and religious attitudes are woven together by the theme of reconciliation in order to bring more people together into a more civil society.

Drawing from the discussion above, the following two tables summarise the principal dimensions, agents and aims that reconciliation takes when used as a mechanism for dispute resolution. Table 1 summarises the principal individuals, governments and institutions that have implemented reconciliation mechanisms over the past 20 years. Relatedly, Table 2 enumerates the specific goals that individuals, national governments and international institutions hope to attain by implementing reconciliation as a device for conflict resolution.

101 Adam Entous, Sue Fleming, and Susan Cornwell "Pentagon Sees Signs of Afghanistan Turnaround (2010) *Reuters* <www.reuters.com>. See also Agence France Presse "US Casualties in Afghanistan Sow Seeds of Anger" *France 24* (France, 1 February 2010) <www.france24.com>.

102 Helene Cooper "Putting Stamp on Afghan War, Obama Will Send 17,000 Troops" *New York Times* (New York, 17 February 2009) <www.nytimes.com>; "Barak Obama Sets Out New Strategy for Afghanistan War" *Guardian* (United Kingdom, 27 Mar. 2009) <www.guardian.co.uk>; "Obama: Afghanistan War is 'Fundamental'" *CBS News* (Philadelphia, 17 Aug. 2009) <<http://cbs3.com>>.

Table 1 Dimensions of Organising and Implementing Reconciliation Processes

Individual Leaders	National Governments	Intergovernmental Institutions
Desmond Tutu	South Africa	United Nations
Nelson Mandela	South Africa	Security Council
Raul Alfonsin	Argentina	General Assembly
Patricio Aylwin	Chile	Main UN Committees
President Calderon Sol	El Salvador	Economic and Social Council
Emilio Tojin Lopez	Guatemala	International Court of Justice
Cllr. Jerome J. Verdier, Sr.	Liberia	International Criminal Tribunals
Salomón Lerner	Peru	Former Yugoslavia
Jean Baptiste Habyarimana	Rwanda	Rwanda
Joseph Christian Humper	Sierra Leone	Liberia
Jose Ramos-Horta	East Timor	Sierra Leone
		Cambodia

Table 2 Aims of Reconciliation as Conflict Resolution

Individual	National	International
Confession/apology	Re-establish civil society	Establish rule of law
Sincere admission of guilt	Re-establish respect for human rights	Prevent war
Redress emotional damage	Re-establish respect for justice	Legitimise human rights
Genuine repentance	Re-establish rule of law	Promote peace/security
Genuine remorse	Reconstruction	Reconstruct economy

VI Trading Justice for Peace

Modern conflicts increasingly take the form of internal wars, rather than clearly defined acts of transnational violence. These civil wars leave societies devastated. Internal armed conflict radically impacts upon the lives of all persons in that society. It changes the beliefs, values and actions of individuals and alters centres of power at both local and national levels. Internal conflict adversely affects prospects for preserving a civil society because such upheaval destroys physical infrastructure, undermines intrasociety communication, costs human lives and displaces members of that community. Such conflict, moreover, debilitates the capacity of national governments to govern; it disrupts individual and societal security and creates feelings of anarchy; it overwhelms basic human rights and curtails procedures in a civil society; and it restricts access to media and

communication facilities.¹⁰³ As a result, no question exists that internal conflict undermines community trust and obliterates feelings of national identity that previously existed.

The inherent tragedy of civil wars is that civilians usually are trapped in the fighting, either as specific victims of war crimes and crimes against humanity or as indirect victims of internal dislocation and property deprivation. Unlike international conflicts that often seek to acquire territorial gains, insurgencies use attacks on civilians to undercut the government's authority. Civilians become the intended targets of violence, rather than victims of so-called collateral damage. Consequently, obtaining a satisfactory military solution to end an internal conflict becomes more difficult. In that regard, many current internal conflicts do not end with the surrender of one side. Rather, they are concluded through protracted peace negotiations that contain compromises over the accountability of alleged perpetrators, despite international law's rejection of impunity in principle. Thus, as a post-conflict means for healing a society torn apart by violent conflict, the process of reconciliation often confronts the uneasy choice of an end to conflict without punishment for offenders, of peace without justice.¹⁰⁴ Consequently, reaffirming trust and implementing justice become overriding considerations if reconciliation is to succeed. Feelings of rage and suspicion between former antagonists can easily obstruct community reconstruction and societal renovation, thus aggravating tensions and inhibiting the healing process. Gross injustices left unresolved can easily fester, causing later eruptions of civil violence.

As the experience of states using reconciliation for resolving internal conflicts often demonstrates, attaining peace and securing justice sometimes become irreconcilable goals. In order to conclude a conflict, negotiations often become necessary with individuals who were directly responsible or clearly implicated in committing the very atrocities at issue. In such circumstances, insisting on justice (ie formal trials, prosecution and punishment) can delay peace indefinitely and cost many more lives in the process. Consequently, granting amnesty, exile or asylum to accused offenders in the past has been used to accelerate the end of conflict and facilitate the reconciliation process by moving forward more expeditiously to the intrasocietal healing process. Still, the critical question remains whether permitting offenders to escape any form of punishment can ever square

103 Thania Paffenholz and Christoph Spurk "Civil Society, Civic Engagement, and Peacebuilding" (2006) 36 *Social Development Papers: Conflict Prevention & Reconstruction* 1 at 14.

104 A vast literature exists on accountability mechanisms, transitional justice, and the advantages pertaining to "peace versus justice". See for example Edel Hughes, William A Schabas and Ramesh Thakur (eds) *Atrocities and International Accountability: Beyond Transitional Justice* (United Nations University Press, Tokyo, 2007); Mark A Drumbl *Atrocity, Punishment, and International Law* (Cambridge University Press, Cambridge, 2007); Jane Stromseth *Accountability for Atrocities: National and International Responses* (Transnational Publishers, New York, 2003); and Paul R Williams & Michael P Scharf *Peace with Justice?: War Crimes and Accountability in the Former Yugoslavia* (Rowman and Littlefield Publishers, Lanham, Maryland, 2002).

with obtaining justice for the pervasive egregious wrongs they inflicted on individual people, as well as on society in general.¹⁰⁵

In attempting to end an armed conflict, agonising choices often become necessary in circumstances of dread and uncertainty.¹⁰⁶ At first blush, a manifest contradiction appears between obtaining peace though impunity and securing justice through the prosecution of alleged offenders. Within the context of reconciliation, the peace versus justice debate becomes highlighted by competing imperatives of retributive and restorative justice. That is, securing retributive justice normally requires prosecution of all offenders accused of international crimes committed during a conflict. On the other hand, upholding restorative justice focuses on the needs of victims, the fundamental causes of the conflict, and the reintegration of all peoples in that society.¹⁰⁷

Certain functions are common to civil societies, amongst them the protection of citizens, holding government leaders accountable for their actions, upholding the public interest, building productive community relations, mediating disputes between citizens and state officials and providing services necessary for that society to function satisfactorily.¹⁰⁸ Thus to ensure a civil society, building the rule of law and enforcing justice becomes of utmost importance because these actions create a sense of order and governance following the chaotic experience of civil conflict. As discussed earlier, various legal post-conflict approaches include international and domestic court systems, truth commissions, and hybrid systems incorporating both justice systems and truth commissions.

Critical for post-conflict peace-building is the implementation of justice and the rule of law. If persons severely afflicted by civil conflict do not believe that justice has been served in the aftermath of atrocities being committed, then that society will find it exceedingly difficult to move beyond the shadows of that conflict. Promoting social justice and reconciliation amongst persons severely affected by the conflict therefore becomes vital. As such, in a post-conflict society, building the rule of law assumes paramount importance.¹⁰⁹ Put bluntly, if atrocities are not

105 Michael P Scharf "Trading Justice for Peace: The Contemporary Law and Policy Debate" in Edel Hughes, William A Schabas and Ramesh Thakur (eds) *Atrocities and International Accountability: Beyond Transitional Issues* (United Nations University Press, Tokyo, 2007) 246.

106 Eric Blumenson "The Challenge of a Global Standard of Justice: Peace Pluralism, and Punishment at the International Criminal Court" (2006) 44 *Colum J Transnatl L* 801 at 829.

107 Corrine Parver and Rebecca Wolf "Civil Society's Involvement in Post-Conflict Peacebuilding" (2008) 36 *Intl J Legal Info* 36 at 51-79.

108 Paffenholz and Spurk, above n 103, at 8.

109 David Tolbert and Andrew Solomon "United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies" (2006) 19 *Harv Hum Rts J* 29 at 30.

confronted and perpetrators are not brought to some form of justice, then new violence in that society is more likely to again flare up.¹¹⁰

The search for justice through reconciliation during post-conflict reconstruction involves the adoption of mechanisms to impose accountability for crimes and abuses that occurred during conflict. It also involves the development of an effective and fair legal system that promotes the rule of law, which, at a minimum, requires functioning law enforcement systems, courts, and corrections institutions.¹¹¹ An impartial and effective administrative system must have procedures in place to combat corruption and manipulation,¹¹² and promote transparency, predictability, and fairness in the promulgation of rules.¹¹³

Accountability procedures can contribute to attaining and preserving peace in various ways. For example, accountability devices delineate between past events and present circumstances and intimate the founding of a new societal order. Indeed, the inability to provide the means for accountability undercuts faith in the rule of law. Obtaining accountability can give victims a sense of justice, thereby allowing grievances to subside rather than fester until they erupt into another armed conflict. In this way they may also foster reconciliation between peoples in that society.

Yet, the potential benefits of ensuring accountability must be gauged against the likelihood that resort to some accountability device might disturb or undercut progress toward a durable peace, at least in the short run. Mandating accountability for all alleged offenders could incite pervasive, deep-rooted animosities that would be better off left alone. It is easy to imagine that insistence on accountability mechanisms could entangle leaders critical to the peace process and whose prosecution could instigate violent reaction from their supporters. In sum, the measures a government takes to protect human rights and punish perpetrators of grave human rights abuses – such as genocide, crimes against humanity, and war crimes – are likely to have effects on the social order within that state which, in turn, affects the prospects for peace there.

Peace undoubtedly is a very good thing, even if it only involves a short-term cessation of hostilities. But opportunities for achieving an enduring peace can be missed if a settlement is ill-founded or unjust. This is especially true of prolonged conflicts. Both civilian and military

110 Gunnar Theissen "Supporting Justice, Co-existence and Reconciliation after Armed Conflict: Strategies for Dealing with the Past" (2004) Berghof Research Centre for Constructive Conflict Management 1 <www.berghof-handbook.net>.

111 See John J Hamre and Gordon R Sullivan "Toward Post-conflict Reconstruction" (2002) 25(2) Washington Quarterly 85 at 91.

112 Neil J Kritz "The Rule of Law in Conflict Management" in Chester A Crocker, Fen Osler Hampson and Pamela Aall (eds) *Leashing the Dogs of War: Conflict Management in a Divided World* (United States Institute of Peace Press, Herndon, 2007) at 406-10.

113 Ibid, at 408-09.

combatants must be reintegrated into society and socialised into becoming tolerant of and non-violent with their former enemies. The broader effects of justice in attaining peace and reconciliation are evidenced in the ways in which court proceedings and truth and reconciliation commissions officially and convincingly chronicle history and promote the end to fictitious denials. In these respects, confronting past human rights violations is needed to satisfy the needs of the victims, as well as to prevent future atrocities. A critical necessity exists, therefore, to examine past events in order to prepare for future contingencies. If gross human rights violations are not redressed, the risk remains that similar violations might recur in the future. As a consequence, the obligation to protect and preserve human rights, which permeates all prominent human rights agreements, demands the duty to hold perpetrators of human rights violations in some way accountable. In like fashion, justice can play an important role in preventing human rights depredations given its inherent potential as a deterrent.

Though it is true that criminal justice is an important element of effective human rights protection, the attendant risk is that unyielding insistence on criminal prosecution might generate negative implications that impede protection of human rights. That is, accused offenders concerned about being prosecuted for past activities may well be highly reluctant about ending the conflict or abandoning violent behaviour. It seems reasonable that, under certain circumstances, attaining the condition of peace might require compromises for arriving at suitable agreements, and, of salient import, termination of human rights atrocities. It is in this context that the concept of reconciliation appears as a means both to facilitate lasting peace and to provide for the protection of human rights in a society. As previously suggested, in some post-conflict situations, governments have maintained that the need for reconciliation requires that demands for criminal justice be compromised.

International criminal justice aspires to three main, albeit disparate, types of goals. First, there is the dual aim of bringing perpetrators to justice and securing retribution for victims. Second, there is the need to establish a historical record of mass atrocities committed. Third, there is the need of assisting transitional societies to achieve peace, through reconciliation if possible. But in an era of transitional justice, the belief that an overriding moral and legal obligation exists to prosecute accused offenders may give way to a responsible evaluation of each state's own particular needs. Trials and truth commissions, even if successful, cannot fully address the root causes of conflict in that society. Rather than adopt an absolutist approach to the law, such transitional forms of justice strive to provide substantive, holistic solutions that can contribute to repairing a society and re-establishing its sense of social order. While such solutions might not conform perfectly with traditional notions of justice, they can promote a revival of social stability and a return to the rule of law. The point here is that absolute justice may no longer remain a rigid requirement for attaining peace. Rather, justice must be responsive to the needs of the peace process in each individual society, and those needs will differ according to the time, persons, circumstances and nature of the conflict just ended.

VII Conclusion

We live in a world pervaded by injustice. It is a world where violent conflicts, poverty and disease cause profound suffering, death and destruction, all of which generate grave security concerns for citizens and governments alike. Resort to legal ways and means of reconciliation offers the possibility of healing that society, but only if participants in that reconciliation process are genuine, sincere and dedicated to preserving peace and political stability in that society. National reconciliation must be based on truth and justice. The rule of fair, impartial and equitable law must prevail. Through reconciliation, understanding takes primacy over vengeance, reparation has primacy over retaliation, and the human spirit has primacy over retribution. To defuse accumulated hatreds, amnesty might be granted to persons who make full public revelations regarding their politically motivated acts. But resort to amnesty is to defuse tensions, not to provide impunity for mass killers who perpetrate genocide or commit widespread crimes against humanity.

Reconciliation thus provides a legal means to transform individuals as well as an entire society. It embodies efforts to permit perpetrators of gross human rights abuses to gain forgiveness, and it allows victims to attain the status of survivors. Reconciliation amounts to a political process, conducted through lawful means. Even so, it also has a spiritual foundation, driven by a psychological need for individuals to rebuild their lives in their society. Importantly, reconciliation has been recognised over the last two decades as a very valuable tool for conflict resolution among individuals, within national societies, and between cultures and countries. Several state governments, the United Nations intergovernmental organisation, and a number of national leaders have all repeatedly resorted to various techniques involving reconciliation in efforts to resolve conflicts, restore civility and eliminate strife in national societies. At the root of all these reconciliation efforts, however, there remains the goal to secure the rule of law.

In the end, each society must decide for itself how to absolve evil-doers and reconcile victims with former adversaries. Even though reconciliation basically involves people talking to and understanding each other, it is still very difficult to achieve. Victims of atrocities must forgive their tormenters, and the perpetrators must confess their sins, admit their conceit, and demonstrate sincere remorse for their crimes. In this case, as history so well teaches, the ability to admit egregious offences and to bestow genuine forgiveness remains a tremendously difficult obstacle. Still, the rule of law must be strengthened in a nation if reconciliation is to accomplish its pre-eminent purpose, which is to permit a fractured society to reunite, to heal itself, to get on with life and living, to get beyond the conflict and hatred that revives and fomenters strife and violence. These are noble aspirations, but they cannot be imposed on a people. The principal lesson of reconciliation is that it requires genuine commitment by all members of a society, and the dedication of a government to expend sufficient political will to make the process work. For any effort at reconciliation on a personal, national or international basis, that will remain a pre-eminent challenge to be overcome.