

A Conceptual Framework for Dealing with the Past

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Dealing with a legacy of human rights violations is one of the most difficult challenges facing societies in transition from authoritarian regimes to more democratic forms of government. In order to re-establish fundamental trust and accountability in society, there is a need to acknowledge publicly the abuses that have taken place, to hold those responsible who have planned, ordered, and committed such violations, and to rehabilitate and compensate victims. This process of Dealing with the Past (DwP) is a necessary precondition for the establishment of the rule of law and the pursuit of reconciliation.²

Although there is no standard model for Dealing with the Past, in recent years a number of precedents have been established through the work of special rapporteurs and experts of the United Nations on the issues of reparations, impunity, and best practices in transitional justice.³

A significant step toward integrating experience in the field within the theoretical framework provided

by international standards has been made by the report of the UN Secretary General on the rule of law and transitional justice issued on 3 August 2004. In that document, the UN Secretary General argues that effective transitional justice strategies must be both comprehensive in scope and inclusive in character, engaging all relevant actors, both state agencies and non-governmental organizations, in the development of a “single nationally owned and led strategic plan.”⁴ The report further emphasizes that the operational definition of transitional justice itself should be broadened to include “judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”⁵

More recently, specific elements of these standards have been further elaborated. In December 2005, the UN General Assembly adopted Basic Principles and Guidelines on the reparation of victims of gross human rights violations.⁶ Significantly, this document outlines the obligations of the State with respect to gross violations of international human rights and humanitarian law and defines the term “victim”. A year later, in December 2006, the General Assembly approved the Convention for the Protection of all Persons from Enforced Disappearance, which specifies the rights of parties with a legitimate interest, such as family members, to access information concerning the fate of victims of enforced disappearance and to receive compensation for material and moral damages

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2 Dealing with the Past (DwP) is used as a technical term throughout this paper to connote a wide range of activities to address past human rights abuses of a serious nature and, in some cases, also root causes of conflict, as explained below. It is used in preference to the term “transitional justice”, because transitional justice is often too narrowly identified with juridical mechanisms and because DwP is a long-term process and not only limited to a transitional period.

3 See the reports submitted by Theo Van Boven (E/CN.4/Sub.2/1993/8; E/CN.4/Sub.2/1996/17; E/CN.4/1997/104) and Cherif Bassiouni (E/CN.4/2000/62) on reparations. Concerning best practices in transitional justice, see the analytical study on human rights and transitional justice (A/HRC/12/18 and A/HRC/12/18/Add.1), prepared by the OHCHR in 2009. With regard to the reports on impunity, see footnotes 8 and 9 below.

4 Report of the UN Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616), p. 9. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>

5 Ibid. p. 4.

6 General Assembly. 2006. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. A/RES/60/147. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement>

where appropriate.⁷ In addition, for the past several years the UN Human Rights Council has addressed the issue of the right to truth in a series of resolutions aimed at strengthening it as a principle of international law.⁸

1. The Principles against Impunity as a Framework for DwP

It is against this background of emerging norms and standards in addressing serious and systematic human rights abuse that a conceptual framework for Dealing with the Past can be formulated.

One of the most significant developments in this regard has been the progress made during the last decade toward establishing standards in the struggle against impunity. The principles against impunity were initially formulated by Louis Joinet in his final report on the administration of justice and the question of impunity to the UN Sub-Commission in 1997⁹ and were later revised by Diane Orentlicher in 2005 at the behest of the Commission on Human Rights.¹⁰ Known as the “Joinet/Orentlicher” principles, the importance of the principles against impunity lies not only in the formulation of the principles themselves, but also in the fact that they are based on the precepts of state responsibility and the inherent right of redress for individual victims of grave human rights violations. As such, the principles against impunity do not entail new international or domestic legal obligations, but identify mechanisms, modalities, and procedures for the implementation of existing legal obligations under international

humanitarian law and international human rights law.¹¹

Taken from both a normative and a legal perspective, the principles against impunity provide a useful framework to conceptualize Dealing with the Past. The “Joinet/Orentlicher” principles identify four key areas in the struggle against impunity, which, in turn, provide a comprehensive scheme for Dealing with the Past:

1.1. The Right to Know

- The right of victims and of society at large to know the truth
- The duty of the State to preserve memory

The Right to Know involves the right on the part of individual victims and their families to learn the truth about what happened to them or their loved ones, in particular with respect to enforced disappearance. It is based on the inalienable right on the part of society at large to know the truth about past events and the circumstances that led to the perpetration of massive or systematic human rights violations, in order to prevent their recurrence in the future. In addition, it involves an obligation on the part of the State to undertake measures, such as securing archives and other evidence, to preserve collective memory from extinction and so to guard against the development of revisionist arguments.

To ensure this right, the “Joinet/Orentlicher” principles propose the establishment, in principle, of extra-judicial commissions of inquiry (in practice, often called “truth” or “truth and reconciliation” commissions). The commissions themselves serve a twofold purpose: 1) to dismantle the administrative machinery that has led to abuses in the past, in order to ensure that they do not recur; and 2) to preserve evidence for the judiciary. The second measure often entails gathering, preserving, and ensuring the access to archives and information relating to serious human rights violations.

1.2. The Right to Justice

- The right of victims to a fair remedy
- The duty of the State to investigate, prosecute, and duly punish

The Right to Justice implies that any victim can assert his or her rights and receive a fair and effective remedy, including the expectation that the person or persons responsible will be held

7 As of August 2010, some 84 countries have signed and 19 countries have ratified the Convention. The Convention enters into force upon ratification by 20 countries. For an overview of the signatories, see: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en
For a copy of the General Assembly resolution, including a copy of the Convention, see: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/505/05/PDF/N0650505.pdf?OpenElement>

8 In 2006 and 2007, the Council welcomed two studies prepared by the OHCHR on the right to truth as a legal standard and instrument (E/CN.4/2006/91 and A/HRC/5/7, respectively). In 2009, a more specific investigation followed on the role of archives and witness protection in realizing the right to truth (A/HRC/12/19).

9 E/CN.4/Sub.2/1997/20/Rev.1. Available at: <http://193.194.138.190/Huridocda/Huridoca.nsf/0/a0a22578a28aacfc8025666a00372708?OpenDocument>

10 The revision (E/CN.4/2005/102/Add.1) focused on identifying best practices in combating impunity and did not significantly re-formulate the principles themselves. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>

11 See also the preamble of the Basic Principles and Guidelines on reparation cited above in this regard.

accountable by judicial means and that reparations will be forthcoming. The Right to Justice also entails obligations on the part of the State to investigate violations, to arrest and prosecute the perpetrators and, if their guilt is established, to punish them. Domestic courts have primary responsibility to exercise jurisdiction in this regard, but international or internationalized criminal tribunals may exercise concurrent jurisdiction, when necessary, in accordance with the terms of their statutes.

The Right to Justice imposes restrictions upon certain rules of law pertaining to prescription, amnesty, right to asylum, extradition, *non bis in idem*, due obedience, official immunity, and other measures, in so far as they may be abused to obstruct justice and benefit impunity.

1.3. The Right to Reparation

- The right of individual victims or their beneficiaries to reparation
- The duty of the State to provide satisfaction

The Right to Reparation entails measures for individual victims, including relatives or dependants, in the following areas:

- Restitution, i.e. seeking to restore the victim to his or her previous situation;
- Compensation, i.e. for physical or mental injury, for lost opportunities with respect to employment, education, and social benefits, for moral damage due to defamation, and for expenses related to legal aid and other expert assistance;
- Rehabilitation, i.e. medical care, including physiotherapy and psychological treatment.

The duty to provide satisfaction pertains to collective measures of reparation. These involve symbolic acts, such as an annual homage to the victims, the establishment of monuments and museums, or the recognition by the State of its responsibility in the form of a public apology, that discharge the duty of remembrance and help to restore victims' dignity. Additional measures in this regard foresee the inclusion of an accurate account of the violations that occurred in public educational materials at all levels.

1.4. The Guarantee of Non-Recurrence

- The right of victims and society at large to protection from further violations
- The duty of the State to ensure good governance and the rule of law

The Guarantee of Non-Recurrence focuses on the need to disband para-statal armed groups, to repeal emergency laws, and to remove senior officials from office who are implicated in serious human rights violations. It also foresees the reform of laws and state institutions in accordance with the norms of good governance and the rule of law. In particular, it mentions the reform of the security sector and of the judiciary as priorities. With regard to para-statal groups, it makes reference to the process of disarmament, demobilization, and reintegration of former combatants with special attention to be paid to the demobilization and social integration of former child soldiers. The vetting of public officials and employees should comply with the requirements of due process of law and the principle of non-discrimination. In addition, civil complaint procedures should be introduced.

2. Dealing with the Past from a Holistic Perspective: A Diagram

As a means of visualizing the framework for Dealing with the Past, swisspeace in collaboration with the DwP program desk in Political Division IV, Human Security of the Swiss Federal Department of Foreign Affairs, has designed a diagram that illustrates some of the main mechanisms and procedures associated with the four principles cited above from a holistic perspective.¹² In addition, the diagram also attempts to illustrate the transformative dimension of Dealing with the Past as part of a political and social process of democratization in post-conflict societies

Dealing with the Past is represented in the diagram by four concentric circles.

The innermost circle depicts the victim- and perpetrator-oriented perspective of DwP initiatives. As defined in the Basic Principles and Guidelines on reparation referred to above, victims are persons who individually or collectively suffered harm through acts or omissions that constitute gross violations of human rights.¹³ While categories exist to define war crimes, crimes against humanity and genocide, there is no single normative definition of a perpetrator, as this qualification will often vary according to domestic legislation. Nevertheless, it can be said in general terms that DwP initiatives should be designed to address the needs of victims and the accountability of perpetrators.

¹² The diagram referred to has been included as an appendix to this document.

¹³ General Assembly, *ibid.* para. 5.8.

The central circle represents the four principles of the conceptual framework and reflects the particular dynamics relating to victims and perpetrators mentioned above. Those DwP mechanisms and procedures that principally address the needs of victims are located in the upper part of the circle, while those focusing on the accountability of perpetrators are located in the lower part. Concrete activities are listed for each of the four areas, the idea being that, depending on the context and circumstances, any one of these activities in any of the four areas might be an entry point for Dealing with the Past. Moreover, it should be noted that there are linkages between the different activities in the different areas. For example, the preservation of archives is important for the realization of both the Right to Know and the Right to Justice. The same holds true for witness protection, which is necessary not only in connection with war crimes trials, but also in the search for missing persons. Ideally, a comprehensive and integrated approach to Dealing with the Past would build upon these and other linkages to create momentum and gradually widen the circle to include other DwP initiatives.

The intermediary circle represents the most immediate long-term goal of strengthening the rule of law by combating impunity. Significant progress made in any one or more of the four areas, such as the realization of a truth commission in connection with the Right to Know or the successful introduction of reforms to the security sector in connection with the Guarantee of Non-Recurrence, will not only provide satisfaction and ensure accountability, but it will serve to strengthen public confidence in State institutions. Obviously, DwP initiatives can only contribute in part to the larger task represented here, but the impact of these initiatives, which may involve implementation on an international, national, or local level (or a combination thereof), can be measured for both their immediate and long-term effects.

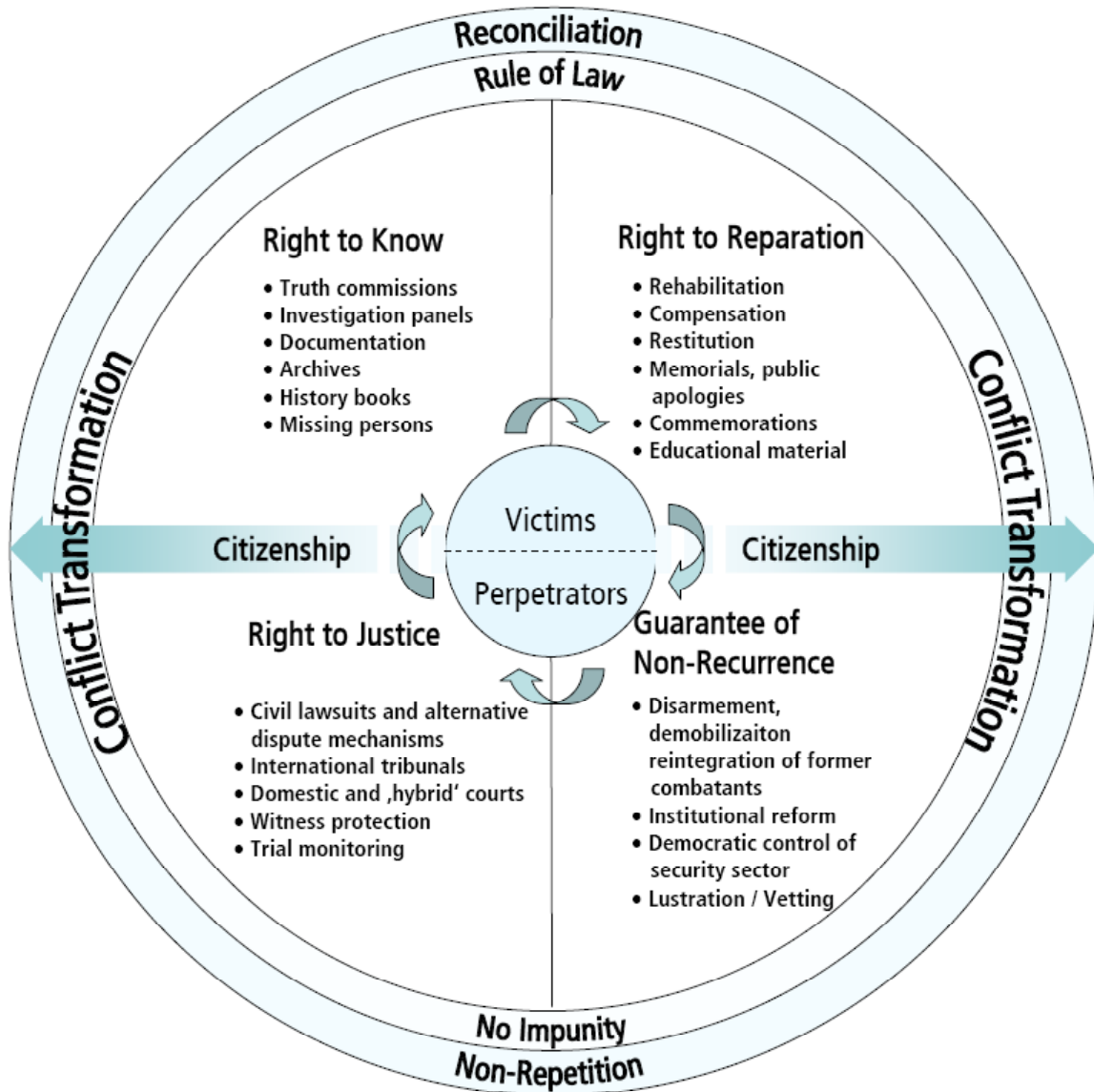
The outermost circle is defined by the parameters of reconciliation and non-repetition of the serious and systemic abuses of the past. This is again a long-term goal, for which a societal process of Dealing with the Past is a necessary pre-requisite. Impact measurement is more difficult here, but the key concept is conflict transformation. By strengthening the rule of law and contributing to the struggle against impunity, Dealing with the Past is creating conditions, in which other means become available to address social conflict. Even when the root causes of conflict continue to persist, the institutions and

mechanisms supported by DwP initiatives as well as the modalities employed and lessons learned will contribute to establish democratic norms of tolerance and power-sharing that reflect not only the social, economic, and ethnic diversity of a country, but also the need to involve women in the decision-making process.

The transformative dimension also finds expression in the transformation of social and political identities. If the victim or perpetrator identity was the predominant one at the beginning of a process of Dealing with the Past, it should change gradually as the process proceeds. The experience of being a victim or perpetrator belongs to one's personal biography, but it is no longer the dominant social or political identity. Instead, it is replaced by the new identity of being a citizen of society with the rights and duties of citizenship as part of the new social contract.

Finally, it should be added that the DwP diagram may also be used as an analytical tool to identify the activities of international, national, and local actors in the four principal areas. Depending on the context, an analysis of certain areas, such as the Right to Know or the Right to Justice, may reveal a diversity of actors on different levels, while other areas, for example the Right to Reparation, show hardly any activity at all. Using the diagram as a mapping tool is therefore not only useful for assessment purposes, but also as a strategic instrument to identify entry points and potential partners around specific DwP issues. Based on this analysis, a realistic comprehensive strategy for Dealing with the Past can be developed, reflecting the contingencies of political context, local culture, ownership, sequencing, and budgetary priorities.¹⁴

¹⁴ An example of the use of this approach with respect to Dealing with the Past in Kosovo is given below in the article on the PD IV program on Dealing with the Past in the Balkans.



© DFAE/Swisspeace 2006, inspired by the Joinet/Orentlicher principles

When working with this diagram, note that:

- Focal groups, represented in the innermost circle, are individual victims and perpetrators.
- It offers a holistic approach, i.e. it addresses, from four complementary angles, different elements related to dealing with the past.
- It combines specific restorative and retributive measures.
- It simultaneously focuses on rights of individuals and on corresponding duties of the State.
- It combines individual rights and duties with collective ones.
- Its topics and mechanisms are inter-linked and inter-related.
- It is an operational working tool that can be used, for instance, for the mapping of on-going and/or new initiatives related to dealing with the past.

Finally, this conceptual framework for dealing with the past describes a long-term political and social process of democratization in post-conflict societies, focusing on the struggle against impunity and on strengthening the rule of law with the ultimate goal of fostering conflict transformation and reconciliation in society.